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# UNPRINCIPLED EXCLUSIONS: THE STRUGGLE TO ACHIEVE JUDICIAL AND LEGISLATIVE EQUALITY FOR TRANSGENDER PEOPLE

PAISLEY CURRAH AND SHANNON MINTER\*

## ABSTRACT

This Article examines recent efforts to enact civil rights statutes for transgender people in the United States. Part I provides an overview of the largely negative case law on the issue of whether transgender people are protected under existing sex, sexual orientation or disability discrimination laws. This context is provided, in part, to explain why transgender rights advocates have turned to the legislative branches of government to secure basic civil rights protections. Part II describes the initial successes that have been achieved as a result of this new focus on political activism and legislation. Part III examines the actual statutory language that has been used to protect transgender people, as well as some of the key strategic questions that have arisen in the course of drafting such legislation.

## I. UNPRINCIPLED EXCLUSIONS: THE SHORT UNHAPPY LIFE OF TRANSGENDER JURISPRUDENCE

Transgender<sup>1</sup> people face severe discrimination in virtually every aspect of social life—in employment, housing, public

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1. This Article uses the term transgender in its most inclusive sense, as an umbrella term encompassing: pre-operative, post-operative and non-operative transsexual people; cross-dressers; feminine men and masculine women; intersexed persons; and more generally, anyone whose gender identity or expression differs from conventional expectations of masculinity or femininity. In contrast, some legal scholars have used the term more narrowly, as a synonym for transsexual. See, e.g., Chai R. Feldblum, *Sexual Orientation, Morality, and the Law: Devlin Revisited*, 57 U. PITT. L. REV. 237, 238 n.1 (1996) (defining transgender people as those "who desire to change their gender, are in the process of changing their gender, or have completed the process of changing their

accommodations, credit, marriage, parenting and law enforcement, among others.<sup>2</sup> This discrimination is rooted in the same stereotypes that have fueled unequal treatment of women, lesbian, gay, bisexual people and people with disabilities—i.e., stereotypes about how men and women are “supposed” to behave and about how male and female bodies are “supposed” to appear.<sup>3</sup> For the most part, in other words, anti-transgender discrimination is not a new or unique form of bias, but rather falls squarely within the parameters of discrimination based on sex, sexual orientation and/or disability.<sup>4</sup> From a strictly philosophical or doctrinal perspective, therefore, it might well seem that the most logical course would be to seek protection for transgender people through litigation under statutes that already prohibit

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gender”). For a helpful discussion of the evolving historical meanings of the term transgender, see Jamison Green, *Introduction to PAISLEY CURRAH & SHANNON MINTER, POLICY INST. OF THE NAT’L GAY & LESBIAN TASK FORCE & NAT’L CTR. FOR LESBIAN RIGHTS, TRANSGENDER EQUALITY: A HANDBOOK FOR ACTIVISTS AND POLICYMAKERS* 1, 3-5 (2000), available at <http://www.ngltf.org/library/index.cfm>.

2. PAISLEY CURRAH & SHANNON MINTER, POLICY INST. OF THE NAT’L GAY & LESBIAN TASK FORCE & NAT’L CTR. FOR LESBIAN RIGHTS, TRANSGENDER EQUALITY: A HANDBOOK FOR ACTIVISTS AND POLICYMAKERS 9-12 (2000), available at <http://www.ngltf.org/library/index.cfm> (describing discrimination against transgender people in social services, education, employment, housing, public accommodations, marriage, parenting, immigration, health care, hate violence and other areas).

3. *Id.* at 8-9 (explaining that both anti-gay and anti-transgender discrimination are rooted in sexism and gender stereotyping). For an early analysis of how transgender people unsettle stereotypical assumptions about male and female anatomy and behavior, see generally HARRY BENJAMIN, *THE TRANSSEXUAL PHENOMENON* (1966).

4. See, e.g., Patricia A. Cain, *Stories from the Gender Garden: Transsexuals and Anti-Discrimination Law*, 75 DENV. U. L. REV. 1321, 1355-59 (1998) (arguing that transgender people should be protected under sex discrimination laws); Mary Coombs, *Sexual Dis-Orientation: Transgendered People and Same-Sex Marriage*, 8 UCLA WOMEN’S L.J. 219, 257-65 (1998) (arguing that gay and transgender people experience the same type of discrimination with regard to marriage); Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 ARIZ. L. REV. 265, 324-28 (1999) (arguing that transgender people should be protected under sex discrimination laws); Susan Etta Keller, *Operations of Legal Rhetoric: Examining Transsexual and Judicial Identity*, 34 HARV. C.R.-C.L. L. REV. 329, 375-79 (1999) (arguing that gay and transgender people are inextricably linked and experience the same types of discrimination); Adrienne L. Hiegel, Note, *Sexual Exclusions: The Americans with Disabilities Act as a Moral Code*, 94 COLUM. L. REV. 1451, 1479 (1994) (arguing that transsexual people should be protected under disability laws); Kristine W. Holt, Comment, *Reevaluating Holloway: Title VII, Equal Protection, and the Evolution of a Transgender Jurisprudence*, 70 TEMP. L. REV. 283, 315-18 (1997) (arguing that transgender people should be protected under sex discrimination laws).

discrimination on those bases, rather than attempting, legislatively, to create a new set of statutory protections.<sup>5</sup>

In practice, however, litigation alone has proved to be a singularly unsuccessful route to winning basic civil rights protections for transgender people. With few exceptions, courts presented with sex or other discrimination claims on behalf of transgender people have dismissed those claims out of hand, with very little in the way of rational analysis or application of the law.<sup>6</sup> As a result, although there is now what Judge Richard Posner has called a "nascent jurisprudence of transsexualism,"<sup>7</sup> it consists largely of decisions in which courts, including Posner's own,<sup>8</sup> have summarily excluded transgender people from civil protections that are readily available to non-transgender persons.<sup>9</sup>

Legal scholars have put forward a variety of theoretical explanations for why courts have failed to deal with transgender people in a coherent or principled way.<sup>10</sup> Ultimately, however, it is probably not possible to identify any single doctrinal error or logical mistake that will account for—and thus provide a simple means of remedying—the historical exclusion of transgender people from equal protection in the courts. For the most part, transgender people have not been excluded from civil rights protections because of conceptual or philosophical failures in

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5. Katherine Franke, for example, has recently suggested that transgender advocates should not seek "to add transgender people or transgenderism . . . into the laundry list of identity groups or statutes that are protected by human rights laws, but [should seek] instead to robustly interpret what our sex- and gender-based discrimination laws prohibit." Katherine Franke, *Current Issues in Lesbian, Gay, Bisexual and Transgendered Law*, 27 FORDHAM URB. L.J. 279, 381 (1999).

6. For a survey of cases involving transgender people, see Shannon Minter, *Representing Transsexual Clients: An Overview of Selected Legal Issues*, at <http://www.transgenderlaw.org> (Sept. 2000). For two helpful recent discussions of this case law, see Greenberg, *supra* note 4, at 292-325; Richard F. Storrow, *Naming the Grotesque Body in the "Nascent Jurisprudence of Transsexualism,"* 4 MICH. J. GENDER & L. 275, 285-332 (1997).

7. *Farmer v. Haas*, 990 F.2d 319, 320 (7th Cir. 1993).

8. *See, e.g., Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984) (holding that transsexual people are not protected under Title VII).

9. *See* Greenberg, *supra* note 4, at 292 (concluding that transgender people have been denied equal protection of the law); Storrow, *supra* note 6, at 332-34 (same); Holt, *supra* note 4, at 306 (same).

10. *E.g.,* Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1 (1995); Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1 (1995); Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 3 (1995).

legal reasoning, but rather because they have not been viewed as worthy of protection or, in some cases, even as human.<sup>11</sup>

In the employment arena, this differential treatment has operated to exclude transsexual plaintiffs from any ability even to state a viable discrimination claim. As Professor Richard Storrow has rightly pointed out:

Employment discrimination jurisprudence at both the federal and state levels . . . captures transsexuals in a discourse of exclusion from social participation. This wide net, using a remarkably refined system of semantic manipulations, snags all claims launched by transsexuals and reveals that no matter how a transsexual frames her discrimination claim, it will fail.<sup>12</sup>

The impact of these judicial exclusions has been particularly stark in sex discrimination cases. Thus, although it is difficult to see how an employer's decision to terminate an employee for undergoing sex-reassignment could plausibly be deemed anything other than a form of sex-based discrimination, courts have adopted the Orwellian notion that there is a meaningful legal distinction between discrimination because of sex and discrimination because of a *change of sex*.<sup>13</sup> In *Holloway v. Arthur Anderson & Co.*,<sup>14</sup> for example, Ramona Holloway was

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11. In one case, for example, a court compared a male-to-female transsexual to a donkey. See *Ashlie v. Chester-Upland Sch. Dist.*, No. CIV.A.78-4037, 1979 U.S. Dist. LEXIS 12516, at \*14 (E.D. Pa. May 9, 1979); Keller, *supra* note 4, at 374 (describing *Ashlie* as a "stunning confirmation" of a more widespread judicial "tendency to view the transsexual as becoming less than human through transformation"); see also Storrow, *supra* note 6, at 334 (arguing that transsexual people have been "systematically denied basic rights" because they trigger a "deeply rooted aversion . . . [which] seems almost insurmountable").

12. Storrow, *supra* note 6, at 310.

13. The European Court of Justice criticized this purported distinction in Case C-13/94, *P. v. S. & Cornwall County Council*, 1996 E.C.R. I-2159, 2165 [1996] 2 C.M.L.R. 247, 263 (1996) (holding that discrimination against a transsexual person "is based, essentially if not exclusively, on the sex of the person concerned"); see also Maffei v. Kolaeton Indus., Inc., 626 N.Y.S.2d 391, 396 (N.Y. Sup. Ct. 1995) (holding that city ordinance prohibiting gender discrimination protects transsexual people); *Rentos v. OCE-Office Sys.*, 95 Civ. 7908, 1996 U.S. Dist. LEXIS 19060, at \*26 (S.D.N.Y. Dec. 23, 1996) (holding that state law prohibiting sex discrimination should be interpreted to include transsexual people). In addition, on November 9, 2000, the Connecticut Human Rights Commission issued a declaratory ruling holding that transgender people are protected under the Connecticut law prohibiting sex discrimination. See *Declaratory Ruling on Behalf of John/Jane Doe*, (Conn. Comm'n Human Rights & Opportunities Nov. 9, 2000) at <http://www.state.ct.us/chro/metapages/HearingOffice/HODecisions/declaratoryrulings/DRDoe.htm> [hereinafter *Declaratory Ruling*].

14. 566 F.2d 659 (9th Cir. 1977).

fired for transitioning from male to female on the job.<sup>15</sup> The Ninth Circuit held that Holloway was not discriminated against “because she is male or female, but rather because she is a transsexual who chose to change her sex. This type of claim is not actionable under Title VII.”<sup>16</sup> Similarly, in *Underwood v. Archer Management Services, Inc.*,<sup>17</sup> the plaintiff alleged that she had been terminated from her job because, as a transsexual woman, she retained some masculine traits.<sup>18</sup> The court held that insofar as “she was discriminated against because . . . she transformed herself into a woman” rather than “because she is a woman,” she had failed to state a viable sex discrimination claim.<sup>19</sup>

The incoherence of this purportedly meaningful distinction (between sex and change of sex) is apparent the moment one imagines a court applying a similar distinction in a case involving discrimination on any other ground. It is unlikely, for example, that an employer who terminated an employee for changing her religious affiliation or nationality would be absolved of liability on the ground that he did not object to the employee’s new religion or national origin, but only to the *change of religion or national origin*.<sup>20</sup> Yet, the only difference between these situations and that of a transsexual person is that while changing one’s religion or nationality is generally considered to be a legitimate personal choice, “the very idea that one sex can change into another” is likely to engender “ridicule and horror.”<sup>21</sup>

Perhaps because of the extreme discomfort that transgender people often evoke, courts have also relied on the dehumanizing argument that transsexual people cannot be classified as either male or female and, therefore, do not fall into a protected

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15. *Id.* at 661.

16. *Id.* at 664; *see also* *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984) (holding that Title VII does not protect “a person born with a male body who believes herself to be a female”); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982) (same); *James v. Ranch Mart Hardware, Inc.*, 881 F. Supp. 478, 481 (D. Kan. 1995) (same); *Terry v. EEOC*, No. 80-C-408, 1980 U.S. Dist. LEXIS 17289, at \*\*7-8 (E.D. Wis. Dec. 10, 1980) (same); *Powell v. Read’s, Inc.*, 436 F. Supp. 369, 371 (D. Md. 1977) (same); *Voyles v. Ralph K. Davies Med. Ctr.*, 403 F. Supp. 456, 457 (N.D. Cal. 1975) (same).

17. 857 F. Supp. 96 (D.D.C. 1994).

18. *Id.* at 98.

19. *Id.*; *see also* *Dobre v. Nat’l R.R. Passenger Corp. (AMTRAK)*, 850 F. Supp. 284, 288 (E.D. Pa. 1993) (holding that a transsexual woman could not state a viable sex discrimination claim under the Pennsylvania Human Rights Act).

20. *See* *Holt*, *supra* note 4, at 306 (noting that transgender people have been excluded from Title VII and other sex discrimination laws “based on reasoning that would be rejected if courts applied it to any other group”).

21. *Storow*, *supra* note 6, at 334; *see also* Ronald R. Garet, *Self-Transformability*, 65 S. CAL. L. REV. 121, 159-64 (1991) (analyzing the similarities between religious conversion and sex reassignment).

category under sex discrimination laws. In *Ulane v. Eastern Airlines, Inc.*,<sup>22</sup> for example, the Seventh Circuit held that Karen Ulane, a transsexual woman fired from her job as an airline pilot because she changed her sex, had failed to state a viable claim of sex discrimination under Title VII.<sup>23</sup> In dismissing Ulane's claim, the court was openly derisive of her identification as a woman, which the court characterized as pathetic and delusional:

Ulane is entitled to any personal belief about her sexual identity she desires. After the surgery, hormones, appearance changes, and a new Illinois birth certificate and FAA pilot's certificate, it may be that society . . . considers Ulane to be female. But even if one believes that a woman can be so easily created from what remains of a man, that does not decide this case. . . . [I]f Eastern did discriminate against Ulane, it was not because she is female, but because Ulane is a transsexual—a biological male who takes female hormones, cross-dresses, and has surgically altered parts of her body to make it appear to be female.<sup>24</sup>

As Professor Susan Keller has noted, the Court's description of Karen Ulane not only excludes her from any definitive identification as either female or male, but in so doing, effectively excludes her from the category of human as well.<sup>25</sup>

[The] court suggests that it may not be so easy to create a woman "from what remains of a man," it also suggests that the transsexual litigant is something less than either a man or a woman, and—since it has previously offered those as the only choices—something less than human.<sup>26</sup>

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22. 742 F.2d 1081 (7th Cir. 1984).

23. *Id.* at 1087.

24. *Id.* In contrast, the trial court in *Ulane* had concluded that:

[S]ex is not a cut-and-dried matter of chromosomes, and . . . that the term, "sex," as used in any scientific sense and as used in the statute can be and should be reasonably interpreted to include among its denotations the question of sexual identity and that, therefore, transsexuals are protected by Title VII.

*Ulane v. E. Airlines, Inc.*, 581 F. Supp. 821, 825 (N.D. Ill. 1983).

25. Keller, *supra* note 4, at 338.

26. *Id.* at 373; see also, e.g., *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982) (concluding that "even medical experts disagree as to whether [the plaintiff] is properly classified as male or female"); *Sommers v. Iowa Civil Rights Comm'n*, 337 N.W.2d 470, 474 (Iowa 1983) (holding that state sex discrimination law protects men and women but not "persons with attributes of both sexes").

Transgender people who have sought protection under the rubric of gay rights statutes have been placed in a similar double bind. In jurisdictions that do not prohibit discrimination on the basis of sexual orientation, courts have emphasized the similarity of gay and transgender people, relying upon decisions that have excluded lesbians and gay men from protection under Title VII as a rationale for excluding transsexual people.<sup>27</sup> At the same time, courts in jurisdictions that protect lesbians and gay men have concluded that transsexualism is distinct from sexual orientation and have dismissed sexual orientation claims by transsexual plaintiffs on that basis.<sup>28</sup> The result, as Richard Storrow has pointed out, is that “no matter the wording of the statutory regime, transsexuals generally are not protected from employment discrimination on either the basis of their transsexualism or their sexual orientation.”<sup>29</sup>

Transsexual employees have also been largely unsuccessful in achieving protection under state disability rights statutes.<sup>30</sup> In *Doe v. Boeing Co.*,<sup>31</sup> for example, the plaintiff (a male-to-female transsexual) was discharged after she wore a string of pearls to work in violation of Boeing’s unwritten dress policy, which allowed Doe (and all other “male” employees) to wear male or unisex clothing but prohibited her from wearing female clothing until she had undergone sex reassignment surgery.<sup>32</sup>

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27. See, e.g., *Ulane*, 742 F.2d at 1084-86 (citing failed attempts to enact a federal law prohibiting discrimination on the basis of sexual orientation as a reason to exclude transsexual people from Title VII); *Holloway v. Arthur Anderson & Co.*, 566 F.2d 659, 662 (9th Cir. 1977) (same); *Powell v. Read’s, Inc.*, 436 F. Supp. 369, 370 (D. Md. 1977) (holding that Title VII does not include transsexuals, homosexuals or bisexuals); *Voyles v. Ralph K. Davies Med. Ctr.*, 403 F. Supp. 456, 457 (N.D. Cal. 1975) (same).

28. See, e.g., *Underwood v. Archer Mgmt. Servs., Inc.*, 857 F. Supp. 96, 98 (D.D.C. 1994) (holding that transsexual people are not included within the definition of sexual orientation in the District of Columbia Human Rights Act). The one exception is Minnesota, where the legislature has expressly defined sexual orientation to include transgender people. See discussion *infra* notes 45-47 and accompanying text.

29. Storrow, *supra* note 6, at 314; see generally Valdes, *supra* note 10 (documenting how courts have created arbitrary loopholes in anti-discrimination law by conflating sexual orientation and gender identity in some cases and denying any connection between the two in others).

30. Transgender persons are expressly excluded from protection under federal laws prohibiting discrimination on the basis of disability. See Rehabilitation Act of 1973, 29 U.S.C. § 706(8)(F)(i) (1994); Americans with Disabilities Act, 42 U.S.C. § 12211(b)(1) (1994). Some state disability statutes explicitly exclude transgender people as well. See IND. CODE ANN. § 22-9-5-6(d)(3) (Michie 1997); IOWA CODE ANN. § 15.102(5)(b)(1)(b) (West 1999); LA. REV. STAT. ANN. § 51:2232(11)(b) (West Supp. 2000); NEB. REV. STAT. § 48-1102(9) (1998); OHIO REV. CODE ANN. § 4112.01(A)(16)(b)(ii) (West Supp. 2000); OKLA. STAT. ANN. tit. 25, § 1451(6) (West 2000); TEX. PROP. CODE ANN. § 301.003(6) (Vernon 1995); VA. CODE ANN. § 36-96.1:1 (Michie 1996).

31. 846 P.2d 531 (Wash. 1993).

32. *Id.* at 533.



The Washington Supreme Court acknowledged that gender dysphoria is a "medically cognizable condition with a prescribed course of treatment,"<sup>33</sup> including living as a member of the other gender before obtaining sex-reassignment surgery. Yet, despite having recognized that Doe's feminine appearance was directly linked to her gender dysphoria, the court held that "Boeing discharged Doe because she violated Boeing's directives on acceptable attire, not because she was gender dysphoric."<sup>34</sup> Following the decision in *Doe*, a number of other state courts have also interpreted their state disability laws to exclude transgender plaintiffs.<sup>35</sup>

In short, one does not have to look past the case law to find at least one powerful reason why transgender people have been motivated to lobby for specific civil rights protections. Because courts have routinely created a "transgender exception" to existing non-discrimination laws, transgender advocates have concluded that one obvious solution is to create legislation that is designed to remedy these exclusions by specifically designating transgender people as a protected group. Thus, it is at least in part because of the animosity transgender people have encountered in the courts that they have turned to the legislative branches of government—local city councils, state legislatures and Congress<sup>36</sup>—to secure basic civil rights protections.

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33. *Id.* at 536.

34. *Id.* In contrast, the Washington Court of Appeals had concluded that Doe's alleged violation of the dress code could not be separated from her medical condition: "Boeing failed to reasonably accommodate the medical requirement that Doe dress in feminine attire prior to undergoing the prescribed surgery." *Doe v. Boeing Co.*, 823 P.2d 1159, 1164 (Wash. Ct. App. 1992); see also Kristin R. Rowland, Note, *Amorphous Employment Discrimination Protection for Transsexuals: Doe v. Boeing*, 4 TEMP. POL. & CIV. RTS. L. REV. 361, 377 (1995) ("Doe's violation of the company's dress code policy was clearly related to her transsexualism . . .").

35. See *Holt v. Northwest Pa. Training P'ship Consortium, Inc.*, 694 A.2d 1134, 1139 (Pa. Commw. Ct. 1997) (holding that transsexualism is not a protected disability under the Pennsylvania Human Rights Act); *Dobre v. Nat'l R.R. Passenger Corp. (AMTRAK)*, 850 F. Supp. 284, 288-90 (E.D. Pa. 1983) (same); *Sommers v. Iowa Civil Rights Comm'n*, 337 N.W.2d 470, 474-77 (Iowa 1983) (holding that transsexualism is not a protected disability under the Iowa Civil Rights Act).

36. Although most legislative advocacy on behalf of transgender people is focused at the local and state level, some transgender advocates have lobbied for the inclusion of transgender people in the federal Employment Non-Discrimination Act (ENDA). ENDA would prohibit employment discrimination on the basis of sexual orientation. See *Holt*, *supra* note 4, at 313. In addition, transgender advocates and allies have also lobbied to include transgender people in the proposed federal Hate Crimes Prevention Act. See, e.g., Book Note, Kara S. Suffredini, *Which Bodies Count When They Are Bashed?: An Argument for the Inclusion of Transgendered Individuals in the Hate Crimes Prevention Act of 1999*, 20 B.C. THIRD WORLD L.J. 447, 463-65 (2000) (reviewing DANGEROUS LIASONS: BLACKS, GAYS, AND THE STRUGGLE FOR EQUALITY (Eric Brandt, ed. 1999)) (expressing concern that the phrase "actual or perceived gender" in the 1999 version of

## II. LEGISLATIVE STRUGGLES AND SUCCESSES

In the past ten years, transgender people have made unprecedented efforts to lobby for civil rights laws.<sup>37</sup> To date, these efforts have been most successful at the local level. In 1975, Minneapolis, Minnesota passed the first local ordinance prohibiting discrimination against transgender people.<sup>38</sup> Fifteen years later, only a handful of additional cities had followed suit—Champaign and Urbana, Illinois, Harrisburg, Pennsylvania, Los Angeles, California, Seattle, Washington and St. Paul, Minnesota.<sup>39</sup> By the end of 2000, however, the number of local ordinances protecting transgender people had multiplied. There are now thirty-one such local laws in place.<sup>40</sup> Transgender-protective ordinances in DeKalb, Illinois and Portland, Oregon<sup>41</sup> are the two most recent additions.

the act may not be sufficiently explicit to ensure that courts will interpret the law to include transgender hate crimes victims).

37. Although this Article focuses on the United States, others have documented a similar surge in transgender activism internationally. See STEPHEN WHITTLE, *THE TRANSGENDER DEBATE: THE CRISIS SURROUNDING GENDER IDENTITIES* 55 (2000) ("The past ten years have seen a huge rise in trans action throughout the world.").

38. MINNEAPOLIS, MINN., CODE OF ORDINANCES tit. 7, ch. 139, § 139.20 (2000).

39. CHAMPAIGN ILL., MUNICIPAL CODE ch. 17, art. I, § 17-3 (2000), at <http://www.municode.com>; HARRISBURG, PA., CODE tit. 4, ch. 4-101.6 (1992); LOS ANGELES, CAL., MUNICIPAL CODE § 49.21 (1992); Seattle, Wash., Ordinance 119628 (Aug. 11, 1999) amending SEATTLE, WASH., CODE § 14.04.030 (1986); ST. PAUL, MINN., CODE OF ORDINANCES ch. 183, § 183.02 (2000), at <http://www.ci.stpaul.mn.us/code>; URBANA, ILL., CODE OF ORDINANCES art. III, div. I, § 12-39 (2000), at <http://www.municode.com>.

40. Municipalities that have enacted some type of transgender-inclusive non-discrimination law are: Ann Arbor, Michigan; Atlanta, Georgia; Benton County, Oregon; Boulder, Colorado; Cambridge, Massachusetts; Champaign, Illinois; DeKalb, Illinois; Evanston, Illinois; Grand Rapids, Michigan; Harrisburg, Pennsylvania; Iowa City, Iowa; Jefferson County, Kentucky; Lexington-Fayette, Kentucky; Los Angeles, California; Louisville, Kentucky; Madison, Wisconsin; Minneapolis, Minnesota; New Orleans, Louisiana; Olympia, Washington; Pittsburgh, Pennsylvania; Portland, Oregon; San Francisco, California; City of Santa Cruz, California; County of Santa Cruz, California; Seattle, Washington; St. Paul, Minnesota; Toledo, Ohio; Tucson, Arizona; Urbana, Illinois; West Hollywood, California; York, Pennsylvania; Ypsilanti, Michigan. See app., *infra*, (providing excerpts of the statutory language used to protect transgender people in these ordinances). The Los Angeles ordinance was held to be preempted by state law in *Delaney v. Superior Fast Freight*, 14 Cal. App. 4th 590, 596-98 (2nd Dist. 1993), *review denied*, *Delaney v. Superior Fast Freight*, S032564, 1993 Cal. LEXIS 3063 (Cal. June 3, 1993).

41. PORTLAND, OR., CIVIL RIGHTS ch. 23.01 (2000); Atlanta, Ga., Ordinance No. OO01983 (Dec. 4, 2000) at <http://www.ci.atlanta.ga.us/dept/council/2000/IMAGES/Proposed/OO01983.pdf>. In addition to the thirty-one municipalities with transgender-inclusive non-discrimination laws, two Georgia municipalities, Pine Lake and Decatur, have policies prohibiting discrimination against transgender people in

Encouragingly for transgender advocates, progress in this arena has not been limited to large metropolitan centers, college towns or any single geographic area.<sup>42</sup> Jurisdictions that have passed local anti-discrimination laws include cities as culturally diverse as Ann Arbor, Michigan, Louisville, Kentucky and Tucson, Arizona.<sup>43</sup> They also include a healthy mix of small and mid-sized cities, such as York, Pennsylvania and Toledo, Ohio (with populations of approximately 19,000 and 333,000, respectively), alongside larger cities such as San Francisco, Pittsburgh and Atlanta.<sup>44</sup>

In 1993, Minnesota became the first jurisdiction to enact a statewide anti-discrimination law that includes express protections for transgender people in education, employment, housing and public accommodations.<sup>45</sup> Although no other state has yet extended comparable legislative protections to transgender people, several have taken significant steps in that direction.<sup>46</sup> In 1998, California became the second state, following Minnesota in 1996,<sup>47</sup> to include transgender people in its state hate crimes statute.<sup>48</sup> In 1999, the California Legislature incorporated the same language into the California Student Safety and Violence Prevention Act, thereby prohibiting discrimination against transgender students and teachers, and administrators.<sup>49</sup> Missouri and Vermont included transgender

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public employment. See City of Decatur Resolution, Ga., R-00-XX, May 15, 2000; City of Pine Lake Personnel Manual Revised & Adopted, Oct. 1999. Ithaca, New York also includes gender identity as a protected category in its municipal hate crimes statute. See ITHACA, N.Y., LOCAL LAW NO. 2-2000 ch. 215, art V, § 215-30 (2000).

42. CURRAH & MINTER, *supra* note 2, at 15.

43. *Id.*

44. *Id.* at 16.

45. These protections were passed as part of a bill that prohibits discrimination on the basis of sexual orientation, which was expressly defined to include transgender people. See MINN. STAT. ANN. § 363.01 (West Supp. 2001); see also CURRAH & MINTER, *supra* note 2, at 15 (describing the history behind Minnesota's passage of the first statewide law protecting transgender people).

46. In 2000, bills that would create comprehensive protections for transgender people were introduced in California, Georgia, Illinois, Iowa, Michigan, Missouri and Vermont, among others. CURRAH & MINTER, *supra* note 2, at 15.

47. See MINN. STAT. ANN. § 611A.29 (West Supp. 2001) (incorporating the transgender inclusive definition of sexual orientation in section 363.01).

48. CAL. PENAL CODE § 422.76 (West 1999).

49. CAL. EDUC. CODE § 220 (West Supp. 2001) (incorporating the language of section 422.76 of the California Penal Code).

people in their state hate crimes statutes,<sup>50</sup> and the governor of Iowa became the first governor to issue an executive order prohibiting discrimination against state employees on the basis of gender identity.<sup>51</sup> In 2000, California became the first state to pass legislation removing "transsexualism" and "gender identity disorder" from the list of excluded impairments under state disability laws.<sup>52</sup>

All told, about 3.8% of the U.S. population now lives in jurisdictions with some form of transgender-protective non-discrimination law.<sup>53</sup> As modest as these initial legislative gains may seem, their true significance lies in what they portend for the future. In the words of a recent news story, "the transgender community . . . appears to be gaining acceptance as a bona fide minority group."<sup>54</sup> For the first time, transgender people are forging a shared political identity and coalescing into a visible and increasingly significant political movement.<sup>55</sup>

### III. FOUR KEY ISSUES IN DRAFTING TRANSGENDER-PROTECTIVE LEGISLATION

After decades of losing in the courts, as described in section I above, transgender people have begun to organize as a political constituency and to lobby for the passage of non-discrimination laws. One of the greatest challenges in that effort has been drafting statutory language for which there is little or no

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50. MO. ANN. STAT. § 557.035.4 (West Supp. 2001) (including gender identity in its definition of "sexual orientation"); VT. STAT. ANN. tit. 13, § 1458 (Supp. 2000) (including "gender identity" as a protected category).

51. Exec. Order No. 7, Sept. 14, 1999, at [http://www.state.ia.us/governor/legal/exec\\_order\\_seven\\_final.pdf](http://www.state.ia.us/governor/legal/exec_order_seven_final.pdf). Unfortunately, a district court judge subsequently held that Governor Tom Vilsack lacked authority to issue the order, in a lawsuit filed by republican state legislators. See Kristi Chew, *Judge Declares Vilsack Executive Order Invalid*, THE ASSOCIATED PRESS & LOCAL WIRE, Dec. 7, 2000, WL ALLNEWSPLUS.

52. Assemb. B. 2222, Reg. Sess. (Cal. 2000); see also Press Release by Jamison Green & Shannon Minter, *Transpeople Removed from California Disability Law Provisions* (Oct. 11, 2000) at <http://www.transgenderlaw.org>.

53. CURRAH & MINTER, *supra* note 2, at 16. This figure does not include Los Angeles, where the local ordinance was held to be preempted by state law. See discussion and sources cited *supra* note 51.

54. Steve Johnson, *Transgender Rights*, CHI. TRIB., Sept. 29, 1998, at C7; see also John Cloud, *Trans Across America: Watch out, Pat Buchanan, Ridiculed for Years, "Transgenders" Are Emerging as the Newest Group to Demand Equality*, TIME, July 20, 1998, at 48 (describing the emergence of transgender people as a new political group); Deb Price, *Transgendered Have Lessons for Society*, DETROIT NEWS, June 26, 2000, at 9 (same).

55. WHITTLE, *supra* note 37, at 56 ("This is a new community with a new sense of self-respect; it will not go quietly and it may well be that it changes the world for the better, for us all.").

precedent, given the virtual absence of prior transgender-specific legislation anywhere in the world. Although there are now numerous examples of such laws on the books,<sup>56</sup> courts have not yet had time to provide much guidance as to problems or limitations that may be associated with particular kinds of statutory language.<sup>57</sup> Nonetheless, it is possible to identify four strategic issues that have repeatedly arisen in drafting this type of legislation.

#### A. *How to Categorize the Prohibited Discrimination*

The first is the question of whether to secure protection for transgender people by establishing "gender identity"<sup>58</sup> (or a comparable term)<sup>59</sup> as a new protected category or, alternatively, by amending the statutory definition of sexual orientation, gender or sex to clarify that transgender people should be included within one of those existing categories. In San Francisco, for example, local legislators amended the local human rights law to add gender identity as a new protected category, alongside the existing categories of sex, sexual orientation, race, disability and religion.<sup>60</sup> This approach was also adopted in sixteen other local non-discrimination laws, as well as in the statewide hate crimes statute in Vermont and the local hate crimes statute in Ithaca, New York.<sup>61</sup>

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56. See, e.g., CURRAH & MINTER, *supra* note 2, at 17 fig.1 (detailing legislation protecting transgender people).

57. To date the only decision construing a transgender specific statute is *Goins v. West Group*, 619 N.W.2d 424, 428-31 (Minn. Ct. App. 2000) (holding that a transsexual employee who was denied use of a workplace facility stated a prima facie case of sexual orientation discrimination under the Minnesota Human Rights Act, Minn. Stat. § 363.03, subd. 1(2)(c), which defines sexual orientation to include "having or being perceived as having a self-image or identity not traditionally associated with one's biological maleness or femaleness").

58. According to Suzanne J. Kessler and Wendy McKenna, gender identity "refers to an individual's own feeling of whether she or he is a woman or a man, or a girl or a boy. In essence gender identity is self-attribution of gender." SUZANNE J. KESSLER & WENDY MCKENNA, *GENDER: AN ETHNOMETHODOLOGICAL APPROACH* 8 (1978).

59. The legislation in Boulder, Colorado, passed by the City Council on January 20, 2000, uses the term "gender variance" rather than gender identity. BOULDER, COLO., CODE 12-1 § 4 (2000). See also Memorandum from Joseph N. de Raismes, III, Boulder City Attorney, to William R. Toor, Mayor, Members of the City Council, and Ronald A. Secrist, City Manager (Dec. 20, 1999), at <http://www.ci.boulder.co.us/clerk/previous/list/000201/10.htm> (explaining why the term "gender variance" was used in the Boulder ordinance).

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

61. Ann Arbor, Mich., Ordinance 10-99 (Mar. 17 1999); Atlanta, Ga., Ordinance No. 00O1983 (Dec. 4, 2000), at <http://www.ci.atlanta.ga.us/dept/council/2000/IMAGES/Proposed/00O1983.pdf>; Benton County, Or., Ordinance 98-0139 (Aug. 14, 1998); Boulder,

In contrast, the Minnesota statute incorporates transgender people within the definition of sexual orientation, which is defined, in relevant part, as "having or being perceived as having a self-image or identity not traditionally associated with one's biological maleness or femaleness."<sup>62</sup> Transgender people are also included within the definition of sexual orientation in the Missouri hate crimes statute<sup>63</sup> and in a number of local ordinances, including those in Evanston, Illinois, Los Angeles, California, Minneapolis, Minnesota, St. Paul, Minnesota, Toledo, Ohio, York, Pennsylvania and Ypsilanti, Michigan.<sup>64</sup>

In California, the legislature included transgender people in the California Hate Crimes Law by defining the term "gender" in the statute as follows: gender "means the victim's actual sex or the defendant's perception of the victim's sex, and includes the defendant's perception of the victim's identity, appearance or behavior, whether or not that identity, appearance or behavior is different from that traditionally associated with the victim's sex at birth."<sup>65</sup> The strategy of including transgender people under the rubric of sex or gender has also been used in Cambridge, Massachusetts, Champaign, Illinois, DeKalb, Illinois, Harrisburg, Pennsylvania, Pittsburgh, Pennsylvania, Santa Cruz, California and Urbana, Illinois.<sup>66</sup>

Co., Ordinance 7040 (Jan. 20 2000); ITHACA, N.Y., LOCAL LAW NO. 2-2000, ch. 215, art. V, § 215-30 (2000); Iowa City, Iowa, Ordinance 95-3697 (Oct. 24, 1995); Jefferson County, Ky., Ordinance 36 (Oct. 12, 1999); Lexington-Fayette Urban County Government, Ky., Ordinance 201-99 (July 8, 1999); Louisville, KY., Ordinance 9 (Jan. 26, 1999); Madison, Wis. Equal Opportunities Ordinance (Aug. 1, 2000); New Orleans, La., Ordinance 18794 (July 8, 1998); Olympia, Wash., Ordinance 5670 (Feb. 25, 1997); PORTLAND, OR., CIVIL RIGHTS ch. 23.01 (2000); S.F., Cal., Ordinance 433-94 (Dec. 30, 1994); Seattle, Wash., Ordinance 119628 (Aug. 11, 1999) *amending* SEATTLE, WASH., CODE § 14.04.030 (1986); Tucson, Ariz., Ordinance 9199 (Feb. 1, 1999); West Hollywood, Cal., Ordinance 98-520 (July 20, 1998); VT. STAT. ANN. TIT. 13, § 1458 (Supp. 2000).

62. MINN. STAT. ANN. § 363.01 (West Supp. 2001).

63. MO. ANN. STAT. § 557.035 (West Supp. 2001).

64. Evanston, Ill., Ordinance 61-0-97 (1997); MINNEAPOLIS, MINN., CODE OF ORDINANCES tit. 7, ch. 139, § 139.20 (2000); ST. PAUL, MINN., CODE OF ORDINANCES ch. 188, § 183.02 (2000); Toledo, Ohio, Ordinance 1183-98 (Dec. 8, 1998); York, Pa., Ordinance 3-1993 (Feb. 16, 1993); Ypsilanti, Mich., Ordinance 865 (Dec. 16, 1997).

65. CAL. PENAL CODE § 422.76 (West 1999).

66. Cambridge, Mass., Ordinance 1182 (Feb. 24, 1997); CHAMPAIGN, ILL., MUNICIPAL CODE ch. 17, art. I, § 17-3 (2000) at <http://www.municode.com>; HARRISBURG, PA. CODE tit. 4, ch. 4-101.6 (1992); CITY OF SANTA CRUZ, CAL., CODE ch. 9.83, § 9.83.020 (1992); County of Santa Cruz, Cal. Ordinance 4501 (Apr. 28, 1998); PITTSBURGH, PA., CODE ch. 651, § 651.04 (1997); DEKLAB, ILL., MUNICIPAL CODE ch. 49, § 49.02 (2000); URBANA, ILL., CODE OF ORDINANCES ch. 12, art III, div. 1 § 12-39 (2000), at <http://www.municode.com>.

In sum, legislative protection for transgender people has been secured in one of three ways: (1) by adding gender identity and expression (or a comparable terms) as a new protected status, (2) by creating an inclusive statutory definition of gender or sex or (3) by creating an inclusive statutory definition of sexual orientation.

The considerations that go into choosing one of these strategies over another may vary from place to place, and different concerns may come into play at the statewide as opposed to the local level. In general, however, the considerations militating in favor of adding gender identity as a separate category center on the benefits of increased visibility and the symbolic value of having gender identity given equal billing, so to speak, with other protected classifications. Designating gender identity as a freestanding classification sends a powerful message that transgender people are entitled to full equality and legitimacy.<sup>67</sup>

There are also potential downsides to establishing gender identity as a new protected category. Pragmatically, it may be easier to persuade legislators to amend the definition of an existing protection than to add a new category of protected persons to the law, which is likely to be seen as a more radical step.<sup>68</sup> In addition, identifying gender identity as a distinct classification may reinforce the perception, which is already so pervasive and damaging in the case law, that transgender people are somehow fundamentally distinct from—and by implication, inferior to—non-transgender people, i.e., that transgender people are not men or women, but something other or in-between.<sup>69</sup>

A related concern is that establishing gender identity as a new legislative category may be misinterpreted as conceding that transgender people are not entitled to protection under

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67. In Iowa City, for example, one transgender activist argued for the importance of including gender identity as a freestanding category by noting, "[M]ost people in this community will never read the complete ordinance . . . . What they will see . . . is the list that you give . . . . If gender identity is subsumed under sexual orientation most of them will never know that." *Public Hearing on an Ordinance Amending the Iowa City Code title 2, Human Rights Ordinance, Chapter 2, Section 2-2-2 & 2-1-1* (Sept. 26, 1995) (testimony of Dawn Atkins).

68. IT'S TIME ILL., 4TH ANNUAL REPORT ON DISCRIMINATION AND HATE CRIMES AGAINST TRANSGENDERED PEOPLE IN ILLINOIS (May 1999), at <http://www.itstimeil.org/reports/report1999.html#a3>.

69. See *supra* notes 22-29 and accompanying text (describing the dehumanizing effect of courts' refusal to recognize transsexual people as men or women in sex discrimination cases).

existing sex discrimination laws.<sup>70</sup> To avoid this possibility, some advocates and legislators have opted to amend the statutory definition of “sex” or “gender” in existing statutes to clarify that transgender people should already be covered under those laws. In New York City, for example, transgender activists introduced a bill amending the New York City Human Rights Law to add a transgender-inclusive definition of the term “gender,” which is already included in the local law. The bill’s legislative findings states that this amendment is designed to clarify existing law.<sup>71</sup>

Regardless of which legislative approach is taken, however, there is no logical or principled reason why efforts to obtain explicit statutory protection for transgender people (whether successful or not) should be deemed to preclude efforts to secure protection for transgender people under sex discrimination and/or other existing statutes as well. Like many other types of discrimination, anti-transgender discrimination may fall under more than one category of discrimination and thus may be cognizable under more than one statutory provision.<sup>72</sup> There is no reason to hold anti-transgender discrimination to a different standard in this regard.

### *B. How Broadly to Define Who Is Protected*

A second strategic issue concerns how broadly or narrowly to define the protected status or group. Regardless of whether transgender people are included in a new category or under the

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70. See Franke, *supra* note 5, at 381 (expressing concern that establishing transgender people as a separate protected category in legislation may undermine efforts to secure protection for transgender people under existing sex discrimination laws).

71. New York City B., Int. No. 754 (2000). The section reads, in part:

Included in the City’s Human Rights Law is a prohibition of discrimination against individuals based on gender. The scope of this gender-based protection, however, requires clarification. This local law is intended to make clear that all gender-based discrimination—including, but not limited to, discrimination based on an individual’s actual or perceived sex, and discrimination based on an individual’s gender identity, self-image, appearance, behavior, or expression—constitutes a violation of the City’s Human Rights Law.

*Id.* § 1.

72. See, e.g., *Nabozny v. Podlesny*, 92 F.3d 446, 454-60 (7th Cir. 1996) (holding that a school district’s failure to protect a gay male student from harassment constituted impermissible discrimination on the basis of sex and of sexual orientation); *Lam v. Univ. of Haw.*, 40 F.3d 1551, 1562 (9th Cir. 1994) (holding that the plaintiff, an Asian woman, could properly allege both race and sex discrimination and noting that “the attempt to bisect a person’s identity at the intersection of race and gender often distorts or ignores the particular nature of their experiences”); *Tanner v. Or. Health Sci. Univ.*, 971 P.2d 435, 441-44 (Or. Ct. App. 1998) (holding that a university’s denial of insurance benefits to same-sex domestic partners discriminated on the basis of sexual orientation and of sex).



rubric of sexual orientation or sex, advocates and legislators have faced the challenge of finding language that is specific enough to remove any doubt that transgender people are protected, and yet broad enough to encompass the full range of those who need protection. In Olympia, Washington, for example, the statute defines the protected category very specifically, as "the status of being transsexual, transvestite, or transgender."<sup>73</sup> This type of very specific enumeration can be useful insofar as it leaves less room for ambiguity about the purpose of the law and may serve to eliminate or at least restrain the kind of semantic manipulations that have led courts to exclude transgender people from Title VII and state sex discrimination laws. The downside of this approach, however, is that such a narrowly drafted law may be construed to exclude gender variant people who may not identify or even necessarily be perceived as a specific "type" of transgender person. In Minnesota, the legislature sought to avoid this problem by defining the scope of protection in broad conceptual terms, as extending to all persons "having or being perceived as having a self-image or identity that is not traditionally associated with one's biological maleness or femaleness."<sup>74</sup>

Thus far, most localities have incorporated some variation of the broad, Minnesota-type language and have avoided relying exclusively on a list of specifically protected groups. In Tucson, for example, the ordinance combines general and specific language by defining gender identity to mean "an individual's various attributes as they are understood to be masculine and/or feminine and shall be broadly interpreted to include pre- and post-operative transsexuals, as well as other persons who are, or are perceived to be, transgender."<sup>75</sup> This hybrid approach has the merit of ensuring protection for specific groups (such as transsexuals) while simultaneously avoiding any implication that other, non-enumerated groups or individuals should not be protected as well.

Similar considerations were behind Seattle's decision to revise its ordinance in 1999. The original ordinance, which was first passed in 1986, limited protection to discrimination on the

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73. Olympia, Wash., Ordinance 5670 (Feb. 25, 1997). The same strategy was used in Benton County, Oregon, which added protections for gender identity in 1998 and defined the term to mean the "status of being transsexual." Benton County, Or., Ordinance 98-0139 (Aug. 14, 1998).

74. MINN. STAT. ANN. § 363.01 (West Supp. 2001); *see also* CURRAH & MINTER, *supra* note 2, at 39 (describing the intentions of those who drafted the Minnesota statute).

75. Tucson, Ariz., Ordinance 9199 (Feb. 1, 1999).

basis of “transsexuality, or transvestism.”<sup>76</sup> After extensive review, the City of Seattle Commission on Sexual Minorities concluded that the “terminology used by the City of Seattle on this matter could be changed to be . . . more accurate, inclusive and more easily administered in its attempts to protect gender non-conforming persons.”<sup>77</sup> The Commission noted that “the words *transsexuality* [and] *transvestism*, but not the word *transgendered*, appear in [the 1986 statute].”<sup>78</sup> The Commission concluded, however, that simply expanding the list to include new terms was not an adequate solution, because “doing so could allow the term transgendered to be read in its narrowest definition, and thus leave unprotected some other members of the gender identity community . . . .”<sup>79</sup> Instead the Commission recommended revising the law to include general language similar to that used in Minnesota, as well as a non-exhaustive listing of covered groups.<sup>80</sup> Commission member Marsha Botzer explained the reasoning behind the recommendation: “Every few years, there’s a new word. When we did the law the first time in the ‘80’s, ‘transgender’ wasn’t something anyone used. With all these words of the week, the real object is to find the most inclusive set of words.”<sup>81</sup>

Some advocates and legislators have also been concerned that using clinical terms such as “transsexual” or “transvestite” may lead to an overly narrow interpretation of who is covered by the law. In particular, because transsexual people must usually receive a diagnosis of gender identity disorder<sup>82</sup> to obtain medical treatment, using only the term transsexual may arbitrarily exclude transgender persons who are unable or choose not to obtain medical care. In 1999, the city council in Boulder, Colorado considered limiting the class of persons protected in a

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76. SEATTLE, WASH., CODE § 14.04.030 (1986), *amended by* Seattle, Wash., Ordinance 119628 (Aug. 11, 1999).

77. POLICY AND LEGISLATIVE RECOMMENDATIONS CONCERNING TRANSGENDERED CITIZENS IN SEATTLE, SEATTLE COMM’N FOR SEXUAL MINORITIES 4 (May 1999), at <http://www.ci.seattle.wa.us/scsm/transgender.html>.

78. *Id.* at 7.

79. *Id.*

80. The new law defines gender identity to mean “having an identity, expression, or physical characteristics not traditionally associated with one’s biological sex or one’s sex at birth, including a person’s attitudes, preferences, beliefs and practices pertaining thereto.” Seattle, Wash., Ordinance 119628 (Aug. 11, 1999), *amending* SEATTLE, WASH., CODE § 14.04030 (1986).

81. Interview with Marsha Botzer, Commissioner, The Seattle Commission for Sexual Minorities (July 19, 1999).

82. See AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 532-38 (4th ed. 1994) (defining gender identity disorder).

proposed non-discrimination law to those who were undergoing or had completed sex-reassignment, as certified by a licensed physician.<sup>83</sup> Christa Kriesel, the coordinator for a Boulder County Health Department program for gay, lesbian, bisexual and transgender youth, argued that the licensed physician requirement would be “tragic because . . . everyone does not have equal access to medical care.”<sup>84</sup> Boulder Human Relations Commissioner Liz Padilla agreed stating, “I don’t want to be responsible for somebody’s pain just because they don’t have the money for a doctor or they just haven’t gone that route.”<sup>85</sup> Transgender activist Kathy Wilson also argued against this limitation: “The idea of singling out people and making them carry a bit of documentation to have access to the most basic human rights—that is most offensive to me.”<sup>86</sup> After a robust public debate on this issue, the Boulder City Council decided to omit this restriction.<sup>87</sup>

### C. *How to Define the Scope of Protection*

A related issue concerns the tension between language that appears to define transgender identity solely as a status (such as “gender identity”) and language that also includes appearances, conduct and behavior (such as “gender expression”). Transgender activists generally agree that some status-based language is necessary to make the point that gender identity is a fundamental aspect of personhood and that transgender people are indeed a real and legitimate minority group, deserving of civil rights protections. At the same time, relying exclusively on status-based language runs the risk that some courts may misinterpret the language to exclude conduct, such as undergoing sex reassignment or changing one’s gender presentation, from protection.<sup>88</sup> To alleviate that risk, the majority of the

83. Halle Shilling, *Gender Identity Discussed*, BOULDER DAILY CAMERA, Aug. 17, 1999, at 1C.

84. Mike Mills, *City of Boulder Ponders Transgendered Rights*, BOULDER PRIDE NEWS, Aug. 12 1999, at <http://www.boulderpride.org/NewsArchive/1999/MikeMillsTransgenderRights.html>.

85. Kristin Dizon, *City Council Faces Human Rights Vote*, BOULDER DAILY CAMERA, July 20, 1999, at 1C.

86. Shilling, *supra* note 83.

87. *Id.*

88. See CURRAH & MINTER, *supra* note 2, at 38-41; see, e.g., *Kirkpatrick v. Seligman & Latz, Inc.*, 636 F.2d 1047, 1049 (5th Cir. 1981) (holding that an employer who fired a transsexual woman for transitioning on the job did not discriminate against the plaintiff for being transsexual, but rather for dressing as a female); *Grossman v. Bernards Township Bd. of Educ.*, No. 74-1904, 1975 U.S. Dist. LEXIS 16261, at \*9 (D.N.J. Sept. 10,

ordinances that have been passed in the U.S. combine elements of both status and conduct.<sup>89</sup> This has been accomplished either by using the term “gender identity and expression,” or by otherwise defining the prohibited basis of discrimination to include discrimination on the basis of external as well as internal manifestations of identity.<sup>90</sup>

#### *D. How to Avoid Dress Code Exemptions*

A final strategic issue concerns how to prevent legislators from undermining the integrity of transgender-protective laws by including so-called “cross-dressing exclusions.” These exclusions permit employers to engage in sex-based discrimination in matters relating to dress and appearance. In the handful of jurisdictions in which they have been adopted, it is clear that they are based on irrational and sensational fears about “men in dresses” rather than on any principled, realistic or legitimate concerns.<sup>91</sup> Although primarily intended to deny legal protections to men who wear clothing that is considered “too feminine,” these exclusions harm women by perpetuating gender stereotypes and reinforcing the devaluation of qualities and characteristics associated with femininity.<sup>92</sup> Cross-dressing exclusions are also increasingly at odds with the growing body of cases finding that discrimination against masculine-appearing women and feminine-appearing men violates Title VII and similar state laws.<sup>93</sup>

1975) (holding that transsexual woman “was discharged by the defendant school board not because of her status as a female, but rather because of her change in sex from the male to female gender”).

89. CURRAH & MINTER, *supra* note 2, at 17-18; *see supra* notes 58-72 and accompanying text.

90. CURRAH & MINTER, *supra* note 2, at 38-41.

91. *Id.* at 54-57.

92. *See Case, supra* note 10, at 1-3, 61-75 (explaining that discrimination against men who wear feminine clothing harms women by reinforcing the devaluation of femininity).

93. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 235 (1989) (holding that an accounting firm engaged in prohibited sex discrimination when it denied a partnership to a female employee who was told that she was too “macho” and needed to “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry”); *see also Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 261 n.4 (1st Cir. 1999) (noting that “a man can ground a claim on evidence that other men discriminated against him because he did not meet stereotyped expectations of masculinity”); *Samborski v. W. Valley Nuclear Servs. Co.*, 99-CV-02143E(M), 1999 U.S. Dist. LEXIS 20263, at \*11 (W.D.N.Y. Nov. 24, 1999) (reinstating sex discrimination claim on behalf of female employee who alleged that she was discriminated against because she

Unfortunately, activists in a few jurisdictions have been unable to fend off these kinds of restrictions. In New Orleans, some local legislators were so concerned that the local law might protect a "man in a dress" that they insisted on adding broad exclusionary language.<sup>94</sup> The New Orleans exemption states that "nothing in this Chapter shall prohibit an employer from prohibiting cross-dressing in the work place or while an employee is acting in the course and scope of his or her employment."<sup>95</sup> The only exception is an additional provision requiring employers to accommodate transsexual employees undergoing sex reassignment surgery.<sup>96</sup> This provision effectively limits employment protection to those under a doctor's care because it requires the employee to provide a written statement certifying that he/she "presents the characteristics of gender identification disorder."<sup>97</sup>

In Kentucky, local transgender advocates spoke out strongly against the unfairness of limiting protection to transsexual persons. F.M. Chester, a transgender lesbian, testified about the harmful impact of gender based dress codes on non-transsexual people at a city council hearing in Lexington:

Many of the people in this room probably thought I was male when they first saw me. I am not. I am biologically female. However, my gender presentation is very masculine. I am a "mannish" woman. I also wear men's clothes. I cannot wear women's clothes comfortably. They feel wrong. When I wear women's clothes I feel anguish. I feel like I am in "drag" and that I am "passing" as a woman. I have always been like this. . . . I am not transexual [sic]. At this point in my life, I do not want to become a man. I have considered changing my sex and have rejected it for me right now.<sup>98</sup>

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did not exhibit her femininity in a stereotypical fashion); *EEOC v. Trugreen Ltd. Partnership*, 122 F. Supp. 986, 993 (W.D. Wis. 1999) (holding that a plaintiff could show prohibited sex discrimination under Title VII by showing that he was treated adversely because he did not conform to stereotypical masculine roles).

94. Shilling, *supra* note 83.

95. New Orleans, La., Ordinance 18794 (July 1, 1998).

96. *Id.*

97. *Id.*

98. F.M. Chester, *Address at the Lexington-Fayette Urban County Council Meeting (July 1, 1999)*, in CURRAH & MINTER, *supra* note 2, at 30-31 (supporting a fairness ordinance with transgender-inclusive language; the ordinance passed a week later).

Despite opposition from Chester and others, Louisville and Lexington both enacted ordinances that contain cross-dressing exclusions.<sup>99</sup> To date, however, these troubling exclusions are the exception rather than the rule; most jurisdictions that have enacted transgender-protective legislation have rejected this type of exclusion as unnecessary, unprincipled and inconsistent with emerging sex discrimination law.

### *E. Summary*

Despite the fears of some, the emergence of a transgender rights movement has not resulted in laws that protect only a narrowly defined class, such as transsexuals or even self-identified transgender people, or that rely upon an overly narrow or sociological account of transgender identity.<sup>100</sup> Instead, transgender advocates and legislators have attempted to fashion statutory language that respects both the diversity among transgender people and the commonality between transgender people and others. Thus, with few exceptions, these statutes do not simply add the term "transgender" to a laundry list of protected classes. Rather, the language employed is principled, broad and inclusive of as wide an array of people as possible, recognizing, for example: that female-to-male transsexuals often have different routes to transition than male-to-female transsexuals, and that many female-to-male transsexuals may never have genital ("bottom") surgery; that many transsexuals are non-operative, either because they cannot afford or choose not to undergo sexual reassignment or are prohibited from doing so for health reasons; that some transgender people may choose to take hormones but not transition from their birth sex, or may choose to take low doses of hormones to bring about some physical changes; that some transsexual people who are

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99. Louisville, Ky., Ordinance 9 (Jan. 26, 1999); Lexington, KY., Ordinance 201-99 (July 8, 1999). These ordinances define gender identity, in part, as "manifesting, for reasons other than dress, an identity not traditionally associated with one's biological maleness or femaleness." *Id.* (emphasis added). They also contain an express dress code provision which provides: "nothing [herein] shall be construed to prevent an employer from . . . enforcing an employee dress policy which policy may include restricting employees from dress associated with the other gender." *Id.* (emphasis added).

100. See, e.g., WENDY BROWN, STATES OF INJURY: POWER AND FREEDOM IN LATE MODERNITY 65-66 (1995) (criticizing Santa Cruz ordinance protecting transgender people, in addition to other groups, as a misguided attempt to install overly specific and historically contingent identities in the law); Franke, *supra* note 5, at 381 (expressing concern about laws that simply add transgender people to the laundry list of protected categories).

transitioning or have transitioned may not be under a doctor's care; that many transgender people are not readily identifiable as such and do not challenge prevailing gender norms in any visible way; that other transgender people are more visible, either because they cannot or do not wish to conceal their transgender status; that some transgender people do not fit easily into one of two gender categories. Moreover, the broad definitions used in most of these statutes also include people who do not identify as transgender, but whose gender identity or expression is at odds with stereotypical norms about gender in some way, such as men who have traits considered to be "feminine," or women who have traits considered to be "masculine."

#### IV. CONCLUSION

After meeting with decades of rejection in the courts, it is only in the past ten years that transgender people have turned to the legislative branches of government and made a concerted effort to lobby for explicit statutory protections. The initial results of these efforts have been impressive, whether measured narrowly in terms of legislative victories or more broadly in terms of greater social acceptance and understanding. It would be a mistake, however, to conclude that transgender people have simply abandoned litigation in favor of legislation and public education.<sup>101</sup> To the contrary, as transgender people have begun to achieve some visibility and success in the legislative arena, the judicial environment has begun to shift as well.<sup>102</sup> Thus, while true equality for transgender people is still a distant goal, never

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101. For a useful discussion of the relative merits of litigation and legislation as vehicles for pursuing civil rights, see generally Thomas B. Stoddard, *Bleeding Heart: Reflections on Using the Law to Make Social Change*, 72 N.Y.U. L. REV. 697 (1997), and responses, Nan D. Hunter, *Lawyering for Social Justice*, 72 N.Y.U. L. REV. 1009 (1997); Chai R. Feldblum, *The Moral Rhetoric of Legislation*, 72 N.Y.U. L. REV. 992 (1997).

102. See, e.g., *Schwenk v. Hartford*, 204 F.3d 1187, 1199-1203 (9th Cir. 2000) (holding that transgender people should be protected under Title VII and other sex discrimination statutes); *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 216 (1st Cir. 2000) (holding that a transgender plaintiff who was denied an opportunity to apply for a bank loan was entitled to bring a sex discrimination claim under the Equal Credit Opportunity Act); *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1099 (9th Cir. 2000) (granting asylum to a transgender gay man from Mexico); *Doe v. Brockton Sch. Comm.*, 2000-J-638, slip. op. at 2-6 (Mass. App. Nov. 30, 2000), *aff'd* *Doe v. Yunits*, No. 00-1060-A (Mass. Super. Ct. Oct. 11, 2000) (affirming injunctive order requiring a public middle school in Brockton, Massachusetts to permit male-to-female transsexual student to attend school in female clothing); Declaratory Ruling, *supra* note 13 (holding that transgender people are protected under Connecticut state laws prohibiting sex discrimination).

before has the political and legal momentum for achieving it been greater.



## APPENDIX

*I. Statutory Definitions of "Gender Identity" or "Gender Variance"*

Ann Arbor, Mich., Ordinance 10-99 (Mar. 17, 1999): "Gender Identity.' A person's actual or perceived gender, including a person's gender identity, self-image, appearance, expression, or behavior, whether or not that gender identity, self-image, appearance, expression, or behavior is different from that traditionally associated with the person's sex at birth as being either female or male."

Atlanta, Ga., Ordinance No. 00O1983 (Dec. 4, 2000), at <http://www.ci.atlanta.ga.us/dept/council/2000/IMAGES/Proposed/00O1983.pdf>:

*Gender identity* means self-perception as male or female, and shall include a person's identity, expression, or physical characteristics, whether or not traditionally associated with one's biological sex or one's sex at birth, including transsexual, transvestite, and transgendered, and including a person's attitudes, preferences, beliefs, and practices pertaining thereto, including but not limited to assumption of male or female identity by appearance or medical treatment.

Benton County, Or., Ordinance 98-0139 (Aug. 14, 1998): "Gender identity' includes the status of being transsexual or transgender."

Boulder, Co., Ordinance 7040 (Jan. 20, 2000): "Gender variance' means a persistent sense that a person's gender identity is incongruent with the person's biological sex, excluding the element of persistence for persons under age twenty-one and including, without limitation, transitioned transsexuals."

Although "gender variance" is the overall category, the statute in Boulder also defines other terms used throughout the statute: "Gender identity' means a person's various individual attributes, actual or perceived, that may be in accord with, or sometimes opposed to, one's physical anatomy, chromosomal sex, genitalia, or sex assigned at birth;" "Genital reassignment surgery' means surgery to alter a person's genitals, in order to complete a program of sex reassignment treatment;" "Sex' means

biological sex, the sum of a person's physical characteristics;" "Sex reassignment treatment' means treatment to change a person's sex, based on medically recognized treatment protocols such as that published by the Harry Benjamin International Gender Dysphoria Association;" "Transitioning transsexual' means a person experiencing gender variance who is undergoing sex reassignment treatment;" "Transitioned transsexual' means a person who has completed genital reassignment surgery."

Iowa City, Iowa, Ordinance 95-3697 (Oct. 24, 1995): "GENDER IDENTITY: A person's various individual attributes, actual or perceived, in behavior, practice or appearance, as they are understood to be masculine and/or feminine."

ITHACA, N.Y., LOCAL LAW NO. 2-2000 ch. 215, art. V, § 215-30 (2000): "Gender identity or presentation shall include a person's gender identity, self-image, appearance, expression, or behavior, whether or not that gender identity, self-image, appearance, expression, or behavior is different from that traditionally associated with the person's sex at birth."

Jefferson County, Ky., Ordinance 36 (Oct. 12, 1999): "GENDER IDENTITY. Manifesting an identity not traditionally associated with one's biological maleness or femaleness."

Lexington-Fayette Urban County Government, Ky., Ordinance 201-99 (July 8, 1999): "[G]ender identity' shall mean: (a) having a gender identity as a result of a sex change surgery; or (b) manifesting, for reasons other than dress, an identity not traditionally associated with one's biological maleness or femaleness."

Louisville, Ky., Ordinance 9 (Jan. 26, 1999): "GENDER IDENTITY.' (1) Having a gender identity as a result of a sex change surgery; or (2) Manifesting, for reasons other than dress, an identity not traditionally associated with one's biological maleness or femaleness."

Madison, Wis., Equal Opportunities Ordinance (Aug. 1, 2000):

Gender identity is the actual or perceived condition, status or acts of 1) identifying emotionally or psychologically with the sex other than one's biological or legal sex at birth, whether or not there has been a physical change of the *organs* of sex; 2)

presenting and/or holding oneself out to the public as a member of the biological sex that was not one's biological or legal sex at birth; 3) lawfully displaying physical characteristics and/or behavioral characteristics and/or expressions which are widely perceived as being more appropriate to the biological or legal sex that was not one's biological or legal sex at birth, as when a male is perceived as feminine or a female is perceived as masculine; and/or 4) being physically and/or behaviorally androgynous.

New Orleans, La., Ordinance 18794 (July 8, 1998):

"Gender identification" is the actual or perceived condition, status or acts of: 1) identifying emotionally or psychologically with the sex other than one's biological or legal sex at birth, whether or not there has been a physical change of the organs of sex, 2) presenting and/or holding oneself out to the public as a member of the biological sex that was not one's biological or legal sex at birth, 3) lawfully displaying physical characteristics and/or behavioral characteristics and/or expressions which are widely perceived as being more appropriate to the biological or legal sex other than one's biological sex at birth, as when a male is perceived as feminine or a female is perceived as masculine, and/or 4) being physically and/or behaviorally androgynous.

Olympia, Wash., Ordinance 5670 (Feb. 25, 1997): "Gender Identity" includes the status of being transsexual, transvestite, or transgender."

PORTLAND, OR., CIVIL RIGHTS ch. 23.01 (2000): "Gender Identity" - a person's actual or perceived sex, including a person's identity, appearance or behavior, whether or not that identity, appearance, or behavior is different from that traditionally associated with the person's sex at birth."

S.F., Cal., Ordinance 433-94 (Dec. 30, 1994): "Gender Identity" shall mean a person's various individual attributes as they are understood to be masculine and/or feminine."

Seattle, Wash., Ordinance 119628 (Aug. 11 1999), amending SEATTLE, WASH., CODE § 1404.030 (1986): "Gender identity" means a person's identity, expression, or physical characteristics, whether or not traditionally associated with one's biological sex or one's sex at birth, including transsexual, transvestite, and

transgendered, and including a person's attitudes, preferences, beliefs, and practices pertaining thereto."

Tucson, Ariz., Ordinance 9199 (Feb. 1, 1999): "Gender identity means an individual's various attributes as they are understood to be masculine and/or feminine and shall be broadly interpreted to include pre- and post-operative transsexuals, as well as other persons who are, or are perceived to be, transgendered."

West Hollywood, Cal., Ordinance 98-520 (July 20, 1998): "*Gender Identity* refers to a person's actual or perceived sex, and includes a person's identity, appearance, or behavior, whether or not that identity, appearance, or behavior is different from that traditionally associated with the person's sex at birth."

VT. STAT. ANN. tit. 13, § 1458 (Supp. 2000) "Protected category includes race, color, religion, national origin, sex, ancestry, age, service in the armed forces of the United States, handicap . . . sexual orientation and gender identity, and perceived membership in any such group."

## *II. Statutory Definitions of Sexual Orientation or Affectional Preference that Include Transgender People*

Evanston, Ill., Ordinance 61-0-97 (1997):

Sexual orientation is defined as: Having or perceived as having emotional, physical, or sexual attachment to another without regard to the sex of that person or having or being perceived as having an orientation for such an attachment, or having or being perceived as having a self image or identity not traditionally associated with one's biological maleness or femaleness.

LOS ANGELES, CAL., MUNICIPAL CODE § 49.71 (1992):

As used in this ordinance, the term "sexual orientation" shall mean an individual having or manifesting an emotional or physical attachment to another consenting adult person or persons, or having manifesting a preference for such attachment, or having or projecting a self-image not associated with one's biological maleness, or one's biological femaleness.

MINNEAPOLIS, MINN., CODE OF ORDINANCES tit. 7 ch. 139 § 139-10 (2000): "*Affectional Preference*: Having or manifesting an emotional or physical attachment to another consenting person or persons, or having or manifesting a preference for such attachment, or having or projecting a self-image not associated with one's biological maleness or one's biological femaleness."

MINN. STAT. ANN. § 363.01(45) (West Supp. 2001):

'Sexual orientation' means having or being perceived as having an emotional, physical, or sexual attachment to another person without regard to the sex of that person or having or being perceived as having an orientation for such attachment, or having or being perceived as having a self-image or identity not traditionally associated with one's biological maleness or femaleness. 'Sexual orientation' does not include a physical or sexual attachment to children by an adult.

ST. PAUL, MINN., CODE ch. 183, § 183.02 (2000), at [www.ci.stpaul.mn.us/code](http://www.ci.stpaul.mn.us/code):

*Sexual or affectional orientation* means having or being perceived as having an emotional or physical attachment to another consenting adult person or persons, or having or being perceived as having an orientation for such attachment, or having or being perceived as having a self-image or identity not traditionally associated with one's biological maleness or one's biological femaleness.

Note also that the St. Paul Code defines sex: "Sex means being identified as having or being perceived as having male or female characteristics and encompasses, but is not limited to, pregnancy, childbirth, disabilities related to pregnancy or childbirth, and sexual harassment."

Toledo, Ohio, Ordinance 1183-98 (Dec. 8, 1998): "'Sexual Orientation' means a person's actual or perceived heterosexuality, bisexuality, homosexuality, or gender identity, by orientation or practice."

York, Pa., Ordinance 3-1993 (Feb. 16, 1993): "'Sexual Orientation' means male or female homosexuality,

heterosexuality and bisexuality, by preference, practice or as perceived by others.”

Ypsilanti, Mich., Ordinance 865 (Dec. 16, 1997): “Sexual Orientation.’ Heterosexuality, male or female homosexuality, bisexuality or gender identity.”

### *III. Statutory Definitions of Gender or Sex that Include Transgender People*

CAL. PENAL CODE § 422.76 (West 1999): “Gender’ means the victim’s actual sex or the defendant’s perception of the victim’s sex, and includes the defendant’s perception of the victim’s identity, appearance, or behavior, whether or not that identity, appearance, or behavior is different from that traditionally associated with the victim’s sex at birth.”

Cambridge, Mass., Ordinance 1182 (Feb. 24, 1997): “Gender’ means the actual or perceived appearance, expression or identity of a person with respect to masculinity and femininity; and ‘Same sex’ means occupying the same social and identity roles as another with respect to being male female [sic].”

CHAMPAIGN, ILL., MUNICIPAL CODE ch. 17, art. I., § 17-3 (2000), at <http://www.municode.com>: “Sex means the state of being or becoming male or female or transsexual, or pregnant.”

CITY OF SANTA CRUZ, CAL., CODE ch. 9.83, § 9.83.010 (1992): “Gender’ shall have the same meaning as ‘sex’ as that term is used herein and shall be broadly interpreted to include persons who are known or assumed to be transgendered.”

County of Santa Cruz, Cal., Ordinance 4501 (Apr. 28, 1998): “Gender’ has the same meaning as ‘sex’ as that term is used in state or federal anti-discrimination legislation and shall be broadly interpreted to include sexual stereotyping and persons who are known or assumed to be transgendered.”

DEKALB, ILL., MUNICIPAL CODE ch. 49 § 49.02 (2000): The definition of “gender’ [was recommended to be] actual or perceived sex, including a person’s gender identity, appearance or behavior[, whether or not that gender identity, appearance, or behavior] is different from that traditionally associated with the

person's sex at birth." Tyler Vincent, *Gender Ordinance Passed*, NORTHERN STAR ONLINE, Fall 2000, <http://www.star.niu.edu/20000929/city/gender.asp>.

HARRISBURG, PA., CODE tit. 4, ch. 4-101.6 (1992): "'Sex' means the gender, male or female, of a person, including those persons who are changing or have changed their sex."

PITTSBURGH, PA., CODE ch. 651 § 651.04 (1997), *amended by Ordinance 1-1997* (1997): "'Sex' means the gender of a person, as perceived, presumed or assumed by others, including those who are changing or have changed their gender identification."

URBANA, ILL., CODE OF ORDINANCES ch. 12, art. III, div. 1, § 12-39 (2000), *at* <http://www.municode.com>: "Sex. The state of being or becoming male or female or transsexual, or pregnant, or the ability to become pregnant."