

GETTING DIRTY: A LITIGATION STRATEGY FOR CHALLENGING SEX DISCRIMINATION LAW BY BEGINNING WITH TRANSSEXUALISM

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I

INTRODUCTION: GETTING DIRTY

This is a paper about getting dirty. This is a paper about strategy, complete with a road map, a game plan, and a recipe for change. While this involves brief forays into questions of statutory interpretation or federalism, this is primarily a paper about how courts view sex and how litigators can influence this view. Without rejecting the importance of theoretical work about the meaning, function, and interpretation of sex in the law, it is important to know that this paper attempts to do something fundamentally different: provide a useful strategy for litigators to change the way courts think about sex discrimination law. It is not meant to be a complete answer, but rather to etch out the place for litigation in a broader movement encompassing activists, legislators, and individuals. Litigation has an important place in this struggle, but large-scale change requires multiple forms of attack.

If the purpose of this paper is to reconsider what is meant by “sex discrimination,” then it may seem strange to set forth a litigation strategy based on the rights of transsexuals,¹ since they comprise such a numerically

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1. Transsexualism is distinct from sexual orientation, intersex conditions, and transvestism, as several courts have recognized. *See, e.g.*, *Ulane v. Eastern Airlines*, 581 F. Supp. 821 (N.D. Ill. 1983), *rev'd.*, 742 F.2d 1081 (7th Cir. 1984); *Doe v. McConn*, 489 F. Supp. 76, 77-78 (S.D. Tex. 1980). Transsexuals, or gender dysphorics, as they are sometimes called, are individuals with sexual identity disorders, defined by a strong and persistent belief of having been born into the wrong body and a desire to live or be treated as the other sex. Transsexuals may seek psychotherapy, hormone treatments, change of legal status, or sex reassignment surgery to bring their bodies into accord with their gender identity. Transsexuals are often sub-classified, both within the movement and within this paper, on the basis of whether or not an individual intends to or has had sex reassignment surgery. These groups are referred to as “pre-operative,” “post-operative,” or “non-operative,” and are often shortened to pre-op, post-op, or non-op. Similarly, sub-groups may be identified within the post-operative group as “male-to-female” or “female-to-male.” These titles are also shortened frequently to MTF or FTM.

Although transvestites, like transsexuals, may engage in cross-dressing, they do so not out of a dissatisfaction with their sexual status, but for sexual arousal. Transsexuals are also distinguishable from homosexuals, individuals who are sexually attracted to members of the same sex. The attraction of a male pre-operative transsexual to a man is not considered

small group of people.² But the treatment of transsexuals under anti-discrimination law affects the rights of all groups marginalized on the basis of sex. An effective challenge to the exclusion of transsexuals from the meaning of "sex" under sex discrimination statutes will undermine the contention that the protections affected by sex discrimination statutes are limited to certain defined groups.

A recent decision from the European Court of Justice (hereinafter the ECJ),³ *P v. S and Cornwall Co. Council*,⁴ (hereinafter *Cornwall*) maps out the reasoning for a challenge to traditional notions of sex discrimination doctrine. In this case, the ECJ held that a sex discrimination statute prohibited the discharge of an employee for undergoing sex reassignment surgery. The Court reached this result by eschewing the traditional analysis of sex discrimination doctrine. Two recent transsexual sex discrimination decisions from New York, *Maffei v. Kolaeton Industry, Inc.*⁵ and *Rentos v. Oce-Office Systems*,⁶ show that American state courts⁷ provide fertile

homosexual since the transsexual considers himself to be a female. Some transsexuals, however, will also identify as homosexual, if they are sexually attracted to other members of the same sex as their gender identity. AMERICAN PSYCHIATRIC ASSOCIATION, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* (4th ed. 1994). See generally *TRANSSEXUALISM AND SEX REASSIGNMENT* (Richard Green & John Money eds., 1969). While I recognize and support the use of the term "transgenderism" as an umbrella term encompassing any person who crosses gender boundaries, since this paper is dealing specifically with transsexuals as a subgroup of transgenderists, I will use the term "transsexual" throughout this paper. See GORDENE OLGA MACKENZIE, *TRANSSEXUALISM AND SEX REASSIGNMENT* 55-56 (1994) (distinguishing between transsexualism and transgenderism).

2. Estimates about the number of transsexuals vary. Extensive studies of transsexualism's prevalence have been hard to obtain given the recent date of psycho-medical sex-reassignment programs, social stigmas, and unsympathetic medical attitudes towards transsexualism. Studies indicate that the number of known transsexuals increases as the social and legal climate for transsexuals improves. The estimated number of transsexuals living in America has ranged from one in 10,000 to a high of one in 500. See MACKENZIE, *supra* note 2, at 16. A 1993 study of the Netherlands, a country considered supportive of transsexuals, found 1:11,900 men and 1:30,000 women were transsexual. Russell Reid, *Psychiatric and Psychological Aspects of Transsexualism*, in *XXIIIRD COLLOQUY ON EUROPEAN LAW: TRANSSEXUALISM, MEDICINE AND LAW* (1995).

3. The European Court of Justice (hereinafter ECJ) is a body of fifteen judges from throughout the European Union who interpret the law of the European Union. As a member of the European Union, a state must agree to be bound by the ECJ's interpretations of community law. Both individuals and member states can bring suits against member states for violations of community law. See generally LEO D'ARCY, *EUROPEAN COMMUNITY LAW AND HUMAN RIGHTS: TEXTBOOK* (1992). In *Cornwall*, the Truro Industrial Tribunal found the United Kingdom's Sex Discrimination Act 1975 too narrow to include transsexualism, but considered that the wording of Council Directive 76/207, art. 1, 1976 O.J. (L 39) 40, 41, the Equal Treatment Directive, may be wider on this point. Case C-13/94, *P v. S and Cornwall County Council*, 1996 E.C.R. I-2160-65. The Industrial Tribunal, therefore, stayed its proceedings until the ECJ's determinations on the Directive's meaning were made. See *id.* at I-2163.

4. *Cornwall*, 1996 E.C.R. I-2159.

5. 626 N.Y.S.2d 391 (N.Y. Sup. Ct. 1995).

6. 72 Fair Empl. Prac. Cas. (BNA) 1717 (S.D.N.Y. Dec. 24, 1996).

7. There are some tricky, but crucial distinctions made in this paper between state and federal courts and state and federal statutes. The distinction between state and federal sex

ground for this interpretive approach. In the past, American decisions based on the federal law of Title VII⁸ have narrowly interpreted the federal sex discrimination statutes to exclude transsexuals from the definition of "sex."⁹ Although, to date, many states have simply adopted the federal reasoning, federal precedent does not compel identical interpretations of state law. Indeed, these two New York courts based their findings that sex discrimination statutes included protections for transsexuals on state, rather than federal, statutes.

Given this open interpretive terrain, I argue that other states should follow New York and the ECJ court's reasoning when interpreting state statutes. I am not concerned with a policy argument about ends. Rather, I begin from the premise that this is a desired end and then develop an interpretive argument about means which will lead to that end. At this point, courts must choose from one of two interpretive lines of sex discrimination case law. The first approach, followed by most American courts and cemented by the Seventh Circuit's decision in *Ulane v. Eastern Airlines, Inc.*,¹⁰ considers the plain meaning of the word "sex" and legislative history to find that "sex" in Title VII of the Civil Rights Act of 1964¹¹ (hereinafter Title VII) does not protect transsexuals. Whereas the American approach looks backward, the second, competing approach espoused by the ECJ looks forward. Based on current and evolving understandings of sex and of

discrimination statutes is crucial because while the federal sex discrimination statute has been consistently interpreted to exclude transsexuals, state statutes are open to more inclusive interpretations. Although state statutes are traditionally interpreted in accordance with their federal counterparts (*see infra* Part V), courts need not and often do not adhere to such narrow interpretations. *See, e.g., Rentos v. Oce-Office Sys.*, 72 Fair Empl. Prac. Cas. (BNA) 1717 (S.D.N.Y. Dec. 24, 1996).

Despite these slippages between state and federal courts and state and federal statutes, this paper will try to distinguish which court and which statute it means. Yet because of these slippages, sometimes this distinction will not be necessary, and so I will speak in the generic of "courts" and "statutes." For instance, since sex discrimination statutes in general are modeled on the federal statute Title VII, when referring to the language of sex discrimination statutes, it is not necessary to specify whether I am speaking of the state or federal level. In addition, when I refer to the general reasons why courts may be hospitable to including transsexuals in the definition of sex for sex discrimination purposes, I draw on reasoning that applies to all courts, since, with the exception of the recent New York cases, all state and federal cases interpret sex discrimination statutes in accordance with the federal precedent as set out in *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984). *See, e.g., Conway v. City of Hartford*, No. CV 950553003, 1997 WL 78585, at *7 (Conn. Super. Ct. Feb. 4, 1997) (adopting *Ulane* reasoning and holding to state non-discrimination statute); *Wood v. C. G. Studios*, 660 F. Supp. 176, 177 (E.D. Pa. 1987) (same); *Sommers v. Iowa Civ. Rts. Comm'n*, 337 N.W.2d 470, 474 (Iowa 1983) (same); *Dobre v. Nat'l R.R. Passenger Corp.*, 850 F. Supp. 284, 286-287 (E.D. Pa. 1993) (applying *Ulane* analysis in Title VII case).

8. *See infra* notes 49 and 53.

9. Even the New York decisions including transsexuals under state law affirmed the federal precedents which exclude transsexuals. *See Maffei v. Kolaeton Indus., Inc.*, 626 N.Y.S.2d 391, 393-394 (Sup. Ct. 1995); *Rentos v. Oce-Office Sys.*, 72 Fair Empl. Prac. Cas. (BNA) at 1717.

10. *Ulane*, 742 F.2d at 1081.

11. 42 U.S.C. § 2000e (1994).

transsexualism, the ECJ interprets sex to include discrimination against transsexuals.

Through a comparison of these two decisions, I suggest why the ECJ's approach provides a better analytic framework for interpreting state statutes. I begin with what I believe is the answer: the Advocate General's¹² opinion which the ECJ essentially adopted in *P v. S and Cornwall Co. Council*. Finding the plain meaning and legislative history analysis non-determinative, the Advocate General employs a "dynamic" interpretation, one which considers a statute in light of changes in legal, social, and scientific understandings.¹³ This interpretive method drives the ECJ to a more inclusive end, one which is more coherent and better fits the particular nature of state law than the federal model.

Following this analysis, I examine why such an approach is both possible and necessary in the United States. To do so, I first consider why American courts as a general proposition may be prepared to expand current sex discrimination law to include transsexuals, despite their failure to make expansions for other groups marginalized on the basis of sex. I then closely examine the American line of transsexual cases, led by *Ulane*, to demonstrate the problems of *Ulane's* reliance on the plain meaning and legislative history analysis in light of the ambiguities present in both of these standards. I contrast the *Ulane* reasoning with the more coherent analysis employed by the ECJ in *Cornwall*. Finally, drawing upon the reluctance of federal courts to go against the *Ulane* reasoning, I suggest that litigators consider asserting claims under state non-discrimination laws. To that end, I present two recent New York cases that demonstrate how the ECJ approach may be successfully applied in the United States.

II

A NEW LINE OF PRECEDENT: *P v. S AND CORNWALL Co. COUNCIL*

A. *The Decision*

American courts have traditionally excluded transsexuals from the protection of sex discrimination law.¹⁴ When the Seventh Circuit's decision

12. The Advocates General assist the ECJ in deciding cases by offering their opinion on a given case before the court makes its decision. As opposed to the plaintiff or defendant counsel, the Advocate General's duty is to protect the ECJ's interests. Although the Advocate General's opinion is not binding on the ECJ, it has great persuasive effect. The ECJ adopts the position of the Advocate General in the great majority of cases. See PAUL CRAIG & GRÁINNE DE BÚRCA, *EC LAW: TEXT, CASES, AND MATERIALS* 75 (1995). In *Cornwall*, for example, the opinion written by the Advocate General was then adopted by the ECJ. Case C-13/94, *P v. S and Cornwall County Council*, 1996 E.C.R. I-2160-67.

13. William Eskridge, *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1497 (1987).

14. See, e.g., *Ulane*, 742 F.2d at 1081; see also *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748 (8th Cir. 1982); *Holloway v. Arthur Anderson & Co.*, 566 F.2d 659 (9th Cir. 1977); *Dobre v. Nat'l R.R. Passenger Corp.*, 850 F. Supp. 284 (E.D. Pa. 1993); *Powell v. Read's*

in *Ulane v. Eastern Airlines, Inc.*¹⁵ reversed the only federal decision which had found transsexuals protected by Title VII,¹⁶ the issue became settled law. Today, most Title VII decisions simply cite *Ulane* or follow its two-pronged analysis of examining the plain meaning of sex and the statute's legislative history to reach the same conclusion.¹⁷

Despite the fact that American courts have interpreted sex discrimination statutes in a consistent manner, there is nothing inevitable about this analysis, particularly with respect to state courts, for which the *Ulane* case is not binding precedent. An alternative approach exists, and has been eloquently laid out in *Cornwall*¹⁸ by the Advocate General of the ECJ. This case applies an evolutive approach to interpretation. That is, it redefines what is meant by "discrimination on grounds of sex" in light of changes in science and social conditions.¹⁹ The ECJ's reasoning suggests that the time is ripe for state courts to re-examine the interpretive methods of the fifteen-year-old *Ulane* decision, which considers and rejects this reasoning. Moreover, the evolutive approach better fits the distinctive institutional role of state courts.

The plaintiff in the ECJ case, known as P., worked successfully as a male until she informed her employer of her desire to undergo sex reassignment surgery to bring her anatomy into line with her gender identity as a woman.²⁰ Her employers consequently issued P. a three-month dismissal notice when P. was still pre-operative, which took effect after P.'s sex reassignment surgery was complete.²¹ The Industrial Tribunal in reviewing the case determined that the employer's claim that P. was dismissed because of downsizing was pretextual.²²

As opposed to the American courts which would narrowly interpret the plain meaning of sex, the Advocate General (and later the ECJ) emphasized "reality today" in which "customs and morals are changing rapidly."²³ Law's relevance, he argued, depends upon its ability to adjust

Inc., 436 F. Supp. 369 (D. Md. 1977); *Voyles v. Ralph K. Davies Med. Ctr.*, 403 F. Supp. 456 (N.D. Cal. 1975), *aff'd*, 570 F.2d 354 (9th Cir. 1978); *Grossman v. Bernards Township Bd. of Educ.*, 11 Fair Empl. Prac. Cas. (BNA) 1196 (D.N.J. Sept. 10, 1975), *aff'd*, 538 F.2d 319 (3d Cir. 1976).

15. *Ulane*, 742 F.2d at 1081.

16. *Ulane*, 581 F. Supp. at 821.

17. *See, e.g.*, *Conway v. City of Hartford*, No. CV 950553003, 1997 WL 78585, at *7 (Conn. Super. Ct. Feb. 4, 1997); *Wood v. C. G. Studios*, 660 F. Supp. 176, 177-178 (E.D. Pa. 1997); *Sommers v. Iowa Civ. Rts. Comm'n*, 337 N.W.2d 470, 474 (Iowa 1983).

18. *Cornwall*, 1996 E.C.R. I-2145 (Advocate General's opinion).

19. *See id.* at I-2149, ¶ 9 (Advocate General's Opinion).

20. The Advocate General's opinion does not give very much information about P.'s work history. However, the fact that S. initially "appeared supportive and tolerant, and reassured her about her position within the establishment" implies that she had no reason to think she was performing inadequately. *Id.* at I-2146-47.

21. *See id.* at I-2147. By firing P. pre-operatively, the council made the one limited ground left open to Karen Ulane—discrimination because she was female—impossible.

22. *Id.* at 2147, ¶ 6.

23. *Id.* at I-2149.

quickly to evolution based on social change and scientific advances. To prove his assertions that these changes have included greater social acceptance of transsexualism, he surveyed the liberalizing trends in the legal treatment of transsexuals among the Member States. With this guiding principle, the Advocate General considered the meaning of “sex” and then, more narrowly, whether the sex discrimination statute — the Equal Treatment Directive (hereinafter Directive), which not only speaks of sex, but also specifies its application to “men” and “women”— could include transsexuals.²⁴

Since it was certain that “P. would not have been dismissed if she had remained a man,” the Advocate General found it impossible to believe that sex was not involved in the decision to fire P.²⁵ The Advocate General then rejected the *Ulane* court’s distinction between discrimination because of sex and discrimination because of change in sex as a “betrayal of the true essence of that fundamental and inalienable value which is equality.”²⁶ That is, “importance may not and must not be given to sex as such, so as to influence, in one way or another the treatment afforded.”²⁷ The overriding responsibility of the ECJ, the Advocate General asserted, was neither to determine the statute’s plain meaning nor to announce the intentions of the framers, who could only take account of reality as it existed in 1976. Rather, the ECJ’s responsibility is to interpret statutes to ensure that the general principles of Community law are realized.

B. *Dynamic Interpretation*

In contrast to the *Ulane* line of cases, the Advocate General in *Cornwall* does not rely exclusively on the sex discrimination statute’s plain meaning and legislative history. Instead, seeing the possible ambiguities in each of these approaches, the Advocate General adopts a third perspective, one more suited to “new situations brought to light by social change and advances in science.”²⁸

24. *Id.* at I-2155. Article 1(1) of the Equal Treatment Directive provides in pertinent part:

The purpose of this Directive is to put into effect in the Member States the principle of equal treatment for *men* and *women* as regards access to employment, including promotion, and to vocational training and as regards working conditions and, on the conditions referred to in paragraph 2, social security. This principle is hereinafter referred to as “the principle of equal treatment.”

Council Directive 76/207, art. 1, 1976 O.J. (L 39) 40 (emphasis added).

Article 3(1) of the Directive provides: “Application of the principle of equal treatment with regard to working conditions, including conditions governing dismissal, means that *men* and *women* shall be guaranteed the same conditions without discrimination on grounds of sex.” *Id.* art. 3, at 41 (emphasis added).

25. *Cornwall*, 1996 E.C.R. at I-2154 (Advocate General’s opinion).

26. *Id.* at I-2154, ¶ 20.

27. *Id.* at I-2154, ¶ 19 (citing a previous case in which the opinion was written by the Advocate General Kalanke).

28. *Id.* at I-2148-9, ¶ 9.

Professor Eskridge, a well-known scholar of statutory interpretation, would call the Advocate General's approach "dynamic interpretation" because the Advocate General considers the "ongoing" history of the statute.²⁹ Simply put, Eskridge argues that where the statute's text clearly answers the interpretive question, such as whether transsexuals are protected by Title VII, the statute's plain meaning should be the most important interpretive consideration.³⁰ Differing interpretations or contrary legislative expectations, however, can render a statute's text unclear.³¹ In these cases, Eskridge suggests that legislative history should control, since the legislature is the primary lawmaker in a democratic society.³² The judiciary should, therefore, generally defer to the legislature's view where the statute's text provides determinate answers and the legislative history reveals a thorough and considered legislative deliberation.³³ However, when the statute's text is ambiguous and where the original legislative intentions no longer correspond to social and legal realities, current policies and social conditions should be given more weight.³⁴ As Eskridge argues, "What is too often lost in the exchange of historical arcana [and, in this case, plain meaning analysis³⁵] is a careful analysis of the statutory text, the evolving policies currently of importance to the statute, and even the facts of the case."³⁶

The Advocate General's dynamic interpretation escapes this rubric, refocusing instead on the crucial policy questions confronting the court. The remedial purposes of Title VII and other judicial precedents and legislative acts suggest that if the American courts followed the Advocate General's dynamic approach, they might arrive at a similarly expansive result.

The Advocate General's evolutive approach affects both his reading of the statute's text and his use of legislative history. In his consideration of the meaning of both transsexuality and sex, the Advocate General begins by considering the traditional, limited views of these words. In both cases, though, he quickly moves on to flesh out these meanings in light of current understandings. So, for example, he notes that Britain has traditionally viewed transsexuality with moral disapprobation and, consequently, has "reject[ed] out of hand" the notion that transsexuals could be protected by law.³⁷ Recent legislative, judicial, and medical views on transsexualism,

29. Eskridge, *supra* note 13, at 1479.

30. *Id.* at 1484.

31. *Id.* at 1483-84.

32. *Id.* at 1481.

33. *Id.* at 1483-84.

34. *Id.* at 1484, 1486-88.

35. See *infra* Part III.B (discussing plain meaning analysis applied in sex discrimination law context).

36. Eskridge, *supra* note 13, at 1548-49.

37. *Cornwall*, 1996 E.C.R. at 2149 (Advocate General's opinion).

however, lead the Advocate General to move beyond this moral condemnation of transsexualism.³⁸ Various member states, particularly since the early 1980s, have through their judiciaries and legislatures recognized transsexualism by allowing transsexuals to change their civil status.³⁹ The Advocate General also considers the medical evidence which suggests that transsexualism may be present at birth and may be beyond the individual's control.⁴⁰ Thus, he concludes, the older, moral view of transsexualism "no longer corresponds to the true situation."⁴¹ Rather, with this changed plain meaning of what it means to be a transsexual a different treatment of transsexuals under the law must follow. Indeed, the European Court of Human Rights⁴² (hereinafter ECHR), whose decisions on transsexuals compose part of the Advocate General's comparative catalogue, explicitly stated that its view of transsexualism needed to be continually "under review" to account for "scientific and societal developments."⁴³

The Advocate General engages in a similar analysis of the word sex. He "go[es] beyond traditional classification[s]" to recognize that sex itself

38. *See id.*

39. *See id.* at I-2149-50.

40. *See id.* at I-2148.

41. *Id.* at I-2149.

42. The ECHR, incorporating 39 member states, is distinct from the ECJ. The ECHR's decisions are not binding upon the ECJ but have great persuasive effect. *See generally* D'ARCY, *supra* note 3; Laurence R. Helfer, *Consensus, Coherence and the European Convention on Human Rights*, 26 CORNELL INT'L L.J. 133, 133-34 (1993). One primary reason for this is that the ECJ usually concerns itself with economic issues arising in the European Union whereas the ECHR is considered the primary forum for resolving social disputes. That it is unusual for the ECJ to lead other courts in affecting social policy is evidenced by the Advocate General Tesouro's closing lines:

Finally, I would point out in the words of Advocate General Trabucchi in an opinion now 20 years old, that 'if we want Community law to be more than a mere mechanical system of economics and to constitute instead a system commensurate with the society which it has to govern, if we wish it to be a legal system corresponding to the concept of social justice and European integration, not only of the economy but of the people, we cannot disappoint the [national] court's expectations, which are more than those of legal form.' (citation omitted).

Cornwall, 1996 E.C.R. I-2157, ¶ 24 (Advocate General's opinion).

Although Community law differs from the law of each member state, the ECJ considers the existing laws and precedents of the defendant state as well as other member states in reaching its decisions. Thus, while *Cornwall* did not come from a British court, it can be considered a British decision in that British courts will now be bound by the ECJ holding in future cases. In fact, already the High Court, Queen's Bench Division, has, following the ECJ's holding in *Cornwall*, held that the Equal Treatment Directive may be extended to preventing discrimination on the grounds of a person's sexual orientation. *R. v. Secretary of State for Defence, ex parte Terence Perkins*, [1997] IRLR 297, 297, ¶¶ 26-29 (Q.B. 1996) (referring questions regarding the Equal Treatment Directive's impact on the British policy of discharging from the armed forces any person of homosexual orientation to the European Court of Justice for a preliminary ruling). *But see* *R. v. Secretary of State for Defence, ex parte Terence Perkins (No. 2)* [1998] IRLR 508, [1999] 1 FLR 491 (Q.B. 1998) (acknowledging the subsequent limitation of the *Cornwall* decision to transsexuality and not homosexuality in *Grant v. South-West Trains Ltd.* [1998] IRLR 206).

43. *Cornwall*, 1996 E.C.R. I-2151 (Advocate General's opinion) (quoting *Rees v. United Kingdom*, 106 Eur. Ct. H.R. (ser. A) at 19 (1986)).

may be thought of as a “continuum.”⁴⁴ While he does not ultimately depend upon such a broad definition of sex, the Advocate General’s analysis does lead him to a broader understanding of sex discrimination. He dismisses as “obsolete” the notion that the law should not protect transsexuals merely because they fall outside the man/woman dichotomy.⁴⁵ Additionally, he dismisses as a “quibbling formalistic interpretation” the notion that P.’s discrimination was not sex discrimination because it resulted from her change in sex.⁴⁶ He settles instead on a definition which prohibits any discrimination which is related to one’s sex, arguing that, “[w]here unfavorable treatment of a transsexual is related to (or rather is caused by) a change of sex, there is discrimination by reason of sex or on grounds of sex.”⁴⁷

To generate these more nuanced definitions, the Advocate General performs, in addition to constitutional and statutory interpretation, an exploration of scientific, social, and legal advances in Britain and abroad. Finding that the treatment of transsexuals varies, he does not artificially limit himself to one perspective, but rather wrestles with these different meanings to develop a coherent interpretation of the Directive.

The Advocate General also takes a dynamic approach to the use of legislative history. Unlike American courts, the Advocate General does not pore over legislative history in an effort to derive the enactors’ intentions in passing the Directive.⁴⁸ He does acknowledge what may have been the actual, stated intentions of the legislators who passed the Directive, noting that the 1976 Directive “took account of . . . ‘normal’ reality at the time of its adoption” and, for this reason, did not “expressly take into account a question and a reality that were only just beginning to be ‘discovered’ at that time.”⁴⁹ Rather than being paralyzed by the past through a narrow view of legislative history, the Advocate General looks more broadly, considering the “general principle[s]” of Community law embodied by the statute.⁵⁰ The Advocate General states that “there can be no doubt that the *elimination of discrimination based on sex* forms part of [an individual’s] fundamental rights.”⁵¹ The Directive’s purpose, then, must be understood to further this goal of rendering sex “irrelevant to the treatment everyone receives.”⁵² Under this reasoning, expanding the statute’s protections to transsexuals does not conflict with the statute’s purpose, but

44. *Id.* at I-2153, ¶ 17.

45. *Id.*

46. *Id.* at I-2155, ¶ 20.

47. *Id.* at I-2154, ¶ 18.

48. *See infra* Part III.C (discussing American courts’ reliance on legislative history analysis in sex discrimination law).

49. *Cornwall*, 1996 E.C.R. at I-2156 (Advocate General’s opinion).

50. *Id.*

51. *Id.* at I-2156.

52. *Id.* at I-2156, ¶ 23.

rather allows its original purpose to be realized. By construing the Directive in light of its underlying principle, the ECJ remains true to the ideals of equality embodied in the Directive.⁵³

III.

THE CURRENT AMERICAN VIEW OF TRANSEXUALISM: *ULANE* *V. EASTERN AIRLINES, INC.*

A. *Background of the Case*

In order to understand why the ECJ got it right through the interpretive approach, it is necessary to understand why the American courts have gotten it wrong.⁵⁴ Through a comparison of the different reasonings employed by American and European courts, one can see several weaknesses in the *Ulane* rationale. In *Ulane*, Eastern Airlines ended the successful twelve-year career of one of its pilots when Karen (previously Kenneth) Ulane, a male-to-female transsexual returned to work following sex reassignment surgery.⁵⁵ The *Ulane* district court opinion was the first federal opinion to hold that transsexuals had a cause of action under Title VII, finding that Ulane had been discriminated against both as a transsexual and as a female.⁵⁶

Although the circuit court accepted the district court's view of Title VII as a remedial statute, it declined to interpret it broadly, stating that it was "constrained [by] what Congress intended when it decided to outlaw discrimination based on sex."⁵⁷ To determine the meaning of sex, the court employed a two part-analysis inferred from prior federal court decisions in the area of transsexual discrimination. It considered first, the plain meaning of sex and second, the legislative history of Title VII.⁵⁸ Given no definition by the statute, the circuit court viewed itself as limited to the ordinary, common meaning of the word "sex": biological anatomy.⁵⁹ The court acknowledged the possibility that its plain meaning might not represent everyone's meaning of sex, but held that only Congress could go beyond the common understanding of the word.⁶⁰ The discrimination which Title VII protected against was therefore held to be only discrimination "against women because they are women and against men because they are

53. *See id.*

54. Prior to the New York cases discussed *infra* in Part V.C.

55. *Ulane*, 742 F.2d at 1083.

56. *Ulane*, 581 F. Supp. at 821.

57. *Ulane*, 742 F.2d at 1086.

58. *See, e.g.,* *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748 (8th Cir. 1982); *Holloway v. Arthur Anderson & Co.*, 566 F.2d 659 (9th Cir. 1977); *Powell v. Read's, Inc.* 436 F. Supp. 369 (D. Md. 1977); *Voyles v. Ralph K. Davies Med. Ctr.*, 403 F. Supp. 456 (N.D. Cal. 1975), *aff'd*, 570 F.2d 354 (9th Cir. 1978); *Grossman v. Bernards Township Bd. of Educ.*, 11 Fair Empl. Prac. Cas. (BNA) 1196 (D.N.J. Sept. 10, 1975), *aff'd*, 538 F.2d 319 (3d Cir. 1976).

59. *Ulane*, 742 F.2d at 1085 (citing *Perrin v. United States*, 444 U.S. 37, 42 (1979)). For a definition of sex and its complications, see *supra* Part III.B.

60. *Id.*

men," not against individuals who have sexual identity disorders or people who believe that their identities do not match their anatomies.⁶¹

The court found authority for its interpretation of sex's plain meaning in the legislative history (or lack thereof) of Title VII. Since sex was added as a last-minute "gambit of a congressman seeking to scuttle adoption of the Civil Rights Act,"⁶² the court concluded that "Congress never considered nor intended that this 1964 legislation apply to anything other than the traditional concept of sex."⁶³ The court buttressed this argument by pointing out Congress' continual rejection of attempts to expand Title VII to prohibit discrimination based on "affectational or sexual orientation,"⁶⁴ even though the court recognized the distinctions between sexual orientation, transsexuality, and transvestism.⁶⁵

Following the reasoning of earlier decisions,⁶⁶ the circuit court held that the plain meaning test may leave room for transsexuals to assert discrimination claims under Title VII if they are discriminated against for being male or female.⁶⁷ However, even accepting *arguendo* that Ulane was female post-operatively, the circuit court rejected the district court's finding of discrimination against Ulane on this basis. The court held that Eastern did not fire Ulane on the ground that, for instance, women lack the physical characteristics needed to be competent pilots. Rather, it shared the district court's conclusion that Eastern fired Ulane because they did not want "a *transsexual* in the cockpit."⁶⁸

Ulane thus allows transsexuals to fall through the cracks in Title VII. Transsexual individuals are unable to assert claims for the discrimination leveled against them as transsexuals — a claim which the facts generally do support. At the same time, the only claim left to them, that discrimination was leveled against them on the basis of their post-operative sex, usually cannot find support in the facts which show discrimination based on their

61. *Id.*

62. *Id.* at 1085. This interpretation of the addition of "sex" to the Civil Rights Act of 1964, while accepted and employed by every federal decision up to *Ulane*, does not provide a full picture of the story. See *infra* note 100.

63. *Ulane*, 742 F.2d at 1085.

64. *Id.* at 1085-6.

65. *Id.* at 1085.

66. *Holloway v. Arthur Anderson & Co.*, 566 F.2d 659, 664 (9th Cir. 1977) (arguing in dicta that Title VII would provide a cause of action to transsexuals claiming discrimination because of their sex, male or female); *Grossman v. Bernards Township Bd. of Educ.*, 11 Fair Empl. Prac. Cas. (BNA) 1196 (D.N.J. Sept. 10, 1975), *aff'd*, 538 F.2d 319 (3d Cir. 1976) (holding that a post-operative transsexual plaintiff would have had a cause of action if she had been terminated because of stereotypes based on sex or conditions common only to women).

67. *Ulane*, 742 F.2d at 1087.

68. *Id.* (quoting *Ulane*, 581 F. Supp. at 821) (emphasis added by circuit court).

change in sex. Subsequent decisions have not scrutinized the *Ulane* reasoning and have adopted the court's conclusions.⁶⁹

B. The Plain Meaning Analysis

Unlike its predecessors, the *Ulane* court explicitly recognizes that Title VII, as a remedial statute, should be liberally construed.⁷⁰ Yet the court ignores the implications of this status by relying on a plain meaning test. Even the strict textualist Judge Easterbrook suggests that a remedial statute requires judges to excavate and flesh out its meaning: "The judge interprets omissions and vague terms in the [remedial] statute as evidence of want of time or foresight and fills in these gaps."⁷¹ It is not necessary to look the courts to see that sex is one of Easterbrook's vague terms. Sex discrimination jurisprudence wrestles with various definitions of sex, seldom arriving at consistent answers. Both the attention given to the question and the inability to come to a consensus on the word's meaning contradict the *Ulane* view that the meaning of sex could ever be plain.

The Title VII transsexual cases uniformly rely on a biological definition of sex in discrimination doctrine.⁷² The *Ulane* court's insistence that sex means only "biological male or biological female"—as opposed to notions of sexual identity or anything related to sex—has prevented courts from construing Title VII to include transsexuals.⁷³

The *Ulane* court avers that only a small group of doctors and activists dispute the plain meaning of sex.⁷⁴ But the debate over the meaning of "sex" pervades both law and legal scholarship. The transsexual civil status cases indicate that courts have not come to a clear consensus on what constitutes "sex." In *Anonymous v. Mellon*, the court determined that sex was defined by a multi-factored weighing of anatomy, psychological identity,

69. See, e.g., *Dobre v. Nat'l R.R. Passenger Corp.*, 850 F. Supp. 284, 286 (E.D. Pa. 1993) (stating the "key inquiry" . . . is, of course, to ascertain Congress' intent." The court concludes that it is "well established that the term 'sex' is to be construed narrowly, according to its plain meaning," citing the *Ulane* line of cases. Even in *Rentos v. Oce-Office Sys.*, No. 95 CIV. 7908, 1996 WL 737215, at *7 (S.D.N.Y. Dec. 24, 1996), where the court read the state non-discrimination statute to include a cause of action for a transsexual, the court held that under *Ulane*, the plaintiff "cannot hope to . . . state a claim under Title VII."

70. *Ulane*, 742 F.2d at 1084.

71. Frank Easterbrook, *The Supreme Court, 1983 Term-Forward: The Court & the Economic System*, 98 HARV. L. REV. 4, 14 (1985).

72. Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 8 (1995).

73. *Ulane*, 742 F.2d at 1087. See also *Doe v. United States Postal Serv.*, 37 Fair Empl. Prac. Cas. (BNA) 1867 (D.D.C. 1985).

74. The *Ulane* court acknowledges that "some may define 'sex' in such a way as to mean an individual's 'sexual identity,'" but contends that this is an expanded view and contrary to congressional intentions. *Ulane*, 742 F.2d at 1084. The court later suggests that the broader view is supported only by a marginal few when it states that the interpretation of the word 'sex' is more than a "mere matter of expert medical testimony or the credibility of witnesses produced in court." *Id.* at 1086.

acceptability by others, chromosomes, reproductive capacity, and endocrine levels.⁷⁵ Relying on anatomy and an individual's psychological sense of sex, the court in *In re Anonymous* held that a post-operative transsexual male-to-female could be considered female for purposes of her birth certificate.⁷⁶ Although the New Jersey Supreme Court weighed several factors, it ultimately concluded that sexual identity was the primary component in determining a transsexual's sex.⁷⁷ In *Richards v. United States Tennis Ass'n.*, the court also employed a balancing test on the grounds that the use of the chromosomal test would be "grossly unfair" when "overwhelming medical evidence" indicated that a post-operative transsexual was female.⁷⁸ Other courts have disagreed, privileging anatomy at birth over any subsequent changes. In these cases, the chromosomes, the only unchangeable feature of an individual's sex or gender, are considered dispositive. In *Anonymous v. Weiner*, for instance, the court held that an individual's sex could not be changed, despite the fact that the formerly-male plaintiff looked like a woman, believed herself to be a woman, and, because of sex reassignment surgery, even had female genitalia.⁷⁹

The definition of sex is also confused because courts use the terms sex and gender interchangeably.⁸⁰ Although this began as linguistic slippage,⁸¹ it has a substantive component which is critical in sex discrimination law. Indeed, every federal court that has distinguished between gender and sex has indicated that if sex discrimination statutes included gender discrimination, Title VII would encompass transsexuals.⁸² To these courts, sex discrimination means discrimination against a man or woman based on the

75. 398 N.Y.S.2d 99, 101 (Sup. Ct. 1977). For the academic debate over the definition of sex, see *Transsexuals in Limbo: The Search for a Legal Definition of Sex*, 31 MD L. REV. 236, 237-44 (1971).

76. 293 N.Y.S.2d 834, 836-38 (N.Y. Civ. Ct. 1968)

77. 355 A.2d 204 (N.J. 1976).

78. 400 N.Y.S.2d 267, 272 (Sup. Ct. 1977)

79. 270 N.Y.S. 2d 319 (1966); see also *In re Declaratory Relief for Ladrach*, 513 N.E.2d 828 (Prob. Ct. Stark County, Ohio 1987); *K. v. Health Div. Dep't of Human Resources*, 560 P.2d 1070 (Or. 1977).

80. Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CALIF. L. REV. 1, 134 (1995) (noting that legal institutions such as the Ninth Circuit and the EEOC have stated that Title VII's prohibition against sex discrimination means only discrimination on the basis of gender).

81. Ruth Bader Ginsburg began this slippage while bringing early sex discrimination cases to the Supreme Court. On the advice of a secretary, she used the term gender interchangeably with the word sex to keep the Supreme Court justices from making "distracting associations." See Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 16 (1995) (citing Ruth Bader Ginsburg, *Gender in the Supreme Court: The 1973 and 1974 Terms*, 1975 SUP. CT. REV. 1, 1 n.1.)

82. The definition of gender discrimination is equally debated. When the transsexual cases refer to gender discrimination as a basis of protecting transsexuals, they are equating gender with sexual identity. See, e.g., *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659

individual's "distinguishing biological or anatomical characteristics." Gender, in contrast, refers to an individual's sexual identity and how that person chooses to express this identity, whether it be as a masculine woman or as a post-operative transsexual.⁸³ The court in *Dobre v. National Railroad Passenger Corp.* found that Title VII protected only against discrimination on the basis of sex, not discrimination against transsexuals on the basis of gender. If, on the other hand, sex includes sexual identity, then a transsexual would not have to demonstrate discrimination on the basis of being male or female, but could instead assert a cause of action for sex discrimination based on transsexualism.⁸⁴

Academics likewise disagree on the meaning of "sex." Professor Case has argued that courts have failed to unpack the differences between sex, gender, and sexual orientation in determining what it means to discriminate on the basis of sex.⁸⁵ In contrast, Professor Franke has argued that it is the "absurdity" of conceptually disaggregating sex and gender which has led to an irregular and conflicting line of sex discrimination jurisprudence.⁸⁶

Case's article demonstrates the inapplicability of the plain meaning argument as applied to pre-operative transsexuals. In *Grossman v. Bernards Township Board of Education*, the court relied on the plain meaning test to find that Title VII does not prevent a school district from terminating a pre-operative transsexual.⁸⁷ Case suggests that this position may no longer be maintained in the wake of the Supreme Court's holding in *Price Waterhouse v. Hopkins*.⁸⁸ In *Hopkins*, the board member who informed Ann Hopkins of the decision to postpone her partnership advised her to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, . . . and wear jewelry" to improve her

(9th Cir. 1977). To dismiss a transsexual man for being transsexual, is to dismiss him because he has or acts on his sexual identity as a woman. Prof. Case, on the other hand, uses gender discrimination to refer to discrimination against either men or women on the basis of a gendered trait, such as refusing to hire anyone who exhibits daintiness or speaks with a high voice, even though these attributes may not be bona fide occupational qualifications. Case, *supra* note 81, at 3. Under the second definition of gender discrimination, transsexuals in Ulane's situation would not be protected, since the basis of discrimination against them is that they have a sexual identity disorder, that they have changed from one sex to another, rather than that they exhibit some specific characteristic seen as feminine and, therefore, undesirable. On the other hand, transsexuals such as the plaintiff in *Doe v. Boeing Co.*, 846 P.2d 531 (Wash. 1993), who brought suit because she was prohibited from wearing feminine clothing and using the women's bathroom, would receive the protections that current caselaw does not afford them.

83. *Dobre v. Nat'l R.R. Passenger Corp.*, 850 F. Supp. 284, 286 (E.D. Pa. 1993); *see also* *Holloway v. Arthur Anderson & Co.*, 566 F.2d 659, 662 (9th Cir. 1977).

84. *Dobre*, 850 F. Supp. at 286.

85. Case, *supra* note 81, at 2.

86. Franke, *supra* note 72, at 1-3.

87. 11 Fair Empl. Prac. Cas. (BNA) 1196 (D.N.J. Sept 10, 1975), *aff'd*, 538 F.2d 319 (3d Cir.).

88. 490 U.S. 228 (1989).

chances at promotion.⁸⁹ The Court held that requiring Hopkins to conform to these feminine gender stereotypes constituted impermissible sex stereotyping, since they were not bona fide occupational qualifications.⁹⁰ The partners did not turn Hopkins down because they believed that women are incapable of the aggression needed to be an accountant.⁹¹ Instead, they turned her down because she displayed characteristics they deemed inappropriate for her sex.⁹² As Case argues, *Hopkins* stands for the proposition that the distinction between sex and gender discrimination is no longer good law.⁹³ That is, it should be equally impermissible to dismiss Mr. Grossman, a pre-operative male-to-female transsexual, for wearing the pink pearl necklace which Ann Hopkins may have refused to wear.⁹⁴

On a more fundamental level, one can challenge the plain meaning argument as misapprehending the goals of sex discrimination law. The *Ulane* court's privileging of biological males and females for protective purposes assumes that these are natural, clearly defined categories, and that the goal of sex discrimination law is to eradicate only wrongful distinctions based on these biological differences. As Professor Franke's thorough examination of sex discrimination law demonstrates, what the court views as distinctions based on biology are often based on cultural norms and beliefs. The emphases on biology and genitals serve, in Franke's words, as "false proxies" for societal rules about gender.⁹⁵ Courts have upheld school rules prohibiting men from wearing earrings when such ornamentation was not consistent with community standards, but prohibited a restaurant from requiring only women to wear revealing uniforms.⁹⁶ Franke's work exposes these categories of male and female, masculine and feminine not as biologically-based, but rather as social constructions. To properly address the wrongs of sex discrimination, the law must recognize that these distinctions are societally created and, therefore, must be societally broken down. For transsexuals, this process means recognizing that sex discrimination goes beyond discrimination against biological males and biological females on

89. *Id.* at 235.

90. *Id.* at 239-42, 250-52.

91. *Id.* at 234-35.

92. *Id.* at 235, 256.

93. Prof. Case sets forth several cases which indicate that courts may allow gender discrimination despite *Hopkins*. See, e.g., *Underwood v. Archer Management Servs., Inc.*, 857 F. Supp. 96, 98 (D.D.C. 1994) (holding that the discharge of a male to female transsexual who "retains some masculine traits" did not constitute sex discrimination); Case, *supra* note 81, at 210.

Case concludes that the court's sex discrimination jurisprudence has permitted discrimination based on *feminine* gender, even as it prohibits discrimination based on sex or masculine gender. *Id.* at 3.

94. Indeed, the Washington Supreme Court recently upheld the firing of a transsexual male-to-female for just this reason. *Doe v. Boeing Co.*, 846 P.2d 531 (Wash. 1993).

95. Franke, *supra* note 72, at 40.

96. See Katharine T. Bartlett, *Only Girls Wear Barrettes: Dress and Appearance Standards, Community Norms, and Workplace Equality*, 92 MICH. L. REV. 2541, 2544 n.17 (1994).

the basis of anatomy. As the courts' varied jurisprudence demonstrates, the whole category of what constitutes sex is up for grabs.

The judicial wrangling over "sex" challenges the *Ulane* contention that sex has a "plain" meaning, or any meaning which can be definitively established. Indeed, the *Ulane* court admits as much by turning to the legislative history for further understanding of the term's meaning.

C. Legislative History Analysis

Most courts use legislative history to determine the interpretation of an undefined or ambiguous phrase. When legislative history is clear and substantial, deferring to congressional goals and intentions may be consistent with a democratic society in which laws come primarily from the people's representatives.⁹⁷ Supporters of this theory argue that judges become merely the guardians of Congress' will, not judicial activists legislating from the bench. Such an approach is arguably justified and helpful when congressional intentions are unambiguous. It becomes more problematic, however, in the context of Title VII discrimination statutes where the *Ulane* court finds a "dearth" of legislative history, yet presents its interpretation as "constrained" by congressional intent.⁹⁸ By inferring meaning from congressional silence, the court engages in the same judicial activism it denounces. The result is an interpretation which can be contradicted both by congressional statements at the time and subsequent judicial interpretations of Title VII.

The court sets forth the legislative history of sex in Title VII as the last-minute "gambit" of a southern congressman seeking to prevent passage of the Civil Rights Amendment.⁹⁹ Since sex was an afterthought, no prior hearings or debates on the meaning of sex were conducted.¹⁰⁰ The court interprets this absence of prior history and the process of enactment as a clear indication that "Congress never considered nor intended that this 1964 legislation apply to anything other than the traditional concept of

97. Eskridge, *supra* note 13, at 1483.

98. *Ulane*, 742 F.2d at 1085.

99. *Id.* (quoting *Holloway v. Arthur Anderson & Co.*, 566 F.2d 659, 662 (9th Cir. 1977)).

I use this version of Title VII's history since it has, through its repetition, become the standard considered by American courts. Scholars have challenged this view of Title VII. Prof. Case demonstrates that the anti-integrationist Smith's motives may have been more complex than just an attempt to "scuttle" the Civil Rights Bill by adding in the unpopular provision of sex. He may also have been concerned that the only group left unprotected after the passage of Title VII was white, Christian women. Mary Anne Case, *From the Mirror of Reason to the Measure of Justice*, 5 *YALE J.L. & HUMAN.* 115, 124 (1993). Prof. Franke takes this argument one step further by situating Smith's amendment as part of an extensive debate about the passage of an equal rights amendment. Smith supported the National Women's Party and the equal rights amendment. See Franke, *supra* note 72, at 14-25.

100. *Holloway*, 566 F.2d at 662.

sex.”¹⁰¹ Had Congress intended to protect anyone else, the court asserts, it would have specifically mentioned transsexuals.¹⁰² In equating congressional silence with a rejection of transsexualism, the court is not “constrained” by Congress’ meaning. If anything, the court is constricting Congress’ meaning by narrowly interpreting the statute. Justice Scalia points out the perils of assigning meaning to congressional silence: “It is impossible to assert with any degree of assurance that congressional failure to act represents (1) approval of the status quo, as opposed to (2) inability to agree upon how to alter the status quo, (3) unawareness of the status quo, (4) indifference to the status quo, or even (5) political cowardice.”¹⁰³ In other words, the only thing clear about Congress’ failure to speak about transsexuals is that Congress did not speak.

The court relies on floor debate to declare that Congress intended a traditional definition of sex. Such debate, even when explicit, does not provide a valuable barometer of congressional intent. Scholars and courts generally do not attach much significance to floor debates, since they are often offered at the last moment for reasons of political expediency. As opposed to committee reports or hearings, floor debate represent nothing more than the view of one lone individual. Consequently, an advocate can selectively cite floor debate in support of nearly any reading of legislative history. In the case of Title VII, the purposes enunciated for the amendment’s passage could as easily support a broad reading of sex as a narrow one. Although transsexuals were not specifically envisioned by the drafters, the concept of equal treatment for all was. Representative Kelly declared that, “I do not want anyone to be denied that which is his or her inherent right as an individual.”¹⁰⁴ Representative Lindsay similarly declared his “hope that [Title VII] will pass to prove to everyone that we believe in equal rights for all people.”¹⁰⁵ As if to pre-empt the backward-looking limitations imposed by the courts in their future interpretations, one representative urged Congress to “reflect sociological insight or shifting social standards.”¹⁰⁶

That the court fills in Congress’ silence is also clear from its assumption that Congress would treat the issues of sexual orientation and sexual identity in the same way. The *Ulane* court, as opposed to previous courts,

101. *Ulane*, 742 F.2d at 1085.

102. *Id.*

103. *Johnson v. Transp. Agency*, 480 U.S. 616, 672 (1987).

104. 88 CONG. REC. 2583 (1964).

105. *Id.* at 2581.

106. *Id.* at 2580.

acknowledges the distinction between sexual identity and sexual orientation.¹⁰⁷ Yet the court allows the treatment of one to stand for the treatment of the other, even in the face of clear legislative, medical, and juridical treatments to the contrary.¹⁰⁸

Contrary to the *Ulane* court's contentions, courts have consistently interpreted the Civil Rights Act of 1964 broadly. Today, Title VII benefits groups never mentioned by Congress, including married women,¹⁰⁹ women with pre-school-aged children,¹¹⁰ unmarried women,¹¹¹ pregnant women,¹¹² women who do not conform to gender stereotypes,¹¹³ men,¹¹⁴ and whites.¹¹⁵ It may be argued that these extensions apply only to subgroups of the classes contemplated by Congress. Courts have, however, justified these extensions based on the broad concept that "race, religion, nationality, and sex (should) become irrelevant (for job qualifications). What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract."¹¹⁶ These interpretations recognize the limits of depending upon legislative history in the civil rights context. As Professor Neuberne has argued:

At best the concept of legislative intent is discernible primarily by the judges who claim to have deciphered it. The truth of the matter is that a legislature, especially in the civil rights area, generally enacts a statute aimed at a broad philosophical concept—in this case, equality in employment. It does not and cannot foresee, much less resolve, the myriad questions which must arise whenever a broad philosophical proposition is applied to the protean complexity of everyday life.¹¹⁷

In limiting its interpretation of Title VII to Congress' statements rather than its broader motivating principle, the *Ulane* court acts against judicial practice in the civil rights area.

One might argue that, even if the legislative history of Title VII is ambiguous, Congress has made clear its intent regarding the protection of

107. See, e.g., *Holloway v. Arthur Anderson & Co.*, 566 F.2d 659, 662 (9th Cir. 1977).

108. See *supra* note 1 (distinguishing transsexuality from other groups marginalized because of sex) and *infra* Part V.A (exploring medical and juridical understandings of transsexuality and sex).

109. See *Sprogis v. United Airlines*, 444 F.2d 1194, 1194-98 (7th Cir. 1971).

110. See *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971).

111. See *Jacobs v. Martin Sweets Co.*, 550 F.2d 364 (6th Cir. 1977).

112. See *California Fed. Sav. and Loan Ass'n v. Guerra*, 479 U.S. 272 (1987) (reversing *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125 (1976) based on the Pregnancy Discrimination Act of 1978 (PDA), 42 U.S.C. § 2000e(k) (1994), which specifies that sex discrimination includes discrimination on the basis of pregnancy).

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

114. See *Diaz v. Pan Am World Airways, Inc.*, 442 F.2d 385 (5th Cir. 1977).

115. See *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976).

116. *Griggs v. Duke Power Co.*, 401 U.S. 424, 436 (1971).

117. Burt Neuberne, *Observations on Weber*, 54 N.Y.U. L. REV. 546, 553 (1979).

transsexuals' employment rights by explicitly excluding transsexuals from the 1990 Americans with Disabilities Act¹¹⁸ (hereinafter ADA) and its equivalents at the state level.¹¹⁹ The argument would be that this explicit exclusion of transsexuality from the ADA evinces a definitive statement of congressional intolerance of transsexualism.¹²⁰ This exclusion and debate occurred in congressional hearings and reports, not in impromptu floor debate.¹²¹ Moreover, it may be argued, since the statute was passed in 1991, when it was clear that the courts had excluded transsexuals from Title VII protection, the ADA accurately reflects the current social view on transsexuality.¹²²

118. 42 U.S.C. §§ 12102(2)-12213 (1994). I will speak here of the ADA, as I did with Title VII, referring not only to the federal statute, but also state statutes modeled on this legislation. I do so because, as with Title VII, many states have modeled both their original statutes on the federal law and because they have deferred to federal law for their interpretation of these statutes in the transsexual context. See, e.g., *Dobre v. Nat'l R.R. Passenger Corp.*, 850 F. Supp. 284, 288 (E.D. Pa. 1993).

119. I am considering the ADA here only for the limited point of arguing that it need not be viewed as a more explicit statement of congressional intent with regard to transsexuals. This is an altogether separate question from the issue of whether from the perspective of a transsexual activist inclusion under the ADA is a desirable goal. For the reasons I discuss regarding the dangers of the medicalization of transsexualism, I believe this is a problematic move. See *infra* notes 179-182 and accompanying text; see also *infra* Part VI. Whereas the language of Title VII is still open to expand from transsexualism to other groups marginalized because of sex, the ADA grants rights on a much narrower basis (having a disability) and, one which is much less likely to have a positive spillover effect into increasing rights for other minorities (even though it would, admittedly, provide accommodation benefits for transsexuals not available under sex discrimination statutes). Aside from political concerns, inclusion of transsexuals under the ADA presents a greater practical hurdle because of the very issue that the congressional intent with regard to sexual minorities is much clearer than that for Title VII. For an explanation of the legislative history surrounding Title VII, see *supra* Part III.C.

120. The House Report states that gender identity disorders, such as transsexualism "would have been included under the ADA, but for this provision" which excludes "certain conditions" from its definition of a covered disability. H.R. REP. NO. 101-485, pt. 3, at 76 (1990), reprinted in 1990 U.S.C.C.A.N. 499. See generally Adrienne Heigel, *The Americans with Disabilities Act as a Moral Code*, 94 COLUM. L. REV. 1451, 1474-1478 (arguing that the ADA creates a standard of "moral qualifications" for employment purposes since there is "no principled way" to justify the exclusion of gender identity disorders from the mental disabilities covered by the Act).

121. See, e.g., H.R. REP. NO. 101-485, pt. 3, at 76 (1990), reprinted in 1990 U.S.C.C.A.N. 498 (discussing the exclusion of gender identity disorders from the ADA.).

122. One may also argue that the 1992 amendment to the Rehabilitation Act of 1973, 29 U.S.C. §§ 701-796 (1992), which protects federal workers from discrimination on the basis of a disability, supports a negative congressional statement regarding the protection of transsexuals. Perhaps as a response to *Blackwell v. United States Dep't of Treasury*, 639 F. Supp. 289, 290 (D.D.C. 1986), dismissed on other grounds, 656 F. Supp. 713 (D.D.C. 1986), in which the district court found that transvestism was a protected disability under the federal Rehabilitation Act, Congress amended the Rehabilitation Act to explicitly exclude transsexuals and other sexual behaviors and disorders. See Pub. L. No. 100-430, § 6(b)(3), 102 Stat. 1619 (1977) (noted under 42 U.S.C. § 3602 (1992)); Eric Matuszewich, *Does Title VII Protect Transsexuals at Work*, THE LEGAL INTELLIGENCER, Jan. 22, 1996 at 9 (discussing explicit exclusion). Concerns that the ADA would be interpreted in the same way as the Rehabilitation Act may have been the impetus behind their exclusion from the ADA at its

Yet the ADA does not determine how sex discrimination statutes should be interpreted for employment purposes. The ADA does not necessarily imply, as Adrienne Heigel suggests, "the explicit sanctioning of private acts of discrimination" against transsexuals.¹²³ In spite of Senator Helms' efforts to insert this meaning into the Act,¹²⁴ the ADA may only mean that Congress does not believe that the rubric of disability law is the appropriate place to handle transsexualism. Transsexuals do not generally experience mental impairments that limit major life activities, a requirement of the mental disabilities protected by the ADA.¹²⁵ Karen Ulane, for instance, was certified (at the highest level) by the Federal Aviation Authority, earned a medal from the United States Army for her service during the Vietnam war, and had been promoted by Eastern Airlines for her superior skill as a pilot. The trial court found that Ulane was not fired because her performance was affected by the surgery, but because of her status as a

creation, Heigel, *supra* note 120, at 1476, particularly since *Blackwell* was cited in the legislative debates over the ADA. Karl E. Klare, *Power/Dressing: Regulation of Employee Appearance*, 26 NEW ENG. L. REV. 1395, 1420 n.103 (1992).

Some states have followed the federal model by explicitly excluding sexual behaviors and disorders from protection as a physical or mental disability under their own statutes. *See, e.g.*, IND. CODE ANN. § 22-9-5-6(d) (Michie 1997); IOWA CODE ANN. §15.102.2.b(1) (West 1994). Most state statutes, however, are not so limited, and states are free to make their own interpretations as to what constitutes a disability. *See, e.g.*, CONN. GEN. STAT. ANN. §§ 46a-60(a) (West 1998); Maine Human Rights Act, ME. REV. STAT. ANN. tit. 5, §§ 4551-4632 (West 1989); MASS. GEN. LAWS ANN. ch. 151B, § 1 (West 1996); New Jersey Law Against Discrimination, N.J. STAT. ANN. §§ 10:5-1 to 49 (West 1998); Pennsylvania Human Relations Act, PA. STAT. ANN. tit. 3, §§ 951-963 (West 1993); Washington Law Against Discrimination, WASH. REV. CODE ANN. § 49.60 (West 1998).

In the states that have not made explicit exclusions, courts have divided as to whether or not the statutes could be interpreted to include transsexuals. *Compare, e.g.*, Holt v. Northwest Penn. Training Partnership Consortium, Inc., 94 A.2d 1134 (Pa. Commw. Ct. 1997) (holding transsexualism not a disability under state human relations act); LaFleur v. Bird-Johnson Co., No. CV 93-703, 1994 WL 878831, at *4 (Mass. Super. Ct. Nov. 3, 1994) (same); Dobre v. Nat'l R.R. Passenger Corp., 850 F. Supp. 284, 286-287 (E.D. Pa. 1993) (same); Doe v. Boeing Co. 846 P.2d 531, 536 (Wash. 1993) (same); Sommers v. Iowa Civil Rights Comm'n, 337 N.W.2d 470 (Iowa 1983) (same); Conway v. City of Hartford, No. CV 950553003, 1997 WL 78585, at *4 (Conn. Super. Ct. 1997) (relying on *Sommers* and *Dobre*, in addition to the ADA and Rehabilitation Act to hold transsexualism did not constitute a physical disability), *with* Conway, 1997 WL 78585, *5 (relying on inclusion of DSM definition of mental disorder in United States Supreme Court and in state statute to hold transsexualism did constitute a mental disorder).

123. *See* Heigel, *supra* note 120, at 1479.

124. During floor debate about the ADA, prior to the exclusion of sexual behaviors and gender identity disorders, Senator Helms asked the Act's managers whether an employer would be permitted to use his or her "own moral standards . . . to make a judgment about any or all of the employees identified" by the sexual behavior or gender identity provision. 135 CONG. REC. S10765 (daily ed. Sept. 7, 1989). Senator Harkin, however, responded that an employer's judgment would be limited to determining whether a person with these disabilities "can do and how they can perform on a job and are they qualified for the job . . . in the manner in which the act provides for such judgments." *Id.* at 10765-6.

125. Some state statutes have been held to include transsexualism as a mental disorder. *See supra* note 123.

125. *Ulane*, 742 F.2d at 1082-83.

transsexual.¹²⁶ Transsexual discrimination may, therefore, be more akin to the prevention of discrimination on the basis of characteristics which are only relevant under Title VII if they affect a bona fide occupational qualification.¹²⁷

The ADA offers a different approach to discrimination than Title VII. The statute initially follows the language of Title VII, preventing employers from taking into account an individual's disability by "limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status or such applicant or employee because of the disability of such applicant or employee."¹²⁸ The ADA, however, goes one step further, requiring employers to make "reasonable accommodations" to disabled workers who request them.¹²⁹ Given that this affirmative obligation may impose a reasonable degree of "hardship" on employers, Pamela Karlan and George Rutherglen argue that "reasonable accommodation is affirmative action, in the sense that it requires an employer to take account of an individual's disabilities and to provide special treatment to him for that reason."¹³⁰

IV

CORNWALL AND ULANE: EXPLAINING THE DIFFERENCE

The difference between the American federal holdings in *Ulane* and its progeny and the ECJ's in *Cornwall* cannot be reduced merely to the differences in statutes, judicial treatment of transsexuals, or laws dealing with transsexuals outside the employment context. Indeed, an examination of these differences alone suggests that the American courts should be more accepting of a transsexuals' sex discrimination claim.

Strict textualists will have difficulty arguing that American courts are limited by Title VII's wording, given the more restrictive language of the Directive, which was not an impediment to the ECJ's interpretation. The American statute prohibits the discharge of any individual "because of such individual's . . . sex,"¹³¹ but neither specifies nor defines what it means by sex. In contrast, the Directive clearly states that it applies to men and

126. *Id.* at 833.

127. As with women or certain religions, this does not mean that employers are free from making any accommodations based on an individual's status under Title VII. A transsexual, particularly pre-operatively, may have limited accommodation needs. The plaintiff in *Doe v. Boeing Co.*, 846 P.2d 531 (Wash. 1993), for instance, brought suit against her employer for prohibiting her from satisfying her required 'real life' test by wearing feminine clothing and using the women's bathroom.

128. 42 U.S.C. § 12112(b)(1) (1995). Cf. Section 703(a)(2) of Title VII, 42 U.S.C. § 2000e(a)(2) (1994), which prohibits an employer from "litigating, segregating, or classifying his employees . . . because of such individual's race, color, religion, sex, or national origin."

129. Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 DUKE L.J. 1, 3 (1996).

130. *Id.* at 14.

131. 42 U.S.C. § 2003-2 (1991).

women. The Directive provides in pertinent part, “[W]ith regard to working conditions, including the conditions governing dismissal . . . men and women shall be guaranteed the same conditions without discrimination on grounds of sex.”¹³² Since the American statutes do not define sex more specifically, American judges are left with greater interpretive freedom than their European counterparts. Thus, if anything, the language of the statutes would point to opposite conclusions in the American and European courts regarding the protection of transsexuals from employment discrimination.

Furthermore, the judiciary’s treatment of transsexuals outside the employment context has generally been more favorable in the United States than it has in either the United Kingdom or Europe. Aside from sex discrimination cases, the bulk of litigation involving transsexuals concerns the designation of sex on birth certificates because of its connection to civil status. The United Kingdom courts have consistently rejected efforts to amend birth certificates following sex reassignment surgery. Most recently, in *Re P and G (Transsexuals)*,¹³³ the highest British court declined to revise the definition of sex based on new medical research beyond the well-established chromosomal, gonadal, and genital test developed in the landmark British case of *Corbett v. Corbett*.¹³⁴ The ECHR has proven somewhat more hospitable to the claims of transsexuals than domestic courts.¹³⁵ Originally, the ECHR found no violations of the European Convention on Human Rights when a member state refused to change a post-operative transsexual’s sex for civil status purposes.¹³⁶ Yet the ECHR has grown more accepting of transsexual rights, subsequently upholding a transsexual’s right to correct her sexual status in the civil status register in *B. v. France*.¹³⁷ The ECHR has limited the effects of this ruling, though, by refusing to abandon a line of case law which has been followed consistently for over twenty years and which has found expression in a large number of judgments.¹³⁸ Thus, under decisions both in British courts and in the ECHR, British transsexuals remain unable to change their civil status.¹³⁹ In contrast to the British situation, American courts have increasingly recognized the right of transsexuals to list their post-operative sex on

132. Council Directive 76/207, art. 5, 1976 O.J. (L 39) 41 (emphasis added).

133. 2 F.L.R. 90 (Q.B. 1996).

134. 2 All E.R. 33 (Q.B. 1970).

135. For a description of the ECHR, see *supra* note 42 and accompanying text.

136. *Rees v. United Kingdom*, 106 Eur. Ct. H.R. (ser. A) (1986); *Cossey v. United Kingdom*, 184 Eur. Ct. H.R. (ser. A) (1990).

137. See *B. v. France*, 232 Eur. Ct. H.R. (ser. A) (1992).

138. *Id.* at 45.

139. When this note went to press, the ECHR had begun deliberations as to whether the European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222, requires recognition of sexual identities altered through sex reassignment surgery. See Rosa Prince, *Transsexuals in Test Case*, THE INDEPENDENT, February 22, 1998, at 6.

their birth certificates,¹⁴⁰ marry,¹⁴¹ and qualify for single-sex athletic competition.¹⁴²

Comparing the legislative treatment of transsexuals in Britain and the United States would also indicate that the United States would be more likely to include transsexualism under sex discrimination law than the British. Faced with a judiciary which, as demonstrated above, had limited the rights of transsexuals under existing statutes, the British legislature could have created new statutes with greater protections. Yet the Births and Deaths Registration Act 1953 remains unamended today, providing for alteration only to correct an "error of fact or substance," which the courts have held does not apply to transsexuals.¹⁴³ In contrast to the British legislature, many American states have responded to narrow judicial holdings regarding transsexuals' civil status by passing new laws which explicitly allow post-operative transsexuals to change the sex designations on their birth certificates.¹⁴⁴

The differences between *Ulane* and *Cornwall* cannot be explained away by statutory, judicial, or political differences. Rather, the differences inhere in interpretative approach. The *Ulane* court uses a narrow interpretation, claiming that the court can do no more than enunciate the intentions of the 88th Congress which passed Title VII. To do so, the court considers the plain meaning of sex and the statute's legislative history. In contrast, the Advocate General in *Cornwall* employs a dynamic approach, urging the ECJ to interpret the Directive in light of wider principles of Community law and current understandings.¹⁴⁵

140. See *Anonymous v. Mellon*, 398 N.Y.S.2d 99, 101 (N.Y. Sup. Ct. 1977) (announcing in dicta a multi-factor test for determining sex since "basing determination of gender (sex) upon any one indicator might well lead to an unwarranted conclusion."); *In re Anonymous*, 293 N.Y.S.2d 834, 838 (N.Y. Civ. Ct. 1968) (holding "[a] male transsexual who submits to a sex-reassignment is anatomically and psychologically a female in fact"). *But see* *K. v. Health Div., Dep't of Human Resources*, 560 P.2d 1070 (Or. 1977) (denying post-operative male-to-female transsexuals petition for change of sex designation on birth certificate).

141. *M.T. v. J.T.*, 355 A.2d 204, 207 (N.J. Super. Ct. App. Div. 1976) (upholding marriage between a post-operative male-to-female transsexual and another male). *But see In re Declaratory Relief for Ladrach*, 513 N.E.2d 828, 832 (Ohio Prob. 1987) (denying marriage license to post-operative male-to-female transsexual for purpose of marrying a male).

142. See *Richards v. United States Tennis Ass'n.*, 400 N.Y.S.2d 267, 721-22 (N.Y. Sup. Ct. 1977) (holding that the use of a chromosomal test to determine an individual's sex for purposes of athletic competition "grossly unfair" in light of "overwhelming medical evidence" that a postoperative transsexual was female).

143. Section 1(1) of the Births and Deaths Registration Act 1953 provides that "error of fact or substance in any . . . register may be corrected . . . by the officer having the custody of the register, . . . upon production to him by that person of a statutory declaration setting forth the nature of the error and the true facts of the case made by two qualified informants of the birth. . . with reference to which the error has been made." *Re P and G (Transsexuals)*, 2 F.L.R. 90 (Q.B. 1996).

144. Currently 16 states and the District of Columbia permit post-operative transsexuals to change their sex designation. See Leslie Pearlman, *Transsexualism as Metaphor: The Collision of Sex and Gender*, 43 *BUFF. L. REV.* 835, n.75 (1995) (listing relevant statutes).

145. *Cornwall*, 1996 E.C.R. at I-2148-49, ¶ 9, 2154-55, ¶ 20.

Professor Eskridge's theory of dynamic interpretation provides a useful model for comparing and evaluating the two approaches. As explained above,¹⁴⁶ Eskridge argues that, where the statutory language is open-ended¹⁴⁷ and the original history is either unknown¹⁴⁸ (as in the case of transsexuals) or irrelevant, the dynamic model — which seeks an evolutive perspective on a given issue — provides a more coherent result.¹⁴⁹ Using the plain meaning and legislative history analyses in these circumstances fails to engage with the difficult questions of a statute's meaning.¹⁵⁰

The *Ulane* court employs the first two analyses Eskridge discusses, plain meaning and legislative history. These two tests are cornerstones of statutory interpretation, but they cannot be relied upon in this context. The judicial tug-of-war over the meaning of sex reflects the ambiguity of the word "sex." Moreover, legislative silence cannot be relied upon to answer the interpretive question. Given these parameters, the Advocate General's opinion adopting Eskridge's third perspective provides a persuasive alternative to the federal approach. The dynamic approach offers a better interpretation of Title VII, since it comports with judicial precedents and the statute's remedial purpose. This approach is particularly relevant in litigation arising under state statutes given the unique characteristics of state governments.

V

APPLYING THE DYNAMIC APPROACH TO AMERICAN LAW

A. *Why It Might Work: Transsexualism As the Easy Case*

Although, as noted earlier, transsexuals make up a small political minority, several factors suggest that courts may be willing to expand current sex discrimination doctrine to include transsexuals, even though they have repeatedly declined to do so for marginalized groups with more political power. Besides transsexualism,¹⁵¹ federal sex discrimination law under Title VII currently does not prohibit discrimination based on sexual orientation,¹⁵² transvestism,¹⁵³ or cross-dressing.¹⁵⁴ In addition, Title VII may not allow sexual harassment claims when the harasser directs his or her actions towards both men and women,¹⁵⁵ or when the harasser is bisexual.¹⁵⁶

146. *See supra* Part II.B.

147. *See supra* Part III.B.

148. *See supra* Part III.C.

149. Eskridge, *supra* note 13, at 1484.

150. *Id.* at 1548.

151. *See Ulane*, 742 F.2d at 1081.

152. *See De Santis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327 (9th Cir. 1979).

153. *See Ulane*, 742 F.2d at 1084-85.

154. *See generally* Mary Whisner, *Gender-Specific Clothing Regulation: A Study in Patriarchy*, 5 HARV. WOMEN'S L.J. 73, 97-106 (1982).

155. *See Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 620 (6th Cir. 1986) (using the example of an employer whose sexual conduct equally offends men and women as a situation which could not create a cause of action under Title VII since the conduct affects both

This limited interpretation affects even those whom courts have considered to be protected by Title VII.¹⁵⁷ For instance, as Professor Case has argued, while courts have disallowed sex discrimination, (i.e. discrimination against women for being female), they have allowed gender discrimination (i.e. discrimination against characteristics society associates with women, such as nurturing or sensitivity).¹⁵⁸ That is, though the Title VII model has made room for the masculine woman who acts like one of the boys and wants to be treated like one of the boys (by getting a raise or promotion on the same basis as her male counterparts would),¹⁵⁹ interpretations of Title VII continue to leave out those men and women who exhibit traits that are deemed excessively feminine.¹⁶⁰ Courts have held, for instance, that dismissal of either a man or a woman for dressing too much like a woman does not constitute sex discrimination. Thus, it was not sex discrimination to fire a teacher in a juvenile detention center for “wearing excessive makeup” and “wearing her hair down,” as opposed to the preferred “Brooks Brothers look.”¹⁶¹ Similarly, it was not sex discrimination to fire a male purely because he seemed “effeminate”; the court explained that the claim was “not that [plaintiff] was discriminated against because he was a male but because as a male he was thought to have those attributes more generally characteristic of females.”¹⁶²

Given the number of groups to which Title VII does not apply and the fact that many of these groups are more numerous and politically powerful than transsexuals, beginning with transsexualism may seem ill-advised. Yet the courts’ reasoning in transsexual and sex discrimination cases more generally suggests that transsexualism is the “easy case” for expanding the definition of sex discrimination. If courts extend sex discrimination law to protect transsexuals, the result would be that sex can no longer be claimed to include only male or female for purposes of sex discrimination law. Rather, once the easier case breaks the barrier, it may become easier to address other forms of gender-based discrimination.

The ECJ has already shown this willingness only a year after including transsexuals under sex discrimination law. In *R. v. Secretary for Defence ex*

sexes equally). *But see* *McDonnell v. Cisneros*, 84 F.3d 256, 260 (7th Cir. 1996) (holding that Title VII prohibits sexual harassment, regardless of whether it affects both sexes equally).

156. *See* *Barnes v. Costle*, 561 F.2d 983, 990 n.55 (D.C. Cir. 1977) (hypothesizing that harassment by a bisexual superior would not constitute sex discrimination because it would apply equally to male and female employees). *But see* *Oncala v. Sundowner Offshore Servs.*, 523 U.S. 75 (1998) (holding that Title VII does extend to cases in which the harasser is the same sex as the person harassed).

157. Franke, *supra* note 72, at 2.

158. Case, *supra* note 81, at 3.

159. *Id.* at 36-46 (discussing the significance of the Supreme Court’s discussion of stereotypes in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)).

160. *Id.* at 46-57, 70-74.

161. *Id.* at 70 (citing *Wislocki-Goin v. Mears*, 831 F.2d 1374, 1376 (7th Cir. 1987)).

162. *Smith v. Liberty Mutual Ins. Co.*, 569 F.2d 325, 327 (5th Cir. 1978).

parte Perkins, the United Kingdom relied on *Cornwall* to suggest that discrimination based on sexual orientation may be included under the definition of sex discrimination.¹⁶³ Moreover, in a preliminary ruling, the Advocate General interpreted sex in EC equality law to include same-sex couples.¹⁶⁴ This ruling was undermined by the ECJ's highly unusual move of rejecting the Advocate General's opinion,¹⁶⁵ but indicates that the *Cornwall* reasoning has affected the terms of the debate.¹⁶⁶

For a variety of reasons, American courts may be more sympathetic to claims asserted by transsexuals than those asserted by other marginalized groups. First, because courts rely so heavily upon what a legislature purportedly said or intended when it enacted a statute, the fact that Congress said nothing about transsexualism and Title VII leaves the area open to interpretation. There was no discussion of transsexualism at Title VII's passage, nor has there been any attempt since then to amend Title VII to include transsexualism.¹⁶⁷ In contrast, though Congress did not originally debate the issue of sexual orientation under Title VII, it has subsequently considered and rejected efforts to make such an amendment.¹⁶⁸

Second, the desire for sex reassignment itself reinforces the notion that there are two distinct sexes.¹⁶⁹ It is true in one sense that the desire to alter

163. 26 IRLR 297, 297, ¶¶ 26-29 (Q.B. 1996) (referring the question of whether EU law protected homosexuals from discrimination in the military to the ECJ since the *Cornwall* case afforded petitioners a "significant prospect of success"). *But see* R. v. Secretary of State for Defence, *ex parte* Terence Perkins (No. 2) [1998] IRLR 508, [1999] 1 FLR 491 (Q.B. 1998) (acknowledging the subsequent limitation of the Cornwall decision to transsexuality and not homosexuality in *Grant v. South-West Trains Ltd.* [1998] IRLR 206).

164. *See* Chris Barton, *Gays, Fathers, and Equality*, *TIMES* (London), Oct. 7, 1997, available in LEXIS (noting preliminary ruling from the ECJ that same sex couples are entitled to same employment benefits as unmarried heterosexual couples); Jamie Doward, *Gay Couples Ruling May Not Stick*, *THE OBSERVER*, Oct. 5, 1997, at 20 (same, but noting ECJ may not adopt Advocate General's opinion).

165. *See* Case C-249/96, *Grant v. South-West Trains Ltd.*, [1998] IRLR 206 at ¶ 50 (1998), *Europa: The European Union Server* (visited Mar. 14, 1998) <<http://europa.eu.int/jurisp/cgi-bin/form.pl?lang=>> (holding denying benefits to same sex partner where such benefits are available to a person of the opposite sex with whom an employee has a stable relationship did not constitute discrimination).

166. The *Grant* case may also be distinguished on the grounds that it involved the extension of positive benefits to same-sex couples, rather than merely creating equality. Interview with Jonathan P. Cooper, Legal Director of Justice, former Legal Director of Liberty and expert in European human rights law, in London, England (June 7, 1998).

167. *Holloway v. Arthur Anderson & Co.*, 566 F.2d 659, 662-63 (9th Cir. 1977).

It is important to note that Congress did, subsequent to the passage of Title VII discuss transsexualism when amending the federal Rehabilitation Act of 1973, 29 U.S.C. §§ 701-796 (1992), and in passing the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12102(2)-12213 (1994). Congress explicitly excluded transsexuals and other groups marginalized because of sex from the anti-discrimination protections afforded to people with other physical and mental disabilities under both statutes.

168. *Holloway*, 566 F.2d at 662 n.6 (listing congressional attempts to include sexual orientation under Title VII).

169. Richard Wasserstrom, *Racism, Sexism & Preferential Treatment: An Approach to the Topics*, 24 *UCLA L. REV.* 581 (1977).

one's genitalia and secondary sex characteristics may be seen a radical rejection of accepted sex and gender roles.¹⁷⁰ But in another sense, transsexualism reinforces traditional sex and gender roles. Transsexuals, particularly those who seek surgery, strive to conform their sex to their gender. The fact that individuals must often pass "real life" tests which require transsexuals to live as members of the opposite sex for a year or two in order to qualify for surgery¹⁷¹ means that these pre-operative transsexuals must be sufficiently "feminine" or "masculine" to convince the public of their assumed sex.

Several courts have viewed transsexualism as consistent with a bipolar view of sex as composed of two distinct categories, male and female. For this reason, courts have distinguished them from other sexual minorities. When courts have found in favor of transsexuals, they have done so only because many courts¹⁷² and legislatures¹⁷³ have accepted the notion that post-operative transsexuals may be considered to have legally changed their sex. The ability to maintain the traditional, bipolar relationship of the sexes has been integral to these decisions. For example, in *M.T. v. J.T.*, the landmark case upholding the validity of a marriage between a post-operative male-to-female transsexual and a man, the New Jersey Supreme Court accepted the fundamental premise that a "lawful marriage requires . . . two persons of the opposite sex, a male and a female."¹⁷⁴ Furthermore, the only federal court to find in favor of a transsexual in an employment discrimination suit (before being reversed by the appellate court) did so by distinguishing transsexualism from transvestitism and sexual orientation:

["Sex" under Title VII] cannot reasonably be argued to have been intended to cover the matter of sexual preference, the preference of a sexual partner, or the matter of sexual gratification from

170. See Robert S. Wintemute, *Recognizing New Kinds of Direct Sex Discrimination: Transsexualism, Sexual Orientation, Dress Codes*, 60 MODERN L. REV. 334, 338 (1997) (describing transsexual persons as violating traditional sex roles).

171. Richard Green, *Spelling 'Relief' for Transsexuals: Employment Discrimination and the Criteria of Sex*, 4 YALE L. & POL'Y REV. 125, 125 (1986) (noting importance of pre-operative trial period during which, "[T]he transsexual explores in reversible fashion, what life will be like after irreversible surgery — the 'real life test.' Employment in the desired gender role is a necessary component of that test. Such employment is critical . . . because it demonstrates the person's ability to function socially in that role. . . .").

172. Generally, state statutes determine a person's sex for civil status purposes. However, occasionally courts will be called upon to determine the individual's sex in a certain instance, such as classifying a person for athletic purposes. See, e.g., *Richards v. U.S. Tennis Ass'n*, 400 N.Y.S.2d 267 (N.Y. Sup. Ct. 1977). Even if a statute exists setting forth the method for determining an individual's sex for a birth certificate, for example, a court may decide this view of sex is too narrow for other purposes, such as a name change. See *In re Anonymous*, 293 N.Y.S.2d 834, 837-38 (N.Y. Civ. Ct. 1968).

173. See *supra* note 149 and accompanying text.

174. 355 A.2d 204, 207 (N.J. Super. Ct. App. Div. 1976).

wearing the clothes of the opposite sex. It seems to me an altogether different question as to whether the matter of sexual identity is comprehended by the word, "sex."¹⁷⁵

By distinguishing transsexuals from other sexual minorities, courts leave the bipolar view of sex intact. Yet their holdings, by recognizing that even this bipolar view encompasses transsexuality, necessarily expand traditional definitions of "sex."¹⁷⁶

Another factor which makes transsexualism the easy case for challenging sex discrimination doctrine is the medical information surrounding transsexualism. Medical evidence can be a powerful tool for advocates, since courts have continually demonstrated faith in the findings generated by the scientific community.¹⁷⁷ The "medicalization of transsexualism" concededly legitimizes the view that transsexuals are sick or diseased people in need of treatment.¹⁷⁸ Yet at the same time, by asserting a physiological cause of transsexualism, these scientific studies allowed certain important civil rights to be recognized.¹⁷⁹ Indeed, even some activists who eschew the psychiatric status of transsexualism have embraced a medical status.¹⁸⁰ Regardless of whether or not courts *should* care about the scientific evidence, the fact is they *do*, and this fact can be exploited strategically.

Although immutability of a personal characteristic is not required for Title VII or state sex discrimination,¹⁸¹ courts have repeatedly used the language of immutability to justify extending Title VII protections to certain groups.¹⁸² The Ninth Circuit, for instance, has argued that Congress

175. *Ulane*, 581 F. Supp. at 823.

176. There is some risk that a court would undercut this expansive notion of sex by keeping the distinction between transsexuals and other sexual minorities on this bipolar basis. But once this challenge has been made in the area of transsexualism, ironically, the very distinction that enabled it may become less important in the face of what is a far more fundamental challenge to traditional notions of sex. *See supra* text accompanying notes 163-167 (arguing that *Cornwall* has already shown signs that it will lead to the inclusion of sexual orientation under the definition of sex).

177. *See infra* note 209 and accompanying text.

178. *See* MACKENZIE, *supra* note 1; Katherine K. Wilson & Barbara Hammond, *Myth, Stereotype, and Cross-Gender Identity in the DSM-IV*, ASS'N FOR WOMEN IN PSYCHOLOGY 21ST ANNUAL FEMINIST PSYCHOLOGY CONFERENCE (1996).

179. *See, e.g., Cornwall*, 1996 E.C.R. I-2160-65; *G.B. v. Lackner*, 80 Cal. App. 3d 64 (Cal. Ct. App. 1978) (holding sex reassignment surgery is not cosmetic and thus claimant was entitled to insurance benefit).

180. *See* Wilson, *supra* note 178.

181. Title VII's protection against religious discrimination is the most obvious example of this. 42 U.S.C. § 2000e-2(a)(1) (1994).

182. Immutability is traditionally used in the context of constitutional arguments as to whether a group classification deserves heightened or strict scrutiny as a "suspect class." *See* *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (noting that an "immutable characteristic determined solely by the accident of birth" is typically the basis for finding a suspect class). However, the language of immutability has become persuasive in the statutory context of Title VII as well. Some courts have specifically distinguished between constitutional protections which require immutability and statutory protections which do not. *See, e.g.,*

intended Title VII to prohibit discrimination based on characteristics which an employee has "no power to alter."¹⁸³

Given the common privileging of immutable characteristics, scientific studies which attempt to demonstrate a biological cause of transsexualism may make courts more willing to extend sex discrimination statutes to include transsexuality. Two recent studies have supplied a narrative of transsexuality which courts have adopted.¹⁸⁴ The first study suggests that sexual differentiation occurs in two stages.¹⁸⁵ Although the external genitalia form prior to birth, the second stage, the brain's sexual differentiation, is not complete until a child reaches age three or four.¹⁸⁶ In the case of the transsexual, this brain sexual differentiation is at odds with the physical sexual differentiation.¹⁸⁷ On this basis, advocates have argued that sex assignment at birth does not alone provide an accurate depiction of an individual's sex.¹⁸⁸

The second study, appearing in *Nature*, compared the brain structure of male-to-female transsexuals with those of non-transsexual men and women. The study found that the brain structure in male-to-female transsexuals is the same as that in non-transsexual females.¹⁸⁹ The researchers concluded that these findings support the hypothesis that an individual's sex is not just an issue of one's psychological sex, but also of physiological differentiation.¹⁹⁰ Since this is one of the few studies focusing specifically

Earwood v. Continental Southeastern Lines, Inc., 539 F.2d 1349, 1352 (1976) (Winter, J. dissenting) (arguing that Title VII should cover hair grooming since it does not require characteristics to be immutable in order to garner protection).

183. Baker v. California Land Title Co., 507 F.2d 895, 897 (9th Cir. 1974). Justice Stevens has similarly opined that Title VII should protect pregnant women from discrimination since the ability to become pregnant is an "inherited and immutable characteristic that 'primarily differentiates the female from the male.'" Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 330 (1993) (Stevens, J. dissenting) (quoting General Electric Co. v. Gilbert, 429 U.S. 125, 162 (1976) (Stevens, J., dissenting)). For other examples of courts linking Title VII and immutable characteristics, see Dodge v. Giant Food, Inc., 488 F.2d 1333, 1337 (D.C. Cir. 1973); Lynch v. Freeman, 817 F.2d 380 (6th Cir. 1987); Olagues v. Russoniello, 770 F.2d 791, 801 (9th Cir. 1985).

184. See also *supra* note 1 and accompanying text.

185. Louis J.G. Gooren, *Biological Aspects of Transsexualism and Their Relevance to its Legal Aspects*, in XXIIIRD COLLOQUY ON EUROPEAN LAW: TRANSSEXUALISM, MEDICINE, AND LAW 128 (Council of Europe 1995).

186. *Id.* at 130 (citing the studies of Dick F. Swaab & Michel A. Hofman, *Sexual Differentiation of the Human Hypothalamus: Ontogeny of the Sexually Dimorphic Nucleus of the Preoptic Area*, 44 *Developmental Brain Research*, 314-18 and Dick F. Swaab & Michel A. Hoffman, *An Enlarged Suprachiasmatic Nucleus in Homosexual Men*, 537 *Brain Research* 141-148 (1990)).

187. *Id.* at 128.

188. *Id.* at 132.

189. Jiang-Ning Zhou, Michel A. Hoffman, Louis J.G. Gooren, & Dick F. Swaab, *A Sex Difference in the Human Brain and its Relation to Transsexuality*, *NATURE*, Nov. 2, 1995, at 68.

190. *Id.* See also Russell Reid, *Psychiatric and Psychological Aspects of Transsexualism*, in XXIIIRD COLLOQUY ON EUROPEAN LAW: TRANSSEXUALISM, MEDICINE AND LAW (1995).

on post-operative transsexuals, its results have received significant attention.¹⁹¹

Taken together, these studies demonstrate that sexual identity may be just as immutable as courts have deemed sex to be. Indeed, they may even indicate that while sex (as indicated by genitalia or secondary sex characteristics) may be changed through surgery, sexual identity is immutable. Seen as a matter of biology (as opposed to lifestyle choice), transsexuality may be able to garner greater protections.¹⁹²

B. *Where & How it Might Work: Turning to the States*

American federal courts are not likely to follow the ECJ's decision even if the dynamic approach does cure many of the difficulties with Title VII interpretation. The federal courts' logic of simply citing to *Ulane* and, consequently, finding no violation of Title VII¹⁹³ grows progressively more difficult to resist as more and more courts follow suit. Thus, for practical reasons, it makes sense to look to state laws, where the interpretive field remains more open.

Scholars have suggested several distinctions in institutional competencies between state and federal courts in the enforcement of federal constitutional rights.¹⁹⁴ Recently, Professor Hershkoff has argued that state courts also have different interpretive concerns and capabilities from federal courts, ones which may make state constitutional rights more susceptible to dynamic interpretation.¹⁹⁵ Her arguments, which are based upon the benefits of state court litigation for welfare issues¹⁹⁶ and education¹⁹⁷ are

191. See, e.g., Christine Gorman, *Sizing Up the Sexes*, TIME, Jan. 20, 1993, at 38 (noting the impact of the brain's chemical and physical functioning on gender differences). See also Nigel Hawkes, *Sex Is All in the Brain*, TIMES (London), Sept. 12, 1992 at 12 (noting that a "growing body of scientific evidence" now indicates that gender differences may be due to differences in the brains of women and men).

192. The increasing medicalization of transsexualism stands in opposition to its explicit exclusion as a disability under the Americans with Disabilities Act, U.S.C. §§ 12102(2)-12213 (1994). With more research, however, states that have not yet considered how disability should be defined under their own statutes, may rethink the federal approach and be more likely to include transsexualism under their protections for people with disabilities.

193. See, e.g., *Rentos v. Oce-Office Systems*, No. 95 CIV. 7908, 1996 WL 737215, at *6 (S.D.N.Y. Dec. 24, 1996); *Conway v. City of Hartford*, No. CV 950553003, 1997 WL 78585, at *7 (Conn. Super. Ct. Feb. 4, 1997); *Wood v. C. G. Studios*, 660 F. Supp. 176, 177-78 (E.D. Pa. 1997); and *Sommers v. Iowa Civil Rights Comm'n*, 337 N.W.2d 470, 474 (Iowa 1983).

194. See, e.g., Lawrence Gene Sager, *Fair Measures: The Legal Status of Under-enforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978).

195. Helen Hershkoff, *State Constitutions: A National Perspective*, 3 WIDENER J. PUBL. L. 7, 16-21 (1993) (describing structural differences between state and federal constitutions).

196. Helen Hershkoff, *Rights and Freedoms Under the State Constitution: A New Deal for Welfare Rights*, 13 TOURO L. REV. 631 (1996) (hereinafter *Rights and Freedoms*); Helen Hershkoff, *Welfare Devolution: A State Constitutional Perspective*, 67 FORDHAM L. REV. 1403 (1999) (hereinafter *Welfare Devolution*); Helen Hershkoff, *School Finance Reform and the Alabama Experience*, in STRATEGIES FOR SCHOOL EQUITY: CREATING PRODUCTIVE SCHOOLS IN A JUST SOCIETY 24, 33-34 (Marilyn Gittell ed., 1998) (hereinafter *School Finance Reform*).

equally persuasive in the context of sex discrimination. Moreover, as Professor Neuborne points out, "Whatever the validity of the concern, federal judges have occasionally been pictured as 'outsiders,' rendering their controversial decisions subject to more resistance than an equally controversial opinion handed down by a 'local' judge. To the extent the 'local' judge can be relied upon to check a local majority, some friction may be avoided and the potentially unpopular decision may be received with better grace."¹⁹⁸ These differing institutional competencies may make the dynamic approach to the interpretation of sex discrimination statutes more appropriate in the state law context, irrespective of federal precedents.¹⁹⁹

If American courts applied the dynamic approach, they would arrive at a more expansive view of sex discrimination law. The current American practice of clinging to the plain meaning and legislative history analysis in the area of transsexual discrimination puts this case law at odds with Title VII law generally and the definition of sex for transsexuals' civil status purposes. In addition, it conflicts with current medical views on transsexualism and the court's usual espousal of medical definitions for medical terms.

Courts' narrow interpretation of sex under Title VII in the transsexual context is at odds with the general liberal interpretation of sex under Title VII in other contexts. Title VII has evolved to protect increasing numbers of males and females under the ambit of sex discrimination law.²⁰⁰ Courts have based these rulings partially, as indicated above, on the notion that Title VII's purpose is to make sex "not relevant to the selection, evaluation or compensation of employees."²⁰¹ The same circuit that decided *Ulane* had earlier declared in *Sprogis v. United Airlines, Inc.* that Title VII's protections against sex discrimination applied to married women because, "so long as sex is a factor in the application of [a] rule, such application involves a discrimination based on sex."²⁰² The Supreme Court later picked up the *Sprogis* reasoning in *Price Waterhouse v. Hopkins*, noting that "[I]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women."²⁰³ While transsexuals do not compose a protected class on their own under Title VII, the court's logic should lead it

197. Hershkoff, *School Finance Reform*, *supra* note 198, at 24, 33-34.

198. Burt Neuborne, *Toward Procedural Parity in Constitutional Litigation*, 22 WM. & MARY L. REV. 725, 732 (1981).

199. *Cf.* Hershkoff, *supra* note 195, at 7, 16-21 (describing structural differences between state and federal constitutions).

200. *See supra* notes 109-117 and accompanying text.

201. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239 (1989). *See also supra* notes 89-94 and accompanying text.

202. 444 F.2d at 1198 (citing the Equal Employment Opportunity Commission's analysis of the applicability of Section 703(a) of Title VII to discrimination against married women).

203. *Hopkins*, 490 U.S. at 251 (quoting *Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702, 707, n.13 (1978) (quoting *Sprogis*, 444 F.2d at 1198).

to include transsexual males and transsexual females as subgroups of men and women.²⁰⁴ The courts' prior sweeping statements indicate that sex discrimination law can go much further than it has gone thus far.

Courts should also consider changes in the medical community when determining the definition of sex for sex discrimination purposes. An increasing number of scientists and doctors now define an individual's sex by weighing multiple factors.²⁰⁵ Based largely on these medical opinions, courts and legislatures have moved increasingly toward a definition of sex that includes "sexual identity" for civil status purposes. In fact, the legislatures who have passed statutes allowing individuals to change their sex for civil status purposes have done so relatively recently,²⁰⁶ indicating that courts may be adjusting to the shift in medical understandings about transsexuality. Significant precedent in other areas also supports judicial

204. Prof. Wintemute suggests that the expansions of sex discrimination law to include subgroups of men and women may also allow transsexual discrimination to fit into the traditional concept of direct sex discrimination. Wintemute, *supra* note 170, at 340-43. As Wintemute notes, courts traditionally have argued that because male and female transsexuals face discrimination equally, transsexuals cannot bring a claim for sex discrimination. *Id.* at 340. Employers have defended themselves as using sex-neutral treatment because they prohibit *all* of their employees to change their sex. *Id.*

Since courts now allow pregnant women and other subgroups to bring sex discrimination claims, though, Wintemute argues that courts have moved away from requiring a comparator that applies to all men and all women. *Id.* at 340. For example, a sex discrimination statute protects a pregnant woman from dismissal based on her pregnancy even though she cannot point to a similarly situated man (i.e. a pregnant man) who has been allowed to work. *Id.* On this basis, Wintemute develops three comparators which allow for chromosomal comparators between transsexuals and subgroups of men and women. *Id.* at 340. He compares, for instance, a chromosomal transsexual male who intends to undergo sex reassignment surgery with a chromosomal female and a non-transsexual chromosomal female not intending to undergo gender reassignment. *Id.* at 341.

However, Wintemute's reasoning will likely not apply in American courts. As opposed to the ECJ's decision in *Dekker v. VJV-Centrum*, Case C-177/88, 1990 E.C.R. I-3941, which forms the basis of Wintemute's analysis, Wintemute, *supra* note 170, at 340, the expansion of Title VII to include pregnant women occurred by statute. In *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), the Supreme Court explicitly rejected reading Title VII to include pregnant women precisely because an appropriate comparator could not be found. *But see* California Fed. Sav. and Loan Ass'n v. Guerra, 479 U.S. 272 (1987) (reversing *Gilbert* based on amendments to Title VII enacted following *Gilbert*).

The Court relied on *Gilbert* in its equal protection reasoning from *Geduldig v. Aiello*, 417 U.S. 484 (1974), in which it held that a state's distinction between "pregnant women and non-pregnant persons" did not constitute a sex-based classification because it did not involve "discrimination based upon gender as such . . . , but merely [removed] one physical condition — pregnancy from the list of compensable disabilities . . . [W]hile the first group is exclusively female, the second includes members of both sexes." *Id.* at 496-97, n.20. In response to *Gilbert*, Congress passed the Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (1994), as an amendment to Title VII. Since the overruling of *Gilbert* was done by Congress, it is unlikely that the Court would expand Title VII on the comparator basis without an explicit statutory intent to do so.

205. *See supra* Part III.B (discussing multi-factored approach to determining sex for civil status purposes).

206. *See supra* note 122 (noting relevant statutes).

reliance on medical definitions. For instance, courts have used medical studies to redefine "life," "death," and "mental illness."²⁰⁷

The fact that Congress fairly recently dealt with the issue of transsexualism when debating the ADA does not undermine the argument that sex discrimination statutes be interpreted dynamically. Even assuming that the ADA exclusion of transsexuals as a disability meriting anti-discrimination protection represents a congressional statement against all transsexual rights, the dynamic approach looks to the treatment of transsexualism broadly. Thus, the strongest congressional statement must be measured against other legislative and judicial acts, as well as social and scientific understandings of sex and transsexualism. Finally, given the clear line of cases restricting Title VII's interpretations, litigators should be looking beyond federal interpretations to state statutes which are not bound by Congress' views.

At the very least, the dynamic approach requires American courts to reexamine the traditional analysis of sex discrimination statutes and to justify their reasoning based on current conditions. Such a move is critical not simply for the rights of these marginalized groups, but also for the court's continuing influence in society. This concern for law's vitality motivates the Advocate General's opinion: "In so far as the law seeks to regulate relations in society, it must . . . keep up with social change, and must therefore be capable of regulating new situations brought to light by social change and advances in science."²⁰⁸ Even if one accepts that the *Ulane* decision reflected some commonly accepted notion of sex's plain meaning when the case was decided thirteen years ago, changes in science and society make this reasoning untenable today. These are changes which the states may be better positioned than the federal government to address.

C. *Some Examples: Maffei v. Kolaeton Industry, Inc. and Rentos v. Oce-Office Systems*

That state courts have recognized the benefits of dynamic interpretation is signalled in part by the decisions of two New York courts in *Maffei v. Kolaeton Industry, Inc.*²⁰⁹ and *Rentos v. Oce-Office Systems*,²¹⁰ which found that state sex discrimination statutes protect transsexuals. In *Maffei*, the first of these decisions, the plain meaning and legislative history analyses are present only when the court is recounting the reasoning of the *Ulane* court.²¹¹ For its own analysis, the court considers the treatment of

207. David M. Neff, *Denial of Title VII Protection to Transsexuals: Ulane v Eastern Airlines, Inc.*, 34 DEPAUL L. REV. 553, 579 (1985).

208. *Cornwall*, 1996 E.C.R. I-2145, 2149 (Advocate General's opinion).

209. 626 N.Y.S.2d 391 (N.Y. Sup. Ct. 1995).

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

211. *Maffei*, 626 N.Y.S.2d at 394.

transsexuals in other areas of the law and the interpretation of anti-discriminatory statutes more generally. The court first examines the case of *Richards v. United States Tennis Association* to determine how the New York courts have defined a transsexual's sex.²¹² The court in *Richards* held that defining sex for athletic competition purposes on the basis of chromosomes alone was discriminatory in light of "overwhelming medical evidence" that indicated that the plaintiff was female.²¹³ The court could have followed the *Ulane* decision and distinguished the question of a transsexual's post-operative sex from the question of statutory protections for an individual who changes sex. The *Ulane* court had accepted that the post-operative plaintiff was female, but denied that the plaintiff was discriminated against on this basis, and refused to protect her as a transsexual. The *Maffei* court, however, sees the *Richards* opinion as embodying a judicial willingness to define sex broadly to include transsexuals.²¹⁴ Moreover, it recognizes that the court's determination of sex may imply a statement against transsexual discrimination more generally. The *Richards* court held that the plaintiff should be considered female not only because the weight of evidence suggested that this was the scientifically correct outcome, but also because the failure to do so would be "discriminatory."²¹⁵

The *Maffei* court also considers the interpretation of anti-discrimination statutes outside the transsexual context. Acknowledging that these statutes were "originally designed" to insure equality for minorities and women, it notes that they have since been expanded to protect Caucasians and males from discrimination.²¹⁶ The New York Court of Appeals has stated that the statutes serve as a "blanket description to eliminate all forms of discrimination, those then existing as well as any later devised."²¹⁷ Consistency with the statutes' purpose, then, requires an expansive reading even at the cost of deviating from the original design. Accordingly, the court found that derogatory comments relating to the fact that an individual has changed his or her sex constituted discrimination based on sex.²¹⁸ As a transsexual male, the plaintiff may be considered part of a subgroup of men, and thus protected against discrimination on that basis.²¹⁹

A recent decision by the District Court for the Southern District of New York indicates that the *Maffei* decision was not aberrant. In *Rentos v.*

212. *Id.* at 395.

213. *Id.* (quoting *Richards v. United States Tennis Ass'n*, 400 N.Y.S.2d 267, 272 (N.Y. Sup. Ct. 1977)).

214. *Id.* at 395-96.

215. *Id.* at 395.

216. *Id.* at 395.

217. *Id.* (quoting *Brooklyn Union Gas Co. v. New York State Human Rights Appeal Bd.*, 390 N.Y.S.2d 884 (1976)).

218. *Id.* at 396.

219. *Id.*

Oce-Office Systems,²²⁰ the court refused to dismiss a complaint asserted by a transsexual under the state and city anti-discrimination statutes. Since the plaintiff's allegation tracked the language of *Maffei* almost exactly, the court held that her complaint was consistent with existing laws and could proceed on this basis.²²¹

VI

CONCLUSION: A FEW CAVEATS

This paper sets forth a litigation strategy intended to challenge existing judicial doctrine regarding the meaning of sex for purposes of sex discrimination statutes. I believe that beginning with transsexualism opens the door for similar challenges to be brought by other groups marginalized "because of sex," yet not currently protected by Title VII or similar state laws. Before starting down this path, however, activists, advocates, and plaintiffs must carefully consider the risks inherent in such a strategy.

I made the choice to map out a practical strategy based on what I thought the courts would accept in light of their prior statements, holdings, and tendencies. In doing so, I made the choice not to pursue certain goals I believed in, because the courts showed no sign of reexamining their positions on such fundamental issues as the bipolarity of sex. But developing a strategy which the courts may accept has necessarily meant exploiting some of the courts' more disturbing tendencies. Using medical evidence, for instance, risks reifying the court's frequent practice of tying civil rights to immutable characteristics, rather than to notions of fundamental rights. It may also mean further marginalizing transsexuals by characterizing them as "diseased." The medicalization of transsexualism is based on the notion that surgery is required to change the "wrong" body into the "right" one. This may lend credence to the argument that one's gender must correspond with one's sex, as opposed to disaggregating gender from sex altogether.

The strategy also depends upon drawing distinctions between sexual orientation and sexual identity. The gay/lesbian/bisexual community may perceive this as stepping on their heads in order to advance a transsexual agenda. Neither of these groups may easily afford to make enemies out of potential allies.

Activists may ultimately decide that the master's tools may be too tainted or too dangerous to use in destroying the master's house. Nevertheless, given the fact that a master will continue to sanction dismissals and harassment for the foreseeable future, failure to use a potentially powerful tool also carries serious costs. Litigation alone is not sufficient. One way of addressing its limits is to attack the house from the outside as well. Coalition lobbying and education may achieve on a larger scale what litigation

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

221. *Id.* at *9.

may achieve on an individual scale.²²² Litigation and activism need not be mutually exclusive, nor need one be prioritized over the other. Courts will, inevitably, be presented with cases posing these questions, and they will, even without political activism, be called upon to give answers. At the very least, employing a litigation strategy reinforces the common struggle to create a broader view of sex discrimination.

222. Measurable success has already occurred on the legislative front in several states and municipalities. The state of Minnesota and cities including San Francisco, Pittsburgh, Santa Cruz, and Seattle have amended state laws and city ordinances to explicitly include protections for transgendered people. Matusewich, *supra*, note 122; Email from Phyllis Frye, Director, International Conference on Transgender Law and Employment Policy, Inc. to Jennifer Nevins (Feb. 18, 1997) (on file with the *N.Y.U. Review of Law & Social Change*). They have accomplished this in a variety of ways. Minnesota's measure defines sexual orientation to include transgenders, and discrimination on the basis of sexual orientation in housing and employment is prohibited. Matusewich, *supra* note 122. Santa Cruz, California protects transsexuals from discrimination through a banning discrimination on the basis of personal appearance. *Id.*