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BATTLING GENDER ORTHODOXY: PROHIBITING DISCRIMINATION ON THE BASIS OF GENDER IDENTITY AND EXPRESSION IN THE COURTS AND IN THE LEGISLATURES

*Carolyn E. Coffey**

INTRODUCTION

After years of discrimination and suffering in the most diverse city in the world, an often overlooked group of people achieved a victory in 2002, when the New York City Council amended the City's human rights law to define the protected class of "gender" to include transgendered people. Finally, this made it clear that discrimination against transgendered people would not be tolerated.¹ Considering the absence of legal recourse at the state and national levels, local ordinances like New York City's amended law currently provide transgendered people with their only protection against discrimination.

This Article focuses on case law and legislation regarding the rights of transgendered people in the workplace and in the public arena. The Article examines the different legal strategies and outcomes of various cases brought by transgender plaintiffs in courtrooms. It also examines attempts to use the legislative process to advance transgendered people's rights, and discusses different theoretical perspectives that have emerged in the transgender battle. Part I provides an overview of the subject of transgenderism; Part II broadly examines the discrimination that transgendered individuals face daily; Part III describes federal gender and transgender discrimination case law; Part IV discusses state transgender discrimination case law; Part V describes local ordinances that exist across the country to protect transgendered people; and Part VI examines the significance of New York City's amendment to its definition of gender. The Article concludes that a combination of strategies will ultimately best serve the transgender movement in

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¹ NEW YORK, N.Y., ADMIN. CODE § 8-102 (2002).

the battle to overcome one of the last bastions of civil rights discrimination.

I. WHAT IS “TRANSGENDERISM”?

*“Unless you have actually experienced transsexualism, you cannot conceive of the trauma of being cast in the wrong body. It is the imprisonment of body and of soul.”*²

The terms “gender” and “sex” often are used interchangeably, however, they have different definitions and connotations. Generally, the term “sex” is used in reference to a person’s biological identity, while “gender” usually refers to culturally ascribed or socially constructed characteristics of masculinity and femininity.³ Such characteristics vary with different societies and cultures, but a transgendered person is considered someone who possesses traditional gender characteristics that are different from his or her sex.⁴ Although individuals are assigned a sex at birth, some males grow up feeling they were meant to be females and some females grow up feeling they were meant to be males. A transgendered person’s desire to be the opposite sex may become powerful at an early age.⁵

The American Psychiatric Association considers transgenderism a medical condition, and classifies it as a specific form of a

² Patricia A. Cain, *Stories from the Gender Garden: Transsexuals and Anti-Discrimination Law*, 75 DENV. U. L. REV. 1321, 1343 (1998) (quoting MARIO MARTINO WITH HARRIETT, *EMERGENCE: A TRANSEXUAL AUTOBIOGRAPHY* (1977)).

³ Jamison Green, *Introduction to PAISLEY CURRAH & SHANNON MINTER, NAT’L CTR. FOR LESBIAN RIGHTS, TRANSGENDER EQUALITY: A HANDBOOK FOR ACTIVISTS AND POLICY-MAKERS 2* (2000) [hereinafter *Introduction to TRANSGENDER EQUALITY*]; see also Jillian Todd Weiss, *The Gender Caste System: Identity, Privacy, and Heteronormativity*, 10 LAW & SEXUALITY 123, 124 n.3 (quoting MILDRED L. BROWN & CHLOE ANNE ROUNSLEY, *TRUE SELVES* 19 (1996)).

⁴ See Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of “Sex,” “Gender,” and “Sexual Orientation” in Euro-American Law and Society*, 83 CAL. L. REV. 1, 39, 66 (1995) (arguing generally that traditionally, men are supposed to be strong, assertive, virile, macho and rational, whereas women are supposed to be weak, passive, quiescent and emotional). One source estimates that approximately one to four percent of the world’s population is intersexed, that is, born with ambiguous genitalia. Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision between Law and Biology*, 41 ARIZ. L. REV. 265, 267 (1999). However, because intersexed people are characterized by ambiguous genitalia, “intersexed” and “transgendered” are not interchangeable terms. *Introduction to TRANSGENDER EQUALITY*, *supra* note 3, at 5.

⁵ See Jill Pilgrim, David Martin & Will Binder, *Far from the Finish Line: Transsexualism and Athletic Competition*, 13 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 495 (2003) (discussing the debate over whether gender identity problems are psychiatric or biological in origin).

broader psychiatric disorder called “gender identity disorder.”⁶ A diagnosis is confirmed when gender dysphoria has been present for at least two years and the feelings of having the wrong identity are alleviated by cross-gender identification.⁷ According to one medical source:

Transsexualism is a Gender Identity Disorder in which there is a strong and on-going cross-gender identification, i.e., a desire to live and be accepted as a member of the opposite sex. There is a persistent discomfort with his or her anatomical sex and a sense of inappropriateness in the gender role of that sex.⁸

The currently accepted and effective treatment for the syndrome is hormone therapy and surgical reconstruction, along with counseling and other psychotherapeutic treatments, such as electrolysis and speech therapy.⁹ Transgendered people who have undergone such treatments to change their gender are referred to as post-operative transsexuals, whereas those who have not completed the transition sometimes are referred to as pre-operative transsexuals, and those who have chosen to not take such measures may be referred to as non-operative transsexuals.¹⁰ One estimate puts the number of pre-operative and non-operative transgendered people at approximately one out of 1,600 people, or, in the United States, nearly 225,000 people.¹¹

⁶ AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS IV 533 (4th ed. 1994) [hereinafter DIAGNOSTIC AND STATISTICAL MANUAL].

⁷ *Id.*

⁸ R. Reid et al., *Transsexualism: The Current Medical Viewpoint*, Press for Change (1996), at <http://www.pfc.org.uk/medical/mediview.htm> (last visited Aug. 11, 2003) (on file with the New York City Law Review). See also PsychNet-UK, *Disorder Information Sheet: Gender Identity Disorder* (Jul. 20, 2003), at www.psychnet-uk.com/dsm_iv/gender_identity_disorder.htm (describing the diagnostic criteria for gender identity disorder as being “a strong persistent cross-gender identification (not merely a desire for any perceived cultural advantages of being the other sex)”); AllPsych Online, *Psychiatric Disorders: Gender Identity Disorder* (May 15, 2004), at <http://allpsych.com/disorders/sexual/genderidentity.html> (stating that symptoms include “a strong and persistent identification with the opposite gender. There is a sense of discomfort in their own gender and may feel they were ‘born the wrong sex’”).

⁹ Reid et al., *supra* note 8.

¹⁰ KATE BORNSTEIN, GENDER OUTLAW: ON MEN, WOMEN AND THE REST OF US 67 (1994). See also *Introduction to TRANSGENDER EQUALITY*, *supra* note 3, at 3.

¹¹ Kristine W. Holt, Comment, *Reevaluating Holloway: Title VII, Equal Protection, and the Evolution of a Transgender Jurisprudence*, 70 Temple L. Rev. 283, 301 (1997) (quoting Marla Aspen, *De-Medicalization of Transsexualism and De-Classification of Sex*, 65 Tapestry J. 11, 11, 20 (1993)). However, precise figures are difficult to calculate. See, e.g., The National Transgender Advocacy Coalition, *TG Numbers: Occurrence Within U.S. Population and Others* (June 4, 2003), at www.ntac.org/research/details.asp?did=37 (listing results from several studies of transgender behavior, but admitting that such figures

The term “gender identity” refers to the gender that people psychologically embrace—be it male, female or something in between.¹² “Gender expression” refers to the gender that people appear to be based on external male or female characteristics, including dress, speech, and mannerisms.¹³ This Article uses the umbrella term “transgender” to refer to anyone whose gender identity or expression differs from conventional or stereotypical expectations of sex, including all pre-operative, post-operative and non-operative transgendered people. Other terms that similarly apply include “gender variant,” “gender different,” and “gender non-conforming.”¹⁴

The jurisprudence of transgenderism is not yet settled, and is fairly controversial as evidenced by the range of theoretical commentary and conflicting beliefs about why and to what extent transgender discrimination exists. As more transgendered people assert their rights, there will be an increase in the need to address transgendered people’s unique legal problems and the discrimination they face in pursuit of equality.

II. TRANSGENDER DISCRIMINATION

Although the media and movie industries occasionally have portrayed transgendered people sympathetically and positively, phobia of transgendered people is prevalent.¹⁵ Transgendered individuals face many forms of discrimination in all areas of life. One individual described the stigma associated with being transgendered:

When I was growing up, people who lived cross-gendered lives were pressured into hiding deep within the darkest closets they could find. Those who came out of their closets were either studied under a microscope, ridiculed in the tabloids, or made exotic in porn books, so it paid to hide. It paid to lie.¹⁶

Little legal recourse is available to combat gender identity dis-

may be imprecise for various reasons, due to “closeted sample set, bias in early studies, poor definitions of the community, and a very small number of accurate studies”).

¹² *Introduction to TRANSGENDER EQUALITY*, *supra* note 3, at 3.

¹³ *Id.*

¹⁴ *Id.* at 4.

¹⁵ See Patti Hartigan, *Crossing Over*, BOSTON GLOBE, Mar. 11, 2001, at N1. *But see* Jillian Todd Weiss, *The Gender Caste System: Identity, Privacy, and Heteronormativity*, 10 LAW & SEX. 123, 184 (2001) (“This heteronormativity requires that transsexual people be seen as outside the system, as freaks, not even human.”); Greenberg, *supra* note 4, at 324 (“Transgendered individuals are not out of the closet because they know that society still considers them to be ‘freaks.’”).

¹⁶ BORNSTEIN, *supra* note 10, at 8.

crimination, because traditional jurisprudence requires that individuals be classified into discrete and binary categories, even when some people do not fit easily into one category.¹⁷ U.S. jurisprudence has no mechanism for dealing with transgender issues because the courts work “within a paradigm positing a rigid view of mutually exclusive sexes” and are “incapable of coping with the medical proposition that sex operates along a continuum.”¹⁸

Transgendered individuals face problems in any area that requires an overt classification of male or female, including athletics, job applications, housing, and restrooms. Often transgendered people must “explain” their sex designation, which can be embarrassing. Other times they are simply refused service.¹⁹

Discrimination begins early for some transgendered people. For example, in a Massachusetts public school, a fifteen-year old transgendered student who identified as female was medically diagnosed as gender dysphoric.²⁰ Nonetheless, the school prohibited her from dressing in girls’ clothing or wearing accessories, and repeatedly refused to allow her to attend classes unless she went home and changed.²¹ The student eventually stopped attending school because she was so traumatized by the treatment she received.²²

Transgendered people also face discrimination in the workplace. Such discrimination includes harassment in the form of offensive or intimidating behavior by co-workers or supervisors, not addressing a person by her or his chosen name or pronoun, refusing to allow a person to use the appropriate bathroom, and asking offensive questions about a person’s medical history or genitalia.²³ Numerous transgendered people have been fired from their jobs because of their gender status. Ramona Holloway was fired from Arthur Anderson because she transitioned from a male to a female

¹⁷ See Greenberg, *supra* note 4, at 324.

¹⁸ Richard F. Storrow, *Naming the Grotesque Body in the “Nascent Jurisprudence of Transsexualism,”* 4 MICH. J. GENDER & L. 275, 333 (1993).

¹⁹ For example, Lucas Rosa, a biological man who lives as a woman, attempted to obtain a loan application at a bank and was refused by an employee who angrily told her to go home and change into more traditionally masculine clothes. *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213 (1st Cir. 2000).

²⁰ *Doe v. Yunits*, No. 00-1060-A, 2000 Mass. Super. LEXIS 491 (Mass. Super. Ct. Oct. 11, 2000).

²¹ *Id.* at *2-3.

²² *Id.* at *5.

²³ See NCLR, *Gender Identity Discrimination and Employment Law: Your Rights Under California Law* at <http://www.nclrights.org/publications/genderlaw.htm> (last visited Aug. 11, 2004) (on file with the New York City Law Review).

while working for the company;²⁴ Karen Ulane was fired from her job as an airline pilot at Eastern Airlines for changing her sex from male to female;²⁵ and Audra Sommers, who was hired at Budget Marketing as a woman, was fired from her job after it was discovered she had been born a man.²⁶

F. M. Chester, a transgender and lesbian activist whose gender presentation is masculine, described growing up correcting people who thought she was a boy.²⁷ She recounted how she was teased in school and frequently chased out of women's restrooms.²⁸ She pointed out that much discrimination against gay, lesbian and bisexual people occurs not necessarily because of their sexual orientation, but because they present themselves as gender deviant.²⁹

Discrimination in the form of crime targeted at transgendered individuals is prevalent. Sixty percent of transgendered people have been victims of hate violence and some have even been killed because of their transgender identity.³⁰ At a symposium on attitudes toward homosexuals and transgendered people in New York City, participants recounted discrimination by New York City police officers against gay and transgendered people.³¹ In particular, one speaker told of a transgendered woman who, while taking a cigarette break, exchanged pleasantries with someone and was then arrested for solicitation and subsequently jailed.³² Later she discovered that the local police precinct in the West Village of New York City was instructed to conduct regular transgender-focused "morals sweep[s]."³³

A. *Discrimination in the Courts*

As discussed in later sections, transgendered people who file

²⁴ *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659 (9th Cir. 1977).

²⁵ *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984), *cert. denied*, 471 U.S. 1017 (1985).

²⁶ *Sommers v. Budget Marketing, Inc.*, 667 F.2d 748 (8th Cir. 1982).

²⁷ PAISLEY CURRAH & SHANNON MINTER, NAT'L CTR. FOR LESBIAN RIGHTS, TRANSGENDER EQUALITY: A HANDBOOK FOR ACTIVISTS AND POLICYMAKERS 30 (n.d.) (in a lobbying session in support of a gender-identity fairness ordinance) [hereinafter TRANSGENDER EQUALITY].

²⁸ *Id.* at 31.

²⁹ *Id.*

³⁰ Sean Cahill, *Preface to* PAISLEY CURRAH & SHANNON MINTER, NAT'L CTR. FOR LESBIAN RIGHTS, TRANSGENDER EQUALITY: A HANDBOOK FOR ACTIVISTS AND POLICYMAKERS i, iii (n.d.).

³¹ Symposium Proceedings: *Does New York City Look Different to You? The Changing Legal Landscape of Queer New York City*, 26 N.Y.U. REV. L. & SOC. CHANGE 139 (2000-01).

³² *Id.* at 145.

³³ *Id.* at 146.

discrimination suits usually do not succeed, presumably because there are few laws and legal theories upon which to base a solid claim. Courts commonly do not interpret laws that prohibit discrimination on the basis of sex and/or sexual orientation and laws that prohibit discrimination against people with disabilities to apply to transgendered people.³⁴ The motivation behind excluding transgendered people from civil rights protection is not immediately apparent. According to transgender activists Paisley Currah and Shannon Minter, the exclusion is not due to failures in legal reasoning, but because transgendered people “have not been viewed as worthy of protection, or in some cases, even as human.”³⁵

Revulsion seems to lie at the root of most transgender discrimination. Many court opinions openly deride transgendered plaintiffs and express disapproval of or discomfort with their decision to change their gender.³⁶ Theorist Richard F. Storrow has written about courts’ overarching hostility toward transgendered people. He has specifically examined the numerous inconsistent approaches of various courts when deciding cases involving transgendered people.³⁷ He observes that courts are threatened by the idea of a person willfully altering her or his body because it disrupts the fixed social order.³⁸ Storrow points out that laws are constructed to only accept traditional binary categories of male and female sex: “The law is unprepared to encompass the blurring of these categories in the phenomenon of transsexualism and reacts to maintain them.”³⁹ However, Storrow discovered that where hard medical evidence points to a diagnosis of “gender dysphoria,” courts are more likely to decide in favor of transgendered people.⁴⁰ He has theorized that surgery to align one’s psychological and physical sexes may be acceptable in light of courts’ tendency to favor congruence.⁴¹

³⁴ See discussion *infra* in this Part.

³⁵ Paisley Currah & Shannon Minter, *Unprincipled Exclusions: The Struggle to Achieve Judicial and Legislative Equality for Transgendered People*, 7 Wm. & Mary J. of Women & L. 37, 39-40 (2000).

³⁶ As just two examples, see *Ulane v. East. Airlines, Inc.*, 742 F.2d 1081, 1087 (7th Cir. 1984), where the court said, “[b]ut even if one believes that a woman can be so easily created from what remains of a man, that does not decide this case.”; and *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 749 (8th Cir. 1982), where the court said, “[i]rrespective of the plaintiff’s manipulation of semantics, the Court finds no genuine issue of fact as to plaintiff’s sex at the time of discharge from employment.”

³⁷ Storrow, *supra* note 18.

³⁸ *Id.* at 279.

³⁹ *Id.* at 278-9.

⁴⁰ *Id.* at 283-4.

⁴¹ *Id.* at 284.

The fear of non-binary categories may also be described as “classification anxiety,” which is related to society’s need to identify with definitive categories.⁴² “It is reinforced by ‘the need for a recognizable identity, and the need to belong to a group of people with a similar identity—these are driving forces in our culture, and nowhere is this more evident than in the areas of gender and sexuality.’”⁴³ It is clear that the concept of gender is controversial, and the bases for such controversy may explain why so few transgender discrimination cases have succeeded in the courts.

B. Discrimination in Legislative Pursuits

In their attempt to obtain rights, transgendered people have faced animosity not just in the courts, but also in their attempts to gain equality legislatively. According to the National Gay and Lesbian Task Force, only fourteen percent of the U.S. population live in jurisdictions with transgender-inclusive anti-discrimination laws.⁴⁴ To date, only seventy-three jurisdictions in the United States, including cities, counties, and states, have passed human rights laws protecting transgendered people.⁴⁵

One reason for the slow progress on transgender rights is that the transgender movement is often combined with or subsumed under the gay and lesbian equality movement, thereby generating controversy.⁴⁶ Transgendered people have faced blatant discrimination from the homosexual community.⁴⁷ Some opponents of the inclusion of transgendered people in the gay and lesbian movement accuse transgendered people of being homophobic gays who wish to change their sex in order to be “normal.”⁴⁸ Other gay and lesbian advocates, in jurisdictions that lack nondiscrimination laws for sexual orientation, fear the inclusion of transgender issues in their appeal for equality, as it may undermine their efforts.⁴⁹ They

⁴² Leslie Pearlman, *Transsexualism as Metaphor: The Collision of Sex and Gender*, 43 *BUFF. L. REV.* 835, 844 (1995).

⁴³ *Id.* at n.34 (quoting KATE BORNSTEIN, *GENDER OUTLAW ON MEN, WOMEN AND THE REST OF US* 3-4 (1994)).

⁴⁴ Nat’l Gay & Lesbian Task Force, *Populations of Jurisdictions with Explicitly Transgender-Inclusive Anti-Discrimination Laws* (June 2003), at www.thetaskforce.org/downloads/transinclusivelaws.pdf (on file with the New York City Law Review).

⁴⁵ Transgender Law & Policy Institute, *U.S. Jurisdictions with Laws Prohibiting Discrimination on the Basis of Gender Identity or Expression* (Sept. 15, 2004), at www.transgenderlaw.org/ndlaws/ngltfplpchart.pdf (on file with the New York City Law Review) [hereinafter *U.S. Jurisdictions with Laws Prohibiting Discrimination*].

⁴⁶ See *Introduction to TRANSGENDER EQUALITY*, *supra* note 3, at 6-7.

⁴⁷ See *id.* at 7.

⁴⁸ *Id.*

⁴⁹ Evidence of this discord was especially prevalent during the period of time lead-

argue that while society may be slowly acclimating to the idea of granting rights to homosexuals, society is not yet ready to accept transgendered people, and thus drawing attention to this separate group may impede the gay and lesbian movement.⁵⁰ Lesbian and gay interest groups have outright stated that if a legislature agrees to treat sexual orientation as a suspect class at the cost of not including transgendered people, they will not give up the opportunity to push for the enactment of such a statute. They add, somewhat conciliatorily, that further protections can always be obtained later.⁵¹

In contrast, many transgender advocates argue that the transgender and sexual orientation groups have faced similar oppression in the past and share the goal of eradicating sexism and gender stereotyping.⁵² They argue that prohibiting discrimination based on gender affects gays, lesbians, and those heterosexuals who are perceived as not being “masculine” or “feminine” enough.⁵³ These individuals are discriminated against not for their sexual orientation, but for not conforming to gender norms.⁵⁴ Some gay and lesbian activists agree with this stance, and adopt an inclusive approach.⁵⁵ Regardless of differences between the gay and transgendered movements, there are inarguable common issues, such as gender non-conformity which may be pursued in the legislatures.⁵⁶

ing up to the passage of the New York State Sexual Orientation Non-Discrimination Act (SONDA), which went into effect in 2003. SONDA outlaws discrimination against gays and lesbians in New York State, but the language of the bill does not protect transgendered people, which caused many transgendered people to feel abandoned by the gay community. See, e.g., Richard Goldstein, *Life After SONDA*, VILLAGE VOICE, Dec. 31, 2002, at 45 (stating that transgendered people were purposely not included in the language of SONDA because the Empire State Pride Agenda (ESPA) “feared it would kill the bill,” and quoting Melissa Sklarz, New York’s first transgendered person to hold office, as being told by ESPA in 2000 that “it was ‘a lesbian and gay organization’ and not a lobby for people like her.”).

⁵⁰ Bob Bacigalupi, *Transgender Rights in Focus*, N.Y.L.J., May 1, 2001, at S6.

⁵¹ *Id.*

⁵² *Introduction to TRANSGENDER EQUALITY*, *supra* note 3, at 8.

⁵³ *Id.* at 1-2.

⁵⁴ *Id.* at 8.

⁵⁵ See, e.g., Bacigalupi, *supra* note 50 (“However understandable and utilitarian this position [of excluding transgendered people from civil rights measures] may be, it simply does not comport with the principle of equality for all.”). See also *supra* note 49 regarding the passage of SONDA.

⁵⁶ Chai R. Feldblum, *Gay People, Trans People, Women: Is It All About Gender?*, 17 N.Y.L. SCH. J. HUM. RTS. 623, 674 (2000).

C. *Theories on the Cause of Transgender Discrimination*

One commentator, Terry S. Kogan, addresses transgender discrimination by exploring two alternative ways to conceptualize sex and gender. One approach is to view sex and gender as a “sexual continuum,” an idea he credits to Martine Rothblatt.⁵⁷ According to Kogan, Rothblatt’s “apartheid of sex” argument posits that although society arbitrarily divides people exclusively into male and female, sex should be viewed on a continuum with no exclusive male and female categories and without regard to genitalia.⁵⁸ Kogan says that Rothblatt believes people should choose where to place themselves on the continuum of sex.⁵⁹ In this regard, Rothblatt embraces transgenderism because “even if a sex type was real at birth, it can now be changed at will during one’s life.”⁶⁰ If Rothblatt’s theory were adopted, perhaps laws could then be reinterpreted to accommodate this continuum.

The other way to view sex and gender, according to Kogan, is to place members of sex/gender minorities into a third sex/gender category.⁶¹ Kogan offers his own theory of the “other” as a third sex or gender, an idea found in many cultures.⁶² He says that identifying oneself as “other” “is a conscious choice by an individual to oppose the male/female, masculine/feminine dichotomies, and the oppressions that result from those dichotomies.”⁶³ According to Kogan, implementing the “other” category as a choice in society is a better solution than Rothblatt’s gender continuum because it is “highly respectful of an individual’s choice of self-definition,” and might encourage all kinds of people to transgress societal norms.⁶⁴ As a first step toward implementing this idea, Kogan suggests making an “other” choice in public restrooms. If implemented, “[a]n individual’s decision to use that restroom for the first time [would be] an important step toward dismantling our culture’s rigid gender codes.”⁶⁵

Rothblatt’s gender continuum theory makes for difficult lawmaking, as lawmaking is generally geared toward categorical expla-

⁵⁷ Terry S. Kogan, *Transsexuals and Critical Gender Theory: The Possibility of a Restroom Labeled “Other,”* 48 *Hastings L.J.* 1223, 1235 (1996-1997).

⁵⁸ *Id.* at 1238.

⁵⁹ *Id.*

⁶⁰ *Id.* at 1240 (quoting MARTINE ROTHBLATT, *THE APARTHEID OF SEX: A MANIFESTO ON THE FREEDOM OF GENDER* 16 (1995)).

⁶¹ *Id.*

⁶² *Id.* at 1245.

⁶³ *Id.* at 1247.

⁶⁴ *Id.* at 1254.

⁶⁵ *Id.*

nations and classifications. Furthermore, the negative reaction by so many courts to transgendered plaintiffs who defy established sex categories makes it unlikely they would easily accept sex as a fluid choice. Kogan's "other" solution, on the other hand, might be extremely difficult to implement in a society that is afraid of the concept of transgenderism. The amorphous, dehumanized association of the term "other" might serve to increase discrimination and hostility toward transgendered individuals. Furthermore, many transgendered people sincerely wish to live as their "adoptive" sex. Given their dedication to propagating gender codes and fulfilling gender stereotypes, transgendered individuals would probably not distance themselves from the male or female gender by identifying themselves as "other."

III. OVERVIEW OF DISCRIMINATION CASE LAW ON THE FEDERAL LEVEL

Currently, there is no national policy in place in the United States to protect transgendered people from discrimination.⁶⁶ However, the lack of established policy has not thwarted attempts by transgendered individuals to file lawsuits. Transgendered people have filed discrimination suits under Title VII for sex discrimination, transgender discrimination, and sexual harassment. They also have tried to sue under Title IX of the Education Act on the grounds of sexual harassment, and under the Americans with Disabilities Act based on disability.⁶⁷ They also have made strides to implement the Employment Non-Discrimination Act as a basis for future lawsuits. For the most part, these suits have not prevailed. In fact, arguably the most helpful case on record for the transgender

⁶⁶ However, there has been a call for international legislation addressing the rights of transgendered people. See Int'l Conference on Transgender Law & Employment Policy, *The International Bill of Gender Rights* (June 17, 1995), at <http://www.altsex.org/transgender/ibgr.html> (on file with the New York City Law Review). This bill of rights calls for the acceptance of ten universal rights, including rights to define gender identity; to freely express gender identity; to secure and retain employment and receive just compensation; to gain access to gendered space and participation in gendered activity; to control and change one's own body; to have competent medical and professional care; to be free from psychiatric diagnosis or treatment; to sexual expression; to form committed, loving relationships and enter into marital contracts; and to conceive, bear, or adopt children as well as to nurture and have custody of children and to exercise parental capacity. Accordingly, when those rights are embraced by all of humankind, "the acts of legislatures and pronouncements of courts and other governing structures will necessarily follow." *Id.*

⁶⁷ While transgendered people also have made equal protection claims, these have failed because courts consistently have found that transgendered people do not comprise a suspect class. See Greenberg *supra* 4, at 319 n.436.

movement is *Price Waterhouse v. Hopkins*, which involved a nontransgendered plaintiff.⁶⁸

A. *Title VII*

Title VII of the Civil Rights Act of 1964⁶⁹ is a remedial statute that is meant to protect individuals from employment discrimination. Originally written as a shield against private racial discrimination in the workplace,⁷⁰ it was expanded to protect employees from discrimination on the basis of sex.⁷¹ The Act clearly states that employers are barred from discriminating against employees on the bases of “compensation, terms, conditions or privileges of employment, because of such individual’s race, color, religion, sex or national origin.”⁷² “Sex” is not defined in the statute, nor is it explained in the legislative history. Despite this lack of clarity, courts have decided that the Act does not prohibit gender identity discrimination.⁷³ To date, every federal court that has considered the issue has refused to extend Title VII protection to transgendered people claiming discrimination.⁷⁴

⁶⁸ *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

⁶⁹ 42 U.S.C. § 2000e, *et seq.* (2004).

⁷⁰ See David E. Rovella, *Same-Sex Harassment Suits on Rise*, NATIONAL LAW JOURNAL, Feb. 10, 1997, at A1 (“Originally constructed as a shield against private discrimination, Title VII was aimed primarily at redressing racial discrimination in the workplace.”).

⁷¹ H.R. REP. NO. 88-914 (1964), reprinted in 1964 U.S.C.C.A.N. 2391, 2401 (“The purpose of this title is to eliminate, through the utilization of formal and informal remedial procedures, discrimination in employment based on race, color, religion, or national origin.”). Supposedly the prohibition against sex discrimination was added to Title VII on the floor of the House of Representatives as a ploy by Representative Howard W. Smith (D. Va.) to encourage other (sexist) representatives to defeat the bill. See 110 CONG. REC. 2577 (1964) (statement of Rep. Green); MARK A. ROTHSTEIN & LANCE LIEBMAN, EMPLOYMENT LAW: CASES AND MATERIALS 258 (5th ed. 2003); CHARLES WHALEN & BARBARA WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT 115-17 (1985); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 63 (1986); Jo Freeman, *How “Sex” Got into Title VII: Persistent Opportunism as a Maker of Public Policy*, 9 Law & Inequality 163, 163 (1991).

⁷² 42 U.S.C. § 2000e-2(a)(1).

⁷³ See discussion *infra* in this Part.

⁷⁴ See Kristine W. Holt, Comment, *Reevaluating Holloway: Title VII, Equal Protection, and the Evolution of a Transgender Jurisprudence*, 70 Temple L. Rev. 283, 301 (1997) (“When a non-transgendered individual suffers from an adverse employment decision predicated upon stereotypical characteristics and behaviors that may or may not be complementary to her anatomical sex, that individual has a cause of action under Title VII.”). However, when a transgendered employee suffers in the same manner, that individual has no cause of action. See *id.* at 285.

1. Discrimination Suits Under Title VII Based on Sex

The Ninth Circuit Court was one of the first courts to seriously address the issue of sex and gender as it relates to transgendered people in *Holloway v. Arthur Andersen & Co.*⁷⁵ Holloway was a transgendered person who was fired from Arthur Andersen after transitioning from male to female. She sued under Title VII for sex discrimination.⁷⁶ Despite Holloway's claim that sex was synonymous with gender, the court determined that the "traditional meaning" of sex was anatomical and based solely on biology.⁷⁷ The court cited legislative intent and the fact that Congress had not amended the Civil Rights Act to prohibit discrimination against homosexuals to bolster its interpretation of Congress's intent to have only a narrow meaning for the term "sex" which relates solely to biology.⁷⁸ By interpreting "sex" strictly, the court set a precedent for future cases and effectively established a significant hurdle for transgendered plaintiffs to overcome. The dissent in *Holloway* stated that the effect of the case was that "the right to claim discrimination [is limited] to those who were born into the victim class."⁷⁹

The Supreme Court declined to adjudicate *Ulane v. Eastern Airlines*, the next significant case in the line of transgender jurisprudence, which involved a male airline pilot who was fired after becoming a woman.⁸⁰ The pilot sued, citing Title VII's prohibition of discrimination based on sex.⁸¹ The Seventh Circuit reversed the district court, which had held that Ulane had been discriminated against as a transgendered person, and it concluded that the term "sex" was not synonymous with sexual identification.⁸² The court relied on its interpretation of congressional intent to define sex as biological.⁸³ It found that if Ulane had been discriminated against because she was now a woman, Title VII would have protected her, but it did not protect her change of sex.⁸⁴

Thus, the court made clear, in its invocation of Ulane's past, that although a transsexual could state a valid Title VII cause of

⁷⁵ *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659 (9th Cir. 1977).

⁷⁶ *Id.* at 661.

⁷⁷ *Id.* at 662.

⁷⁸ *Id.*

⁷⁹ *Id.* at 664 (Goodwin, J., dissenting).

⁸⁰ *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984), *cert. denied*, 471 U.S. 1017 (1985).

⁸¹ *Id.* at 1082.

⁸² *Id.* at 1087.

⁸³ *Id.* at 1086.

⁸⁴ *Id.* at 1087.

action on the basis of his or her reassigned sex, the discrimination could always be reframed as discrimination on the basis of transsexuality, which . . . under Title VII is no claim at all.⁸⁵

The court concluded that the plaintiff was discriminated against for something she did, not for what she was, and that such discrimination was legally permissible.

Other federal cases that have followed this line of thinking include *Sommers v. Budget Marketing, Inc.*,⁸⁶ and *James v. Ranch Mart Hardware, Inc.*⁸⁷ In *Sommers*, which involved a fired male-to-female transgendered person, the court decided that under Title VII, the plaintiff was male because she was anatomically male.⁸⁸ *James* involved a plaintiff who was hired as a man and fired after she informed her employer of her decision to live as a woman.⁸⁹ The *James* court quoted *Sommers*, saying, "Even if plaintiff is psychologically female, Congress did not intend 'to ignore anatomical classification and determine a person's sex according to the psychological makeup of that individual.'" ⁹⁰

The *Price Waterhouse v. Hopkins* case in 1989 seemed to herald a change in courts' tendencies to strictly interpret "sex" as anatomical and place sex into the realm of expression or behavior.⁹¹ The nontransgendered plaintiff, Ann Hopkins, was denied a promotion to partnership at her accounting firm and she sued for sex discrimination, claiming her Title VII rights had been violated.⁹² Despite the quality of her work, the partners in the firm who denied her promotion reportedly described Hopkins as "macho," stated that she "overcompensated for being a woman," and one partner even suggested that she "wear make-up, have her hair styled, and wear jewelry," to improve her chances of making partner.⁹³ Hopkins was criticized and discriminated against at work for failing to conform to female stereotypes.

The Supreme Court recognized that Hopkins had been discriminated against for not being stereotypically female and said in its opinion, "[w]e take these words [of Title VII] to mean that gender must be irrelevant to employment decisions."⁹⁴ The Court's

⁸⁵ Storrow, *supra* note 18, at 321.

⁸⁶ 667 F.2d 748 (8th Cir. 1982).

⁸⁷ No. 94-2235-KHV, 1994 U.S. Dist. LEXIS 19102 (D. Kan. Dec. 23, 1994).

⁸⁸ 667 F.2d at 749.

⁸⁹ 1994 U.S. Dist. LEXIS 19102, at *1-2.

⁹⁰ *Id.* at *3 (quoting *Sommers*, 667 F.2d at 749).

⁹¹ *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

⁹² *Id.* at 231-32.

⁹³ *Id.* at 235.

⁹⁴ *Id.* at 240.

conclusion took a broader view of the Title VII phrase “because of sex” than previous cases in other courts. But as one theorist points out “there is still a distance between acknowledging that an employer violates Title VII when he refuses to promote a woman because she is not feminine enough, and recognizing that an employer similarly violates Title VII when he refuses to promote a woman because she looks like a man.”⁹⁵

Based on the language regarding gender in *Price Waterhouse*, it seemed likely that a transgender case could be argued along similar lines.⁹⁶ Fourteen years later, the truck driver plaintiff in *Oiler v. Winn Dixie*,⁹⁷ who cross-dressed *outside of work*, was fired “because of his lifestyle.”⁹⁸ Using a *Price Waterhouse* argument, the plaintiff, Oiler, alleged that he was fired because he “did not conform to a gender stereotype.”⁹⁹ In analyzing Oiler’s argument, the court observed that under the Supreme Court’s theory in *Price Waterhouse*, relief would be available under Title VII for discrimination based upon sexual stereotypes.¹⁰⁰ Despite this promising language, however, the court in *Winn Dixie* did not find that the plaintiff was discriminated against for not acting masculine enough, but for “disguising himself as a woman” and therefore Title VII did not apply.¹⁰¹ The court acknowledged that the defendant company’s actions might be “morally wrong” but it refused to take a stand on the issue.¹⁰² Rather, the court entrusted Congress to “expand the definition of sex as used in Title VII beyond its common and traditional interpretation.”¹⁰³

The Ninth Circuit signaled a change in gender jurisprudence in 2000 in *Schwenk v. Hartford*, which involved a transgendered prisoner who was sexually harassed and assaulted by a prison guard.¹⁰⁴ There, the court held that the *Holloway* judicial approach had been “overruled by the logic and language of *Price Waterhouse*,” and found that discrimination for not acting like a stereotypical man or

⁹⁵ Feldblum, *supra* note 56, at 643.

⁹⁶ *Id.* at 675 (“In the wake of *Price Waterhouse*, courts should be more receptive to arguments that other instances of discrimination based on employees’ failure to adapt to certain sex stereotypes violate Title VII and analogous state laws.”).

⁹⁷ *Oiler v. Winn-Dixie Louisiana, Inc.*, No. 00-3114, 2002 U.S. Dist. LEXIS 17417 (E.D. La. Sept. 16, 2002).

⁹⁸ *Id.* at *9.

⁹⁹ *Id.* at *24.

¹⁰⁰ *Id.* at *26 (quoting *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250-51 (1989)).

¹⁰¹ *Id.* at *28.

¹⁰² *Id.* at *30.

¹⁰³ *Id.* at *31.

¹⁰⁴ *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000).

woman was forbidden under Title VII.¹⁰⁵ Also in 2000, in *Rosa v. Park West Bank & Trust Co.*, the First Circuit Court reinstated the claim of a biological male who identified as female and was denied the opportunity to apply for a bank loan because of how she dressed.¹⁰⁶

Some theorists have argued that gender identity is too fluid for Title VII jurisprudence. “Title VII’s sex discrimination jurisprudence must be reconceptualized to account for the reality of individuals who are both male and female, whether at the same moment in time or at different moments over time.”¹⁰⁷ For transgender plaintiffs to succeed with sexual discrimination cases, the entire notion of sexual discrimination should be viewed as gender discrimination.

Another criticism of courts’ approaches to transgender discrimination cases is that they interpret “sex” versus “gender” based on Congressional intent. It is entirely likely that Congress did not consider “sex” to include transgendered people at the time it drafted Title VII, but, as the commentator Julie Greenberg points out, that “does not lead to the conclusion that the wrongs Congress sought to remedy when it adopted Title VII do not affect these individuals.”¹⁰⁸

In analyzing *Ulane* (the case involving the airline pilot who was fired), some commentators have compared transgendered people to other protected classes. For example, commentator Greenberg argues that, just as employees who change religions are protected from discrimination based on their “new” religion, courts should similarly treat transgendered people who change to a new sex.¹⁰⁹ “Regardless of whether transsexuals are being discriminated against based upon their transsexual status or their change from one sex to another, they should receive Title VII protection just as the religious convert would receive Title VII protection.”¹¹⁰

2. Discrimination Suits under Title VII Based on Being Transgendered

Transgendered plaintiffs have brought Title VII cases claiming that they were discriminated against for being transgendered and

¹⁰⁵ *Id.* at 1202. Note that the language of the Gender Motivated Violence Act, under which the plaintiff brought suit, mirrors the language of Title VII.

¹⁰⁶ *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213 (1st Cir. 2000).

¹⁰⁷ Cain, *supra* note 2, at 1359.

¹⁰⁸ Greenberg, *supra* note 4, at 324.

¹⁰⁹ *Id.* at 321 n.445.

¹¹⁰ *Id.*

not because of their sex per se. The plaintiff in *Ulane v. Eastern Airlines, Inc.* was successful in using this argument, but the Supreme Court summarily reversed the Court of Appeals' decision in her favor because "Title VII does not protect transsexuals."¹¹¹ In reaction, commentator Patricia Cain argues that adopting a liberal interpretation of anti-discrimination law means that courts must hold that Title VII was created to protect everyone, regardless of sex.¹¹² Under this theory, Title VII would protect a transgendered person in situations where the person can prove that discrimination occurred because of perceptions about her or his gender appearance, as well as in situations where "the employer claims that discrimination occurred because the employee failed to fit within the neat binary classifications of male or female."¹¹³

An alternate theory addressing transgender discrimination proposes that the law should only recognize the self-defined gender of post-operative transsexuals.¹¹⁴ However, this solution fails to take into consideration that post-operative transsexuals comprise a small percentage of the transgender community. Under this theory the majority of transgendered persons would be precluded from Title VII protection. The high cost of surgery makes it prohibitive to many, most medical coverage does not include sex-reassignment surgery, and not all individuals who identify with the opposite gender elect to make the physical transition. Moreover, such a clear-cut classification would essentially place those transsexuals making the transition to the opposite gender (which lasts for at least one year and often longer) in legal and social limbo. This theory also limits the expansion of the traditional categories to those individuals who have aligned their gender identification with their physical sexuality.

3. Discrimination Suits Under Title VII (and Title IX) Based on Sexual Harassment

No federal court, except the district court in *Ulane v. Eastern Airlines*, which was later reversed, has found that discrimination based on a plaintiff's status as a transgendered person is discrimi-

¹¹¹ *Ulane v. Eastern Airlines, Inc.*, 742 U.S. 1081, 1084 (1984).

¹¹² Cain, *supra* note 2, at 1356.

¹¹³ *Id.* at 1356.

¹¹⁴ See Jody Lyneé Madeira, *Law as a Reflection of Her/His-Story: Current Institutional Perceptions of, and Possibilities for, Protecting Transsexuals' Interests in Legal Determinations of Sex*, 5 U. PA. J. CONST. L. 128, 177 (2002) (stating, "only those transsexuals whose gender was harmonized with anatomical sex and secondary sex characteristics would be legally recognized as members of their self-identified sex.").

nation based on sex under Title VII.¹¹⁵ However, the Supreme Court has held that same-sex discrimination is actionable under Title VII, which might pave the way for future transgender victories. In *Oncale v. Sundowner Offshore Services, Inc.*, a heterosexual man who worked on an oil platform was humiliated and sexually assaulted by other male heterosexual crewmembers.¹¹⁶ The Supreme Court held that same-sex discrimination is prohibited under Title VII, so long as the victim can prove that harassment resulted because of a person's sex.¹¹⁷ In deciding that same-sex sexual harassment is actionable under Title VII, the unanimous Court said,

male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.¹¹⁸

One could argue that this unanimous decision removed the "legislative intent" argument regarding Title VII and broadened the interpretation of "sex" considerably, if judges are allowed to interpret Title VII as going "beyond" what it was enacted for and if the "provisions of our laws" are deemed more controlling than legislators' concerns. Under this guise, it is not difficult to argue that transgender discrimination is covered by Title VII as a "reasonably comparable evil" to race and sex discrimination. Using *Price Waterhouse* and *Oncale* as examples, the theorist Chai Feldblum has noted that courts are beginning to realize that adverse action taken against an individual because that individual does not conform to societal expectations of how a "real man" or "real woman" should look or act are actions taken "because of sex."¹¹⁹ She notes that such an interpretation of the phrase is no longer precluded simply because Congress had not contemplated such a result when it enacted Title VII in 1964.¹²⁰

In another case, sexual harassment of a transgendered woman was determined to be illegal under Title IX of the Education Amendments of 1972, although the decision has some caveats. *Miles v. New York University* involved a male professor who sexually

¹¹⁵ *Ulane v. Eastern Airlines, Inc.*, 581 F. Supp. 821 (N.D. Ill. 1983).

¹¹⁶ *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 77 (1998).

¹¹⁷ *Id.* at 79.

¹¹⁸ *Id.*

¹¹⁹ Feldblum, *supra* note 56, at 642-45.

¹²⁰ *Id.*

harassed a female transgendered student.¹²¹ The district court found that Title IX prohibited sexual harassment of a transsexual woman.¹²² However, the professor accused of harassing the student did not know she was transgendered, diminishing the victory somewhat. While the student's sex as a female was legitimized by not being considered an issue by the court, the court came to its conclusion without addressing her gender identity, so it is difficult to argue that the case constituted progress in the battle for transgender equality.

B. Discrimination Under the Americans with Disabilities Act

Federal claims of discrimination based on transgenderism as a disability are rarely contemplated because of the clear language of the Americans with Disabilities Act (ADA) of 1997.¹²³ Although the American Psychiatric Association classifies gender dysphoria as a gender identity disorder,¹²⁴ the ADA does not include it as a disorder, in fact it specifically *excludes* transgendered people from the protective class.¹²⁵ The Act says that the term “‘disability’ shall not include—(1) transvestism, transsexualism . . . gender identity disorders not resulting from physical impairments, or other sexual behavior disorders”

C. Employment Non-Discrimination Act

Because attempts to gain transgender equality in the federal court system have been unsuccessful, some believe that the congressionally proposed Employment Non-Discrimination Act (ENDA) may be an effective means to gain transgender equality on the national level, and would serve as a compelling basis for filing lawsuits.¹²⁶ The bill calls for amending Title VII of the Civil Rights Act of 1964 to prohibit workplace discrimination based on sexual orientation.¹²⁷ It was first introduced in 1994 and reintroduced in 1996, when it was passed in the House of Representatives, but failed in the Senate by one vote.¹²⁸ In 2001 the bill was re-intro-

¹²¹ *Miles v. New York Univ.*, 979 F. Supp. 248 (S.D.N.Y. 1997).

¹²² *Id.* at 249-50.

¹²³ 42 U.S.C.S. § 12211(b) (2002).

¹²⁴ DIAGNOSTIC AND STATISTICAL MANUAL, *supra* note 6.

¹²⁵ *See* 42 U.S.C.S. § 12211(b).

¹²⁶ Employment Non-Discrimination Act of 2001, H.R. 2692, 107th Cong. (2001); Employment Nondiscrimination Act of 1996, S. 2056, 104th Cong. (1996); Employment Non-Discrimination Act of 1995, H.R. 1863, 104th Cong. (1995); Employment Non-Discrimination Act of 1994, H.R. 4636, 103d Cong (1994).

¹²⁷ H.R. 2692.

¹²⁸ S. 2056.

duced, but no vote was taken.¹²⁹

In the ENDA, “sexual orientation” is defined as “homosexuality, bisexuality, or heterosexuality, whether the orientation is real or perceived.”¹³⁰ Individuals are protected based on their sexual orientation, thus membership in the protected class under the ENDA is unrelated to a person’s gender identity or gender expression. The only way a transgendered person is protected under the bill is if an employer discriminates against a person whose gender expression is or is perceived to be gay or bisexual. Therefore, if a transgendered person is discriminated against because she or he is transgendered, such discrimination could not be challenged under the ENDA. This is why some transgendered people advocate amending the ENDA to include transgendered people as a protected class.¹³¹

Another way to gain equal rights for transgendered people on a national scale would be to amend Title VII to specifically include gender, particularly in view of the Supreme Court’s interpretation of “sex” in *Price Waterhouse*. This could be done by amending the Civil Rights Act to include transgendered people in the definition of “sex,” which would effectively preserve the small strides made by the transgender movement on the national level.

IV. OVERVIEW OF DISCRIMINATION CASE LAW ON THE STATE LEVEL AND INTERPRETING STATE LAW

State courts often rely on federal court interpretations of Title VII and the ADA to evaluate claims derived from analogous state and local legislation. In recent years, however, some state courts, notably those in New York and New Jersey, have interpreted cases more favorably for transgendered individuals than have the federal courts. Furthermore, some federal courts have interpreted state antidiscrimination laws more favorably than federal laws.

A. *Sex Discrimination Suits*

Transgendered people have filed lawsuits in state courts across the country based on sex discrimination to little avail. For example, *Sommers v. Iowa Civil Rights Commission* involved a transgendered person who was hired as a woman, but who was fired when her

¹²⁹ H.R. 2692.

¹³⁰ Employment Non-Discrimination Act of 1999, H.R., 2355, 106th Cong. § 3(9) (1999).

¹³¹ See, e.g., John M. Ohle, *Constructing the Trannie: Transgender People and the Law*, 8 J. GENDER RACE & JUST. 237, n.22 (2004).

employer discovered she was transitioning from male to female.¹³² The Supreme Court of Iowa conclusively held that the Iowa Civil Rights Act did not intend to protect transsexuals.¹³³ In 1997, the Superior Court of Connecticut in *Conway v. City of Hartford* relied on federal authority and Connecticut legislative intent to dismiss a transgendered person's sex discrimination claim based on the Connecticut Fair Employment Practice Act.¹³⁴

Another case, *Underwood v. Archer Management Services, Inc.*, involved a transgendered employee who sued her former employer on several grounds, including based on the local human rights law.¹³⁵ The district court there granted the defendant's motion to dismiss the plaintiff's sex discrimination and sexual orientation discrimination claims, holding that the District of Columbia Human Rights Act did not apply.¹³⁶ However, the court found that the plaintiff's claim of discrimination because of "personal appearance," which is specifically prohibited in the D.C. statute, was valid.¹³⁷ The language of D.C.'s human rights law is unique, thus, the decision provides little precedent for transgender discrimination law.

However, some state courts, with New York in the forefront, have begun moving away from the restrictive federal interpretation of "sex" and have held that the definition intended by Congress does not necessarily apply to state anti-discrimination laws.¹³⁸ In *Maffei v. Kolaeton Industry Inc.*, which involved a harassment suit by a female-to-male transgendered person in 1995, the court took a broad and inclusive approach.¹³⁹ Using common sense to differentiate between sexual orientation and sexual identity, the trial court based its decision on the language of New York City's Human Rights Law, which prohibits discrimination based on gender.¹⁴⁰ The judge wrote: "an employee who has fulfilled a sexual identity

¹³² *Sommers v. Iowa Civil Rights Comm'n.*, 337 N.W.2d 470 (Iowa 1983). Sommers is the same plaintiff who sued in federal court in *Sommers v. Budget Marketing, Inc.*, 667 F.2d 748 (8th Cir. 1982), discussed *supra*.

¹³³ *Id.* at 477.

¹³⁴ *Conway v. City of Hartford*, No. CV95 0553003, 1997 Conn. Super. Ct. LEXIS 282 (1997).

¹³⁵ 857 F. Supp. 96 (D. D.C. 1994).

¹³⁶ *Id.* at 98.

¹³⁷ *Id.* at 98-99.

¹³⁸ *See, e.g., Maffei v. Kolaeton*, 626 N.Y.S.2d 391, 395 (N.Y. Sup. Ct. 1995) ("our Court of Appeals has noted that even though the State statute is similar, New York courts are not bound by interpretations of the Federal law (even by the United States Supreme Court), although the determinations are 'instructive' . . .").

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 396.

urge by changing sex and is harassed because of such fulfillment is entitled to the law's protection against employer harassment."¹⁴¹ *Rentos v. Oce-Office Systems* followed in New York federal court in 1996. *Rentos* concerned a sex discrimination suit filed by a post-operative transgendered person against her former employer based on local human rights laws.¹⁴² The district court held that the plaintiff had established membership in a protected class under New York City and New York State human rights laws.¹⁴³ Although the decision was a clear victory for transgendered people in New York, the case left some questions unanswered, including whether the case law applied to non-post-operative transsexuals.

In *Enriquez v. West Jersey Health Systems*, the New Jersey plaintiff used the *Price Waterhouse* theory to advance the gender versus sex idea even further.¹⁴⁴ In that case, a physician who began transitioning from male to female was terminated without cause from her place of employment, an outpatient treatment facility.¹⁴⁵ After discussing gender dysphoria, the condition with which the plaintiff had been diagnosed, the court turned its attention to Title VII.¹⁴⁶ Referring to *Price Waterhouse*, the court said the case indicated that the term "sex" in Title VII encompassed both gender and sex and "forbids discrimination because of one's failure to act in a way expected of a man or a woman."¹⁴⁷

The plaintiff in *Enriquez* also argued that New Jersey law precluded discrimination against employees on the basis of sexual identity or gender.¹⁴⁸ In analyzing this argument, the *Enriquez* court cited *Zalewski v. Overlook Hospital*, where the New Jersey Superior Court applied New Jersey's anti-discrimination law to a situation involving a heterosexual man who was sexually harassed by his heterosexual male coworkers who thought he was a virgin.¹⁴⁹ The judge in the *Zalewski* case said, "[we should not] condone severe sexual harassment of a person because he is perceived or pre-

¹⁴¹ *Id.*

¹⁴² *Rentos v. Oce-Office Systems*, No. 95-7908, 1996 U.S. Dist. LEXIS 19060 (S.D.N.Y. Dec. 24, 1996).

¹⁴³ *Id.* at *26 ("Any ambiguity as to the plaintiff's protected status is therefore merely reflective of the present state of the law, and the complaint clearly alleges membership in what at least one court has found to be a protected class under city and state law.").

¹⁴⁴ *Enriquez v. W. Jersey Health Sys.*, 342 N.J. Super. 501 (2001).

¹⁴⁵ *Id.* at 506.

¹⁴⁶ *Id.* at 509-12.

¹⁴⁷ *Id.* at 512 (citing *Schwenk v. Hartford*, 204 F.3d 1187, 1201-02 (9th Cir. 2000)).

¹⁴⁸ *Id.* at 511-12.

¹⁴⁹ *Id.* at 515 (citing *Zalewski v. Overlook Hosp.*, 300 N.J. Super. 202 (Super Ct. Law Div. 1996)).

sumed to be less than someone's definition of masculine."¹⁵⁰ This language was easily applied to the transgender situation in *Enriquez* where, in a sympathetic and liberally construed opinion, the court decided to follow the similar reasoning of *Maffei* and *Price Waterhouse*:

A person who is discriminated against because he changes his gender from male to female is being discriminated against because he or she is a member of a very small minority whose condition remains incomprehensible to most individuals. The view of sex discrimination reflected in these decisions [*Sommers v. Iowa Civil Rights Commission*; *James v. Ranch Mart Hardware, Inc.*; and *Underwood v. Archer Management Services, Inc.*] is too constricted.¹⁵¹

Other states have taken different measures. For example, the Connecticut Commission on Human Rights and Opportunities declared in 2000 that discrimination against an individual based on transgender status constitutes discrimination based on sex under Connecticut law.¹⁵² The Commission stated that "more and more courts have ruled that having specific expectations that a person will manifest certain behavior based upon his or her gender is not only conceptually outmoded sexual stereotyping, but also an unlawful form of sex discrimination."¹⁵³

B. State Discrimination Suits Based on Disability

In determining whether gender dysphoria is protected under state disability laws, many state courts follow the example of the federal courts and specifically exclude gender dysphoria from their lists of protected disabilities.¹⁵⁴ In states that do not specifically cite gender dysphoria as a nonprotected disorder, state courts have nonetheless held that transgendered people are not protected under state laws.¹⁵⁵ Until recently, the closest a court had come to

¹⁵⁰ *Zalewski*, 300 N.J. Super. at 211.

¹⁵¹ *Enriquez*, 342 N.J. Super. at 513.

¹⁵² Conn. Comm'n on Human Rights & Opportunities, *Declaratory Ruling on Behalf of John/Jane Doe* (Nov. 9, 2000) (on file with the New York City Law Review).

¹⁵³ *Id.*

¹⁵⁴ See Shannon Minter, *Representing Transsexual Clients: Selected Legal Issues*, available at www.transgenderlaw.org/resources/translaw.htm (last modified Oct. 2003) (listing states that specifically exempt transsexualism as a disability in state laws as including: Indiana, Iowa, Louisiana, Nebraska, Ohio, Oklahoma, Texas and Virginia).

¹⁵⁵ See *Holt v. Northwest Pa. Training P'ship. Consortium, Inc.*, 694 A.2d 1134 (Pa. Commw. 1997) (holding that transsexualism was not a disability); *Dobre v. Nat'l R.R. Passenger Corp.* ("AMTRAK"), 850 F. Supp. 284, 289 (E.D. Pa. 1993) (holding that the transgendered plaintiff was not impaired because she did not have any organic disorders and was not restricted from any life activities); *Sommers v. Iowa Civil Rights*

protecting transgendered people under the legal theory of disability was when in 1993, the Supreme Court of Washington held in *Doe v. Boeing* that gender dysphoria was an “abnormal condition.”¹⁵⁶ But the court held that the plaintiff was not “handicapped” because the defendant employer did not fire the plaintiff employee “because of that condition.”¹⁵⁷ Therefore, the court reasoned the plaintiff was not discriminated against.

In New Jersey, however, the concept of transgenderism as a disability changed in 2001. In *Enriquez v. West Jersey Health Systems*,¹⁵⁸ the transgendered plaintiff had also argued that gender dysphoria was a handicap under the New Jersey Law Against Discrimination (LAD).¹⁵⁹ The court agreed.¹⁶⁰ Citing medical documentation that showed gender dysphoria was a recognized medical disorder, the court relied on precedent interpreting the LAD to apply to conditions such as alcoholism and substance abuse.¹⁶¹ The court said, “[t]he LAD has thus been broadly and liberally construed to include what otherwise might be termed emotional or mental disorders, in order to eradicate the evil of discrimination in New Jersey.”¹⁶² This case was deemed a victory for the plaintiff (although the case was remanded for trial on whether she actually had gender dysphoria) and other transgendered people in New Jersey.

The New Jersey court in *Enriquez* spent a considerable amount of time detailing how gender dysphoria is a medical disorder and cited numerous references.¹⁶³ In 2002, a Massachusetts Superior Court followed this approach in *Lie v. Sky Publishing Corp.*, holding that a transgendered plaintiff had established a prima facie case of discrimination on the basis of handicap under state law.¹⁶⁴ This

Comm'n., 337 N.W.2d 470, 476 (Iowa 1983) (holding that sex discrimination did not apply to transgendered people under Iowa law and noting that “no claim is made that a transsexual has an abnormal or unhealthy body”); *Conway v. City of Hartford*, No. 95-0553003, 1997 Conn. Super. LEXIS 282 (Conn. Super. Ct. Feb. 4, 1997) (citing *Dobre* and *Sommers* and holding that the plaintiff’s condition was not a physical disability or mental disorder under Connecticut law), *aff’d*, 760 A.2d 974 (Conn. App. Ct. 2000).

¹⁵⁶ 846 P.2d 531, 536 (Wash. 1993).

¹⁵⁷ *Id.* at 538.

¹⁵⁸ Discussed *infra*.

¹⁵⁹ 342 N.J. Super. 501, 505 (2001).

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 519.

¹⁶² *Id.*

¹⁶³ *Id.* at 510.

¹⁶⁴ *Lie v. Sky Publishing Corp.*, No. 01-3117, 2002 Mass. Super. LEXIS 402 (Mass. Super. Ct. Oct. 7, 2002). The court also found the plaintiff had made a successful sex discrimination argument, but had no basis for a claim based on sexual orientation. *Id.* at 4, 6.

grounding in medical references is in keeping with Storrow's theory that courts are more inclined to be sympathetic to transgendered people when doing so will promote congruence between a person's psychological and physical sexes.¹⁶⁵ Although it may be the most effective approach, the disability tactic of battling discrimination may be the least attractive to transgendered people because it equates their "condition" with physical and mental disorders.

V. LEGISLATION THAT PROTECTS TRANSGENDERED PEOPLE

Transgender activists have achieved greater success on the legislative front than with the judiciary. In 1993 Minnesota became the first state to enact an anti-discrimination law that expressly protects transgendered people in education, employment, housing and public accommodations.¹⁶⁶ Since then, Rhode Island, New Mexico, and California have joined Minnesota's ranks.¹⁶⁷

Additional success has been achieved at the local level, in the form of city and county ordinances that either explicitly prohibit discrimination against transgendered people, or are construed to protect gender variant individuals. Ordinances that protect transgendered people have been passed around the country in a range of localities, from large cities such as Los Angeles to small towns like Huntington Woods, Wisconsin.¹⁶⁸

In 1975, Minneapolis, Minnesota, was the first city to pass a human rights law that included transgendered people.¹⁶⁹ Fifteen years later, only six other jurisdictions had adopted ordinances to similar effect.¹⁷⁰ But after nearly thirty years, the number of cities and states that have enacted trans-protective ordinances now stands at seventy-four and appears to be growing.¹⁷¹

¹⁶⁵ Storrow, *supra* note 18.

¹⁶⁶ See MINN. STAT. ANN. § 363 (West Supp. 2002).

¹⁶⁷ See *U.S. Jurisdictions with Laws Prohibiting Discrimination*, *supra* note 45.

¹⁶⁸ See, e.g., Transgender Law & Policy Inst., *Populations of Jurisdictions with Transgender Civil Rights Laws* (Mar. 2004), at www.transgenderlaw.org/ndlaws/transinclusivelaws.pdf (on file with the New York City Law Review) (showing ordinances passed in Los Angeles, with a population of 3,694,820 and Huntington Woods, MI, with a population of 6,151) [hereinafter *Populations of Jurisdictions*].

¹⁶⁹ Minneapolis, Minn., Code tit. 7, chs. 139, 141 (1975) (defining "affectional preference" as "having or projecting a self-image not associated with one's biological maleness or one's biological femaleness").

¹⁷⁰ Transgender Law Policy Institute, *Scope of Explicitly Transgender-Inclusive Anti-Discrimination Laws* (Mar. 2004), available at www.transgenderlaw.org/ndlaws/ngtftlpichart.pdf (listing the following jurisdictions as having transgender-protective laws as of 1990: Los Angeles, Calif., Champaign, Ill., Urbana, Ill., Minneapolis, Minn., St. Paul, Minn., Harrisburg, Penn., and Seattle, Wash.).

¹⁷¹ *Id.*

Activists point out that when enacting such statutes, phrasing is critical to helping transgendered people overcome discrimination. “[T]he more clarity there is in the text of the statute itself—the plain meaning of the law—the less trouble there will be when the law gets interpreted later, by employers, by the local human rights commission, and, eventually, by the courts.”¹⁷² Transgender advocates have primarily focused on three ways of obtaining protection through the legislative process: (1) by adding gender identity as a protected status to a list of already existing categories; (2) by incorporating transgendered people into the definition of sexual orientation already in a statute; or (3) by defining sexual orientation as including perception of gender identity.¹⁷³

Using the first approach, advocates have been successful in gaining protection by adding categories which generally are defined in the ordinances, including “gender identity,” “transgender” and “transsexual.”¹⁷⁴ For example, San Francisco’s employment, housing, and public accommodations non-discrimination ordinances were amended in 1994 to add transgender and gender-variant people to the list of protected classes under the term “gender identity,” which the ordinance says, “shall mean a person’s various individual attributes as they are understood to be masculine and/or feminine.”¹⁷⁵ Rhode Island’s nondiscrimination statute added “gender identity or expression” as a protected category, which it then broadly defined as “a person’s actual or perceived gender, as

¹⁷² TRANSGENDER EQUALITY, *supra* note 27, at 40. Proper enforcement also is important. When San Francisco added “gender identity” as a protected class to its nondiscrimination ordinances, the Human Rights Commission of the City and County of San Francisco developed compliance guidelines to help implement its laws and to “[c]reate a flexible implementation plan designed to provide guidance to agencies, business establishments, and organizations seeking to comply with the law.” SAN FRANCISCO HUMAN RIGHTS COMM’N, COMPLIANCE GUIDELINES TO PROHIBIT GENDER IDENTITY DISCRIMINATION (2003), available at http://www.sfgov.org/site/sfhumanrights_page.asp?id=6274. The guidelines provide definitions and suggestions for appropriate conduct and demeanor that agencies, business establishments and organizations should adopt when engaged with transgendered individuals and they also detail the Commission’s expectations for the treatment of transgendered individuals. *Id.* In general, the guidelines require that organizations comply with the ordinances by making a “reasonable” effort to treat transgendered people the same as nontransgendered men and women. *Id.* The guidelines offer advice for a range of situations, from schools and places of employment to shelters. *Id.* Significantly, the guidelines state that gender identity is self-determined, even when a person is undergoing gender transition. *Id.* By making this point, the potential victim is empowered to control the situation. Overall, the San Francisco guidelines offer a comprehensive model for implementing a transgender statute that may provide a useful template for other locales.

¹⁷³ *Id.* at 45-50.

¹⁷⁴ *Id.*

¹⁷⁵ S.F., Cal., Ordinance 433-94 (Dec. 30, 1994).

well as a person's gender identity, gender-related self-image, gender-related appearance, or gender-related expression."¹⁷⁶ The District of Columbia is unique because it protects people on the basis of "personal appearance," which has been interpreted by the courts there to protect transgendered people.¹⁷⁷ Most local, state and federal non-discrimination statutes use the term "sex," rather than the term "gender," and few of those include definitions of sex.

The second approach is to subsume transgendered people under the category of sexual orientation. This option, chosen in Minnesota, links homophobia and transphobia, which can be similar, and serves to cover a wide range of gender-variant people.¹⁷⁸ The statute defines sexual orientation, in part, as "having or being perceived as having a self-image or identity not traditionally associated with one's biological maleness or femaleness."¹⁷⁹ The third approach is to include prohibitions of discrimination against transgendered people under definitions of gender or sex. This approach includes transgendered individuals under established sex-discrimination language, and interprets transgender discrimination as gender discrimination.

Even with nondiscrimination ordinances that already use the term "gender" instead of "sex" it is possible for courts to exclude transgendered people from protection. Such laws equate gender with sex and use a Title VII interpretation of "sex." Therefore, some argue that "gender identity" must be added to laws to protect transgendered people from discrimination as a protected class. As experience in New York City shows, amending the term "sex" to include transgendered people may be easier or simpler than adding another category. Furthermore, adding transgendered people as a new protected subgroup may weaken the argument that they are already protected under existing law.

VI. NEW YORK CITY'S HUMAN RIGHTS LAW AS A MODEL ANTI-DISCRIMINATION ORDINANCE

New York City's Human Rights Law, which is Title Eight of the Administrative Code of the City of New York, affords people protection from discrimination on a wide range of bases. The law pro-

¹⁷⁶ R.I. GEN. LAWS § 34-37-3 (2004).

¹⁷⁷ See *Underwood v. Archer Mgmt. Servs., Inc.*, 857 F. Supp. 96 (D. D.C. 1994) (discussing District of Columbia Human Rights Act, D.C. Code Ann. § 1-2512(a)(1)).

¹⁷⁸ See MINN. STAT. ANN. § 363.01(41a) (West Supp. 2002).

¹⁷⁹ *Id.*

hibits discrimination in employment, housing and public accommodations based on race, color, creed, age, national origin, alienage, gender, sexual orientation, disability, marital status, criminal status, and status as a victim of domestic violence.¹⁸⁰

New York City amended its human rights law in 2002 to clarify its established prohibition of discrimination based on gender.¹⁸¹ The new subdivision states:

[t]he term “gender” shall include actual or perceived sex and shall also include a person’s gender identity, self-image, appearance, behavior, or expression, whether or not that gender identity, self-image, appearance, behavior, or expression is different from that traditionally associated with the legal sex assigned to that person at birth.¹⁸²

This new law made New York City the largest city in the United States to adopt anti-discrimination transgender legislation.¹⁸³

A. *Legislative History and Passage of the Amendment*

A group of New York City Council members initiated New York City’s Human Rights Law amendment upon the recommendation of a legislative work group, convened by the New York Association for Gender Rights Advocacy (NYAGRA), the New York TransGender Coalition, and the Empire State Pride Agenda to study discrimination against gender-variant individuals in New York City.¹⁸⁴ The proposal to amend the law was first presented in June of 2000.¹⁸⁵ The City Council convened a General Welfare Committee hearing in May of 2001 to discuss the language of the bill and the need for a change.¹⁸⁶ More than 200 people attended and several experts and prominent transgender activists testified at the hearing.¹⁸⁷ Dennis deLeon, former chair/commissioner of the

¹⁸⁰ See generally NEW YORK, N.Y., ADMIN. CODE § 8 (2002).

¹⁸¹ NEW YORK, N.Y., ADMIN. CODE § 8-102 (2002).

¹⁸² *Id.*

¹⁸³ See *Populations of Jurisdictions*, *supra* note 167.

¹⁸⁴ See Press Release, National Gay & Lesbian Task Force, New York City Transgender Anti-Discrimination Law Take Effect Today (Apr. 30, 2002), available at www.commondreams.org/news2002/0430-12.htm; N.Y. Ass’n for Gender Rights Advocacy, *NYC Council Passes Transgender Rights Bill* (Apr. 24, 2002), available at www.nyagra.tripod.com/NewsRelease020424.html.

¹⁸⁵ New York City Council, Legislative Details for Int. 0754-2000 (2000), available at http://www.nycouncil.info/issues/bill_details.cfm?ID=int%200754-2000&TYPE=TYPE=1&YEAR=2000&SPONSORS=YES&REPORTS=YES&HISTORY=YES.

¹⁸⁶ Inga Sorenson, *Transgender Activists State Case to Council*, NEW YORK BLADE (May 11, 2001), available at <http://www.ntac.org/news> (listed under headlines for May 18, 2001).

¹⁸⁷ *Id.*

New York City Commission on Human Rights, appeared before the General Welfare Committee.¹⁸⁸ He said that during his tenure as commissioner (from March 1990 to January 1994) he was aware of pervasive discrimination against transgendered people in the areas of employment, housing and public accommodations.¹⁸⁹ He also testified that landlords and employers who discriminated against transgendered people argued that they were not violating the Human Rights Law because the language in the statute was ambiguous.¹⁹⁰ DeLeon testified that, “[t]he absence of specific reference to gender identity or expression in the statute told these individuals that there was no bar in refusing to hire a transgendered person because it “‘offended’ the culture of the company.”¹⁹¹ Not only were employers and landlords unclear about the legislative intent of the term “gender,” those with diverse gender identities also were unaware of their rights.¹⁹² DeLeon stated that confusion embedded in the term “gender” was part of the problem.¹⁹³

During the same committee hearing, Pauline Park, a NYAGRA founder and coordinator of the legislative work group, called for legal redress for transgendered people who face discrimination.¹⁹⁴ In testifying for the amendment, she said:

[I]egislation would send a clear signal to employers, to landlords, to providers of public accommodations, and to ordinary citizens that transgendered and gender-variant people are entitled to the full protection of the law. And finally, and equally importantly, legislation would communicate to transgendered people themselves that they have access to legal redress through the Human Rights Commission and through private legal action.¹⁹⁵

At the same hearing, Dr. Paisley Currah, associate professor of political science at Brooklyn College of the City University of New York, testified that the bill represented a growing trend in law regarding gender-based discrimination, a trend that is responsive to

¹⁸⁸ Transgender Law & Policy Institute, *Testimony of Dennis deLeon on Intro. 754, Before the General Welfare Committee* (May 4, 2001), available at <http://www.transgenderlaw.org/resources/deleon.htm>.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.* (“It is the very ambiguity of the law that this legislation is intended to address.”).

¹⁹⁴ Transgender Law & Policy Inst., *Int. No. 754 Public Hearing Testimony on Behalf of NYAGRA by Pauline Park* (May 4, 2001), available at <http://www.transgenderlaw.org/resources/park.htm>.

¹⁹⁵ *Id.*

increasing numbers of transgendered people losing their jobs and housing due to discrimination.¹⁹⁶ Currah said, “[t]his discrimination is rooted in the same stereotypes that have fueled the unequal treatment of women, lesbian, gay, and bisexual people, and people with disabilities—that is, stereotypes about how men and women are ‘supposed’ to behave, and about how male and female bodies are ‘supposed’ to appear.”¹⁹⁷

New York City’s then-existing statutory language and case law on the subject was the cause of some of the confusion and discord at the time of the bill’s introduction. Some city officials believed that transgendered people were already covered under the city’s anti-discrimination law because of the term “gender” instead of “sex” was used in the ordinance.¹⁹⁸ Some members of the Human Rights Commission felt that transgendered people were covered under a claim based on disability.¹⁹⁹ However, as discussed earlier in reference to the Americans with Disabilities Act,²⁰⁰ it is not clear that a disability argument would be possible or appropriate for every transgender discrimination claim.

One could argue that because the term “gender” was judicially interpreted as including transgendered people in *Maffei*²⁰¹ and *Rentos*,²⁰² which held that local laws protected transgendered people under “sex discrimination,” there was no need to alter the current law. However, because the facts of *Maffei* and *Rentos* involved post-operative transgendered people, it was unclear whether the decisions applied to other transgendered people.

Passage of the amendment failed, but the bill was proposed again in January of 2002.²⁰³ Another hearing was held on April 23,

¹⁹⁶ Transgender Law & Policy Inst., *Statement by Dr. Paisley Currah, Associate Professor of Political Science, Brooklyn College of the City University of New York before the General Welfare Committee of the New York City Council concerning Int. No. 754* (May 4, 2001), available at www.transgenderlaw.org.

¹⁹⁷ *Id.*

¹⁹⁸ Sorenson, *supra* note 185. At the committee hearing, Marta Varela, then-chair of the New York City Commission on Human Rights, testified that the City Council’s prior amendment of the law to change “sex” to “gender” “effectively expanded the protections afforded by the law.” *Id.*

¹⁹⁹ *Id.*

²⁰⁰ Discussed *supra* in Part III(A).

²⁰¹ *Maffei v. Kolaeton*, 626 N.Y.S.2d 391, 395 (N.Y. Sup. Ct. 1995).

²⁰² *Rentos v. Oce-Office Systems*, No. 95-7908, 1996 U.S. Dist. LEXIS 19060 (S.D.N.Y. Dec. 24, 1996).

²⁰³ See New York City Council, *Legislative Details for Int 0024-2002, Gender-Based Discrimination* (2002), available at <http://www.nycouncil.info/issues/search.cfm?ID=int%200024-2002&KEYWORD=Gender&TYPE=1&YEAR=2002&HISTORY=YES> (under “Search Legislation” select “introductions” for Document Type, select “2002” for Year, and type “gender” for Keyword).

2002, by the General Welfare Committee, which approved the bill that day.²⁰⁴ The City Council approved it the next day and New York City Mayor Michael Bloomberg signed the new subdivision into law on April 30, 2002.²⁰⁵ The legislative findings of the amendment read:

[t]his local law is intended to make clear that all gender-based discrimination—including, but not limited to, discrimination based on an individual’s actual or perceived sex, and discrimination based on an individual’s gender identity, self-image, appearance, behavior, or expression—constitutes a violation of the City’s Human Rights Law. . . . For those individuals, gender-based discrimination often leads to pariah status including the loss of a job, the loss of an apartment, and the refusal of service in public accommodations such as restaurants or stores. . . . In adopting this legislation, the City Council declares that the ability of all New Yorkers to work and to live free from invidious discrimination based on gender is the guiding principle of public policy and law.²⁰⁶

Currah commented on the impact of the law’s amendment by saying, “the City Council is sending a very clear signal to employers, to landlords and to owners of public accommodations that this kind of discriminatory behavior is now illegal.”²⁰⁷ With the passage of the amendment, New York City became the third jurisdiction in New York State to pass anti-discrimination laws in favor of transgendered people.²⁰⁸ Because of New York City’s large population of over eight million people, the passage of the measure dramatically increased the national percentage of people who live in areas where there are transgender-inclusive anti-discrimination laws.²⁰⁹

New York City’s ordinance is particularly noteworthy because “transgender” is not a separate and protected category. Rather, the term “gender,” which was already in the statute, is more clearly defined as including transgendered people. The language of many other ordinances is broad and open to interpretation, but New York’s ordinance is specific about gender identity being “actual or perceived.” This language indicates that the law protects people

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ NEW YORK, N.Y., ADMIN. CODE § 8-102 (2002) (accompanying note).

²⁰⁷ See Press Release, Transgender Law & Policy Institute, New York City Council Votes to Include Transgender People in its Human Rights Law (April 24, 2002), available at www.transgenderlaw.org/nycapril02.htm.

²⁰⁸ See *id.* (Rochester and Suffolk County are the other two jurisdictions that have passed anti-discrimination laws in favor of transgendered people.)

²⁰⁹ See *Populations of Jurisdictions*, *supra* note 167.

who are gender ambiguous, whereas other ordinances, like San Francisco's, which use the terms "masculine" and "feminine" might be construed to mean a person must be one or the other.

As discussed earlier, some critics worry that making transgendered people a separate class will lead society and courts to think that they were not protected before and will, in some way, reinforce the idea that transgendered people are "different." Because New York's amendment to its Human Rights Law "clarified" the law, it suggested that transgendered people should have been included under the existing sex discrimination law. The amendment merely made this fact clear. Such an approach was possible given the language already present in New York City's Administrative Code. One could argue that cases like *Price Waterhouse* and *Maffei* have stretched the term "sex" to mean "gender" and by taking this approach one step further, prohibition of discrimination based on "gender" should naturally include transgendered people.

B. *The Effects of the Amendment*

Since its enactment, transgendered people have successfully used the New York City amendment. A case decided in October of 2002, *McGrath et alia, v. Toys "R" Us, Inc.*, addressed a question about whether New York City's Human Rights Law protected transgendered people.²¹⁰ In *McGrath*, three shoppers claimed that the defendant store was responsible for the actions of its employees who had violated sections of the New York City Administrative Code by denying them accommodations, privileges or facilities of the store because of their actual or perceived gender or sexual orientation.²¹¹ In June of 2002, a jury returned a verdict in favor of the plaintiffs, but only awarded them nominal damages.²¹² The plaintiffs appealed, seeking attorney's fees.²¹³ In analyzing the case, the district court admitted there was a question about whether the Administrative Code's protections extended to transgendered people at the time of the original trial, but stated conclusively that the ambiguity was resolved when the definition of gender was amended to include prohibition of discrimination based on "gender identity or expression."²¹⁴ The case was the first public accom-

²¹⁰ No. 01-3071, 2002 U.S. Dist. LEXIS 22610 (E.D.N.Y. Oct. 16, 2002), *appealed on other grounds*, 356 F.3d 246 (2d Cir. 2004).

²¹¹ *Id.* at *2.

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.* at *7.

modations case under the new Human Rights Law and the first victory of its kind for the rights of transgendered people.

The victory in *McGrath* was diminished somewhat in 2003 when a federal district court found that an employee's sex discrimination claims against her employer were warrantless and granted the defendant employer's motion for summary judgment.²¹⁵ The plaintiff, who was a lesbian who acknowledged she did "not conform to gender norms,"²¹⁶ based her complaint on the grounds of sex, gender, sex stereotypes, and sexual orientation under Title VII and New York State and City Human Rights laws.²¹⁷ However, the court focused its analysis on Title VII, because "[c]onsideration of actions under the [New York State Human Rights Law] and [New York City Human Rights Law] generally parallels the standards and analysis applicable to Title VII claims."²¹⁸ The court declined to discuss the new amendment to the New York City Human Rights Law.

VII. CONCLUSION

While enactment of local ordinances may provide protection to transgendered people, state and federal suits may use the expanded definition of gender from *Price Waterhouse*. This effort could be coupled with the argument that the purpose of Title VII has changed substantially since it was first written. Extending protection to transgendered people is the logical next step. Also, defining "sex" in future bills and in judicial opinions as inclusive of gender and gender identity will help erode the stubborn confusion about sex and gender that still lingers.²¹⁹ In the end, "[t]ransgender rights are simply human rights, based on the recognition that transgendered people are human beings deserving of

²¹⁵ *Dawson v. Bumble & Bumble*, 246 F. Supp. 2d 301 (S.D.N.Y. 2003).

²¹⁶ *Id.* at 306.

²¹⁷ *Id.* at 304.

²¹⁸ *Id.* at 313 n.4.

²¹⁹ Educating people about transgendered people is important too. This will help to dismantle the fear that many people associate with/have of transgendered people.

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

Cain, *supra* note 2, at 1323. One recommendation is for transgendered people to be more visible. "[U]ltimately, personal contact with a member of a stigmatized group is the best mechanism for changing people's hearts and minds about the group." Feldblum, *supra* note 56, at 653.

common respect and dignity, regardless of their appearance or their choices about how to manage the transgender aspect of their lives.”²²⁰ Analogizing the transgender movement to past and current movements for minority, women’s, and gay and lesbian rights, it is clear that protecting transgendered people must be included in any legitimate pursuit of equal rights for all.

²²⁰ *Introduction to TRANSGENDER EQUALITY*, *supra* note 3, at 12.