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Panel III: Reaching Goals: Choosing Strategies and Issues for Advancement

GAY PEOPLE, TRANS PEOPLE, WOMEN: IS IT ALL ABOUT GENDER?

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Gay men, lesbians, and bisexuals confound ordinary gender stereotypes because we are sexually attracted to people of the same gender. But apart from that particular form of gender "non-conformity," many gay people consider themselves to be very gender conforming. Indeed, many gay people do not view themselves as particularly different from mainstream America, apart from that "minor" point regarding their choice of sex partners. Thus, a significant number of gay people might well presume they fit more within mainstream America, than, for example, an individual who was designated as male at birth, but who now lives as a heterosexual woman.

Of course, many gay people do not match the stereotype of what the general public expects men and women to look like. Indeed, the greater visibility of butch-femme couples within the lesbian community confirms both realities. A large number of lesbians are very gender-conforming (all those femmes and all that lipstick . . .), while other lesbians may often be mistaken as male by those with whom they come into contact. And, of course, plenty of lesbians and gay men are adrogynous-looking, neither embracing nor opposing gender stereotypes.

As a legal matter, however, prohibitions of discrimination based on sexual orientation have rarely engaged with the issue of gender non-conformity. In most state and local gay rights laws and ordinances, and in the federal employment non-discrimination bill (the Employment Non-Discrimination Act, or ENDA), "sexual

orientation" is defined as "homosexuality, heterosexuality, and bisexuality, whether real or perceived." [FN1] Thus, protection is extended to an individual based on the sexual orientation of the individual (i.e., whom the individual is oriented to have sex with), and has nothing to do with the gender identity or gender expression of the individual. Of course, if an employer, based on the individual's gender identity or expression, perceives that individual as wishing to have sex with a person of the same gender, then that individual is protected as someone "perceived" to be homosexual. [FN2]

A few gay rights theorists have long pointed out that discrimination on the basis of sexual orientation can be conceived of as discrimination based on sex. [FN3] But those of us who play primarily in the legislative or litigation arenas have largely ignored the practical applications of that insight. In this brief essay, I want to consider whether it makes sense for gay rights legislative advocates and litigators to continue to downplay the gender non-conformity aspects of gay sexual orientation. [FN4]

My involvement in this area, and the growth in my conceptual thinking, stem directly from my role in drafting and negotiating the provisions of the Employment Non-Discrimination Act (ENDA), a bill that prohibits discrimination based on sexual orientation in private employment. [FN5] Thus, the first part of this essay reviews activities that occurred between 1993 and 2001 regarding coverage of gender identity in ENDA. In an appendix to the essay, I include a number of primary materials that were written during this time period. I include these documents both to provide background for my comments in this essay, as well as to help preserve a historical record of a fascinating and controversial issue of our times. In the latter half of this essay, I review trends in the case law that I believe should cause us to rethink some of the positions I, and others, took during this time period.

The Story of the Struggle: How Should We Protect Gender Identity?

In January 1993, I was hired by the Human Rights Campaign (HRC) to serve as a consultant in drafting an omnibus gay civil rights bill. For the following year and a half, I worked with a drafting committee established by the Leadership Conference on Civil Rights, an umbrella organization of civil rights groups, to draft such a bill. Finally, in June 1994, a gay civil rights bill that covered only employment (ENDA) was introduced in both the Senate and the House of Representatives. [FN6] The definition of "sexual orientation" in that bill was "lesbian, gay, bisexual, or heterosexual orientation . . . as manifested by identity, acts, statements, or associations." [FN7]

ENDA is intended to protect gay men, lesbians, bisexuals, and heterosexuals who are discriminated against because of their choice of sexual partner. This group includes individuals whose gay identity is manifested through gender non- conforming behavior. But ENDA is not intended to protect an individual who experiences discrimination solely because of a change in his or her gender status.

Our decision to restrict the non-discrimination coverage of ENDA in this manner

was quite deliberate. During drafting of the bill, two questions arose regarding the scope of the bill. First, should people who experience discrimination based on marital status be covered under the bill? Second, should people who experience discrimination based on transgender status be covered? In both cases, our answer was no.

With regard to marital status, we recognized that gay people could not legally be married in any state, and hence that marital status discrimination was of significant concern to gay people. That is, an employer could decide to deny promotions to any non-married employee, and that would have a significant adverse effect on any gay employee. Nevertheless, we decided we could not take on the larger issue of marital status discrimination in a gay rights bill. As a strategic matter, the more a bill tries to do, the harder it is to enact. [FN8] Thus, we decided that prohibiting marital status discrimination would have to wait for another federal bill. [FN9]

With regard to transgender status, we shared the same strategic concerns that applied to marital status. Moreover, the addition of transgender status would not only create additional weight for ENDA to bear (just as marital status would), but it was also weight that would probably come at significant political cost. Although no one in the drafting group had polled Members of Congress on the particular question of prohibiting discrimination against transgender individuals, our instinct was that even Members who were willing to prohibit sexual orientation discrimination would not yet be willing to prohibit discrimination based on transgender status. [FN10]

Apart from the strategic concern in adding transgender status, however, we believed that discrimination based on transgender status was conceptually different from discrimination based on sexual orientation. The latter was generated by an employer's discomfort with the gender of the person that an employee or potential employee had sex with. The former was generated by an employer's discomfort with the fact that an employee or potential employee no longer expressed the gender he or she had been assigned at birth. One was discrimination based on sexual orientation; the other was discrimination based on gender. Indeed, we believed discrimination based on an individual's gender non-conformity, or based on the fact that an individual was living as a gender different from the one assigned at birth, was already prohibited under existing sex discrimination laws. The problem was simply that the current laws had not yet been properly construed to cover situations regarding transgender individuals. [FN11]

As I noted above, even if we had perceived a wonderful conceptual fit between transgender status and sexual orientation, I am sure we still would not have added transgender status to ENDA's coverage. In such a case, we would have thought of transgender status discrimination in the same way we thought of marital status discrimination. That is, we would have acknowledged the close confluence between discrimination based on transgender status and discrimination based on sexual orientation, but we would have still decided to forgo addressing the former as a strategic matter. Civil rights law is often a story of incremental protection; and, the transgender issue would have fallen into that pattern. [FN12]

But, for me, the conceptual difference between discrimination based on transgender status and discrimination based on sexual orientation was quite real. I believed this difference meant there was a higher strategic legal cost in adding coverage for transgender status to ENDA. That is, if there was a reasonable chance of covering such discrimination under existing sex discrimination laws, such as Title VII of the Civil Rights Act of 1964, then adding protection for transgender individuals in ENDA would be a short-sighted legal move. First, if one included such coverage in a new federal bill, courts would read that action as confirming that coverage did not already exist under federal sex discrimination law. Second, there was a high likelihood that coverage of transgender status would never survive final passage of ENDA. Courts would then use rejection of the coverage as yet further confirmation that Congress never wished to extend protection to transgender individuals. Hence, it would be even more likely that existing sex discrimination law would not be interpreted as including such coverage.

The introduction of ENDA in July 1994 was a major media event. [FN13] The visibility of the bill, however, was also a galvanizing event for members of the transgender community who were furious at their exclusion from the bill. [FN14] The heightened activism and politicization of the transgender community, following introduction of ENDA in 1994, was an essential force in moving the conversation forward in the gay political and legal community. While I did not necessarily enjoy being on the receiving end of some of the anger in the early years, I believe such anger and activism were essential components for creating necessary change, and I celebrate it for that.

My initial response, however, when transgender individuals and organizations posted documents on the web criticizing HRC, as an organization, and me, as an individual, for the non-inclusion of transgender individuals in ENDA, was purely defensive. I drafted a document, entitled "Statement of Chai Feldblum re ENDA and Discrimination Against Transgender People," and posted it on the web in July 1995. (See Appendix A) This document neatly captures my thinking at the time. The document sets out a legal and strategic defense for not including transgender status in ENDA, and calls for achieving better anti- discrimination protection based on gender identity through litigation under existing sex discrimination laws.

In the fall of 1995, HRC decided to host a meeting with a number of the transgender activists to discuss their concerns regarding ENDA. My role in that meeting was two-fold. First, I wanted to explain our conceptual distinction between sexual orientation discrimination--which required a new law, ENDA, and discrimination based on gender identity--which simply required a reinvigoration of litigation under sex discrimination laws. Second, I wanted to challenge the assertion made by many transgender activists that ENDA would not effectively protect butch lesbians and effeminate gay men who were discriminated against because of their gender non-conformity. Of course, an employer could try to avoid liability under ENDA by asserting he had no problem with hiring lesbians, but simply did not want to hire lesbians who

"looked too male." But, as I explained, I believed such an employer would still be found liable under ENDA, and if not, would certainly be found liable under Title VII. [FN15]

The meeting at HRC was long and acrimonious. The bottom line was that sex discrimination laws had not been construed in the past to cover transgender individuals, and the transgender representatives at the meeting were not interested in hanging their hopes on that tack. The HRC representatives were equally adamant that it was neither strategically wise, nor conceptually appropriate, to amend ENDA to include transgender status or gender identity.

Nancy Buermeyer, HRC's lead lobbyist on ENDA, finally provided the key to ending the impasse. She suggested that HRC agree not to oppose an amendment that would add gender identity to ENDA, if such an amendment were offered at any point by a Member of Congress. In addition, HRC's executive director, Elizabeth Birch, agreed I could work over the next few months (as a paid HRC consultant) with representatives from the transgender community to help develop a gender identity amendment. Birch, Buermeyer, and Daniel Zingale, HRC's public policy director, all emphasized that the organization was not agreeing to include gender identity into ENDA prior to reintroduction of the bill, nor was HRC committing itself to support any amendment we drafted. [FN16]

Over the following twelve months, a small group of us worked to develop a gender identity amendment to ENDA. The group consisted of myself, Erin Leveton (a George Washington University law student who worked with me for school credit and who did the bulk of the legal research), Jessica Xavier (a Maryland activist on transgender issues), and Sharon Stuart (a bi-gendered activist from Connecticut.) Towards the end of the process, Dana Priesing, a lawyer and activist with a gender rights group, Gender Public Advocacy Coalition (GenderPAC), joined the effort. [FN17] The result of the work was a series of proposed modifications to ENDA. The proposed textual changes, as well as our accompanying explanation of the changes, appear in Appendix B. We also presented the changes in the form of a free-standing bill, entitled The Gender Identity Non-Discrimination Act (GINDA).

In certain respects, the year-long effort was a disappointment for members of the transgender community. While we had developed a legally sound set of recommendations for adding gender identity to ENDA, the negative political ramifications of making such an addition had not changed at all. Hence, it is no surprise that HRC maintained its position in a follow-up meeting with transgender activists in November 1996: HRC would not oppose the amendment that had been drafted by our small group were such an amendment to be offered. HRC would not, however, recommend to the civil rights community, or to ENDA's Congressional sponsors, that ENDA be changed to include such an addition.

The year-long effort did, however, make a significant impact on me. I still agreed with HRC that to recommend that ENDA be amended to include gender identity was strategically wrong for the gay community. I also still believed it was legally short-

sighted for the transgender community to seek the inclusion of gender identity in ENDA, given that such a move might undermine efforts to use existing sex discrimination laws to prohibit discrimination based on gender non-conformity. But I had become more personally committed to fighting the injustice of the current situation: that is, the lack of effective legal redress for individuals who suffer discrimination based on gender identity or gender non-conformity.

As a general matter, I felt the gay rights and the women's rights litigation organizations had a responsibility to devote resources to establishing protection for gender non-conformity--and ultimately, for transgender status-- under existing sex discrimination laws. To me, it did not seem this was a responsibility the organizations were carrying out vigorously in their litigation strategies. Moreover, I felt that if such renewed litigation were not successful, then the gay community and the women's community had a responsibility to work with the transgender community to amend existing sex discrimination laws to create explicit protection for gender non-conformity and gender identity.

My first effort to raise these concerns occurred in the context of the bi-annual legal roundtable, co-hosted by the Lambda Legal Defense and Education Fund (LAMBDA) and the ACLU Lesbian and Gay Rights Project (ACLU). The legal roundtable consists of litigators who work at the four major gay rights litigation groups: LAMBDA, ACLU, NCLR (National Center for Lesbian Rights), and GLAD (Gay and Lesbian Advocates and Defenders). [FN18] Shannon Minter, a lawyer with NCLR, was one of the individuals who had been present at both of the HRC meetings with transgender activists and I had learned much from him over the previous two years. Shannon and I asked the organizers of the roundtable for a session devoted to selected issues regarding gender non- conformity. A session was set aside at the September 1997 roundtable, and Shannon and I drafted a memo for that session. (The memo appears as Appendix C.)

Our roundtable memo was carefully designed to address certain issues, and not others. Shannon and I were not interested in revisiting the question of whether ENDA should be amended to include gender identity. Rather, a mainstay of the attacks on ENDA by the transgender community had been that ENDA would not adequately protect butch lesbians and effeminate gay men who experienced discrimination based on their gender non-conformity. We wanted the litigators who would be faced with these situations to decide whether ENDA was, in fact, adequate for their needs. In addition, we wanted to highlight the fact that some gay men and lesbians experience discrimination largely as a result of their gender non-conformity, and we believed gay litigation groups should be using their resources under existing sex discrimination laws to address such discrimination. [FN19]

The roundtable discussion was generally productive. On the first issue, Shannon argued that gender expression is often a manifestation of sexual orientation, and not simply a concomitant side-product of such orientation. Hence, for example, a lesbian who is fired for being too butch is, in fact, being fired for being a lesbian--because for

that woman, her butchness is part of her sexual orientation. I had been skeptical of that argument going into the roundtable conversation, [FN20] but I became more convinced of its logic during the discussion. [FN21]

Most of the roundtable litigators did not accept the argument that sexual orientation should be defined as "including a particular gender projection." [FN22] But those litigators still believed, as a practical matter, that employers would not escape liability under ENDA by trying to disaggregate gender expression from sexual orientation. The bottom line, for these litigators, was that the American public would simply not be sophisticated enough about either gender expression or sexual orientation to understand an employer's attempted effort to disconnect the two. Thus, a lesbian fired for being too male, or a gay man fired for being too effeminate, would still be viewed by the public as being fired because of his or her sexual orientation-- regardless of what an employer might say.

On the second issue, the roundtable discussion was informative but not particularly ground-breaking. All the litigators agreed it would be beneficial if existing sex discrimination laws were more effectively used to prohibit discrimination based on gender non-conformity. Moreover, there was general consensus that reaffirming such a legal principle through a series of cases would redound to the benefit of those gay men and lesbians who did not conform to expected gender expressions. But there was no consensus that taking on such cases should become a high priority for gay litigation groups. Rather, there was a consensus that further conversations along these lines should be held with women's litigation groups.

The first official effort at engaging the women's litigation groups occurred in 1998. The Human Rights Campaign and GenderPAC co-hosted a one-day event in Washington.D.C. and invited representatives of gay rights and women's rights policy and litigation groups, as well as selected staffers for Members of Congress. (The attendance list and letter of invitation appear as Appendix D.) The goal of the meeting was simple: to open a conversation about ways in which the groups could work together to advance the ultimate goal of ensuring real protection against discrimination based on gender identity or expression. No commitments or significant breakthroughs were made at the meeting. But the very fact of the conversation was unique and important. Moreover, the meeting energized the staff of GenderPAC (executive director Riki Wilchins and lawyer Dana Priesing) to continue their efforts to broaden the debate about gender rights to include both transgender individuals and gay people.

In June 1998, I stopped working as a consultant for HRC. The organization had brought on new lawyers, and I felt it was time for me to apply my energies elsewhere. In particular, I wanted to create a legislative lawyering project in a gay rights policy group. My clinical teaching work over the previous seven years had centered around the concept that effective advocacy (at either the federal or state level) requires five types of people: a strategist, a lobbyist, a legislative lawyer, a grassroots organizer, and a media specialist. [FN23] In my Federal Legislation Clinic at Georgetown University Law Center, I had been training students to be legislative lawyers: that is, lawyers who

are equally skilled in and comfortable with law and politics. I wanted to see if such an effort could be duplicated, on a full- time basis, in a national gay rights organization.

During summer and fall of 1998, I had the opportunity to help create this dream. Kerry Lobel, executive director of the National Gay and Lesbian Task Force (NGLTF), and Rebecca Isaacs, NGLTF's public policy director, were both excited about having a legislative lawyering project at the organization. Funding came through in January 1999, and the project started in earnest in August 1999 with both a state and federal legislative lawyer. I signed on as a consultant for the project.

For the previous decade, NGLTF had been focused primarily on state and local legislative initiatives regarding gay rights. But, for me, a prerequisite for consulting with NGLTF was that the organization also plan to re-engage with the federal legislative arena. That included, of course, a commitment to be actively engaged in the effort to pass ENDA. But ENDA was not a simple issue for NGLTF. The organization had seen HRC lambasted by the transgender community for not including gender identity in ENDA. In 1996, Lobel had met with representatives of the transgender community after their disappointing second meeting with HRC. [FN24] Shortly thereafter, the NGLTF board had voted to expand the organization's mission to read: "the National Gay and Lesbian Task Force works to eliminate prejudice, violence and injustice against gay, lesbian, bisexual and transgender people at the local, state and national level." [FN25]

Despite the change in NGLTF's mission statement, the organization did not immediately translate that mission statement into a concrete policy position on ENDA. It had been relatively easy for the organization to avoid doing so because NGLTF had not been largely absent from the federal scene for some years. But that would need to change were the organization now to engage more directly with helping to advance ENDA in Congress.

In light of the new role NGLTF was planning to play on the federal level, Rebecca Isaacs and I held a meeting in March 1999 with a range of transgender legal activists and other interested parties. [FN26] Our question was whether NGLTF should formally ask the lead Senate sponsors of ENDA to include gender identity when the bill was reintroduced. I continued to have strategic legal concerns regarding such a move, and I was looking forward to hearing what the lawyers in the transgender movement had to say.

All the transgender legal activists were unanimous that ENDA should be amended to include gender identity. My views were shaped most significantly by Shannon Minter's arguments. He had litigated enough cases to be aware of the potential legal down-side of including such a provision in a bill that might not pass for years. Nevertheless, he believed that a breakthrough on achieving gender identity protection under existing sex discrimination laws was not imminent, and that including gender identity in ENDA would thus bring essential visibility and energy to transgender issues.

Rebecca and I were both convinced. We pledged that NGLTF would make an official request to the staffs of Senator Kennedy and Senator Jeffords for inclusion of gender identity in ENDA. Having worked on the bill for six years, however, I warned the group that the staff response to the request was almost certain to be in the negative. Nevertheless, I felt that "making the ask" was critical. The request would provide an opening to begin working with the staff to educate other staffers on Capitol Hill about transgender issues; and, it would show the staff that NGLTF was serious about creatingsome movement on the issue. [FN27]

As I expected, the staff people for Senator Jeffords and Senator Kennedy both rejected NGLTF's request that ENDA be amended to include protection for transgender individuals. But I was pleasantly surprised at the seriousness of the conversation with both staff people. Both were quite willing to discuss the existing lack of guaranteed legal redress for discrimination based on transgender status. Moreover, both felt that as members of the American public started changing their views of transgender individuals through a concerted educational and visibility effort, Congress would move as well.

There was little movement on ENDA itself, however, throughout most of 1999 and 2000. Most of my efforts, therefore, were focused on helping to increase the effort to use federal sex discrimination law to remedy discrimination based on gender non-conformity and gender identity. A historic meeting was held, at NGLTF's request, at the Department of Justice (DOJ) in early spring 1999. Lawyers from Department of justice (DOJ), the Department of Education, and the Equal Employment Opportunity Commission met with representatives from gay legal and policy groups [FN28] and from GenderPAC. The goal of the meeting was to discuss the type of litigation that could be brought by the federal government under Title VII of the Civil Rights Act of 1964, and under Title IX of the Education Amendments of 1972, to protect gender non-conforming individuals. The conversation ranged from high theory to practical suggestions.

Follow-up activities to the DOJ meeting, as well as additional efforts on the transgender front, were carried out by Lisa Mottet, a first-year Georgetown Law Center student who volunteered with NGLTF during spring 1999. [FN29] Lisa worked with Dana Priesing from GenderPAC to develop a questionnaire that would provide information about the type of gender-related discrimination that occurs in today's workplaces and businesses. (The questionnaire and letter appear in Appendix E.) Lisa and I also worked (sporadically, and only somewhat successfully) with the Department of Education to help shape their guidance on sexual harassment in the schools. Our goal was to have the guidance deal more expansively with the range of gender-based harassment that occurs in the schools, including harassment based on gender non-conformity. Our official comments on the guidance, which we submitted in December 2000, appear in Appendix F.

During this same time period, Shannon Minter, Jennifer Levi, Paisley Currah and other transgender activists were creating documents, petitions, and briefs to advance the view that discrimination on the basis of transgender status and expression was both illegal under existing sex discrimination law and should be explicitly outlawed in

legislation. The next part of this essay deals with the outcome of some of those efforts--and what we can learn from them.

What's Next?

The part of the symposium for which I have written this essay is entitled "Choosing Strategies and Issues for Advancement." Taking that title seriously, I want to ask two questions. First, is it time to re-shape our legislative and litigation agendas with regard to sexual orientation so that our arguments for equality are based more explicitly on gender equality? Second, is it time for members of the gay community to rethink their opposition to including transgender status in sexual orientation bills, given that both sexual orientation and transgender status could equally be included under sex discrimination laws? The second question is directly pointed at someone like me, as I was eight years ago when I wrote the memo that appears in Appendix A.

Particularly appropriate, in my mind, is to ask these questions in the context of the catalyst for this symposium. You are honoring 20 years of Art Leonard's remarkable work in publishing Lesbian/Gay Law Notes. That publication has been key in ensuring that those of us who work to advance lesbian and gay equality are kept updated on recent litigation in the area. And my views on the possible need to reintegrate a focus on gender in our efforts for gay equality, and to rethink opposition to including transgender status in sexual orientation bills, stem directly from some of the recent cases that have been highlighted in Lesbian/Gay Law Notes.

A word of qualification first. I do not intend, in this brief essay, to systematically review all cases in which plaintiffs have argued that Title VII prohibits discrimination on the basis of transgender status or sexual orientation. Such reviews have been done quite well elsewhere. [FN30] Nor do I purport to analyze the strengths and weaknesses of recent cases in which Title VII, and other sex discrimination laws, have been revitalized in this regard. Rather, my goal is simply to describe what is occurring. The fact is that courts are increasingly interpreting sex discrimination laws to apply to cases of gender non-conformity and transgender status. Moreover, the reasoning in these cases can equally help gay people who are discriminated against because of their gender non-conformity. My point for this symposium is simply that we should sit up, take notice of that fact, and figure out how to become part of the struggle.

Let me first recap a brief history of early cases in this area. The reasoning in those cases was not particularly complex or sophisticated. In fact, the primary reason given for why Title VII [FN31] did not prohibit discrimination against transgender individuals, or gay men and lesbians, was remarkably simple. Courts simply could not imagine that a statutory prohibition against discrimination "on the basis of sex" could encompass an adverse action taken against an individual because that individual loved someone of the same sex. It was equally impossible for courts to imagine that this prohibition encompassed adverse action taken against an individual because that individual identified as a sex different from the one he or she had been assigned at

birth. Why? Because, according to these courts, Congress never intended to extend non-discrimination protection to such circumstances, and a court's job is to carry out Congressional intent. [FN32]

There were some dissenting voices, even in those early years. For example, neither Judge Goodwin in 1977 on the Fifth Circuit, [FN33] nor Judge Grady in 1983 in federal district court, [FN34] believed that when Congress passed Title VII, it did so to protect transsexuals. But both judges were more concerned with what the statute actually meant, than with what Congress intended it to mean. [FN35] From Judge Goodwin's perspective, a person who changed his or her sex (or was in the process of doing so) was clearly encompassed in a statute that prohibited discrimination "because of sex." [FN36] From Judge Grady's perspective, the trial he presided over provided him with a fascinating experience in learning that the word "sex" did not necessarily have a self-evident meaning. [FN37] Based on the evidence in the trial, he concluded that "sex is not a cut-and-dried matter of chromosomes," and that "'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 questions of sexual identity." [FN38]

Let's fast forward approximately twenty years. Two Supreme Court cases are creating a new momentum in sex discrimination law. One case is over ten years old; the other is of more recent vintage. Together, they are changing the approach of courts to sex discrimination and gender non-conformity.

The first case, Price Waterhouse v. Hopkins, dealt largely with a procedural question under Title VII regarding the manner in which a case should be handled when inappropriate reliance on gender is one factor in an employer's decision- making. [FN39] Indeed, law professors often still teach Price Waterhouse, solely for this principle. But Justice Brennan's opinion also addressed whether gender played "a motivating part in [the] employment decision" in the case before the Court. [FN40] The respondent, Ann Hopkins, claimed she was denied a promotion because she did not act in a sufficiently feminine manner. [FN41] Her claim was not that her employer routinely denied promotions to all women. Rather, her claim was that her employer denied her a promotion because she was not the right type of woman--that is, she was a woman who did not sufficiently conform to her employer's expectations of how a "real woman" should act or look.

Justice Brennan's opinion noted that "[i]n the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender." [FN42] Moreover, Justice Brennan noted that the "parties do not overtly dispute [this] proposition." Nevertheless, lawyers for Price Waterhouse put the term "sex stereotyping" in quotation marks throughout their brief to the Court. This provoked a somewhat stinging rebuke from the Court:

> [T]he placement by Price Waterhouse of "sex stereotyping" in quotation marks throughout its brief seems to us an insinuation either that such stereotyping was

> not present in this case or that it lacks legal relevance. We reject both possibilities. As to the existence of sex stereotyping in this case, we are not inclined to quarrel with the District Court's conclusion . . . . As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they match the stereotype associated with their group. . . [FN43]

The Court's opinion in Price Waterhouse manifested a broader view of what "because of sex" can mean than had been apparent in previous cases. But there is still a distance between acknowledging that an employer violates Title VII when he refuses to promote a woman because she is not "feminine enough," and recognizing that an employer similarly violates Title VII when he refuses to promote a woman because she looks like a man--or perhaps, because she lived as a man for a period of time. It is not that this is a particularly significant leap in logic. But the leap does represent a more significant distance from what a court might reasonably conclude Congress had in mind when it enacted Title VII. [FN44]

The Supreme Court's opinion in Oncale v. Sundowner, provides the second step necessary to complete the analysis. In that case, Justice Scalia pointedly noted that even if the words of Title VII compel a result Congress has not expressly contemplated, "it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." [FN45] Oncale dealt with amale employee who alleged sexual harassment by his male supervisors and co-workers. The Court had already held that Title VII's prohibition of discrimination "because of . . . sex" protects men as well as women, [FN46] and in Oncale, the Court clarified that nothing in Title VII barred a claim merely because the plaintiff and defendant were of the same sex. [FN47]

Justice Scalia pointed out that lower courts had easily applied that principle where an employee claimed to have been passed over for promotion. However, in the context of "hostile environment" sexual harassment claims, Justice Scalia observed, "the state and federal courts have taken a bewildering variety of stances." [FN48] Some of those bewildering results could be explained by the various courts' desire to reflect original Congressional intent. Justice Scalia, however, was not bothered by that small point. As he explained:

> As some courts have observed, male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed. Title VII prohibits "discrimination because of . . .sex" in the "terms" or "conditions" of employment. Our holding that this includes sexual harassment must extend to sexual harassment of any kind that meets the statutory requirements. [FN49]

The question then becomes, of course, what type of action meets the statutory

requirement that it be taken on the basis of "sex?" Here is where Price Waterhouse and Oncale converge. Courts are increasingly acknowledging that adverse action taken against an individual because that individual does not conform to societal expectations of how a "real man" or "real woman" should look or act are actions taken "because of sex." And such an understanding is no longer precluded simply because Congress had not contemplated such a result when it enacted Title VII in 1964.

For example, in Schwenk v. Hartford, a transgender person was sexually harassed and assaulted by a prison guard and brought suit under the Gender Motivated Violence Act (GMVA). [FN50] The defense argued that the GMVA was parallel to Title VII, and just as Title VII did not protect transgender people (as the Ninth Circuit had held in Holloway in 1977), neither did the GMVA.

The defense won part of the argument, but not quite as anticipated. The Ninth Circuit agreed that the GMVA and Title VII should be understood and interpreted in concert. But, according to the Ninth Circuit, "the initial judicial approach taken in cases such as Holloway has been overruled by the logic and language of Price Waterhouse." [FN51] That is, under Price Waterhouse, Title VII bars discrimination based on the fact that a woman "fail [s] 'to act like a woman'--that is, to conform to socially-constructed gender expectations." [FN52] What matters, as the court explained, "is that in the mind of the perpetrator the discrimination is related to the sex of the victim: here, for example, the perpetrator's actions stem from the fact that he believed that the victim was a man who 'failed to act like' one." [FN53] "The GMVA does parallel Title VII," the panel explained, but "discrimination because one fails to act in the way expected of a man or a woman is forbidden under Title VII." [FN54]

Schwenk is not an isolated occurrence. Courts and human rights commissions are beginning to understand the intuitive point that "because of sex" includes "because of expectations about sex." For example, in Rosa v. Park West Bank & Trust Co., the plaintiff, a biological man who dresses and lives as a woman, requested a loan application from a bank employee. As Jennifer Levi, Rosa's lawyer, describes the incident that occurred: "Rosa gave the loan officer three pieces of identification containing her photograph. In one photograph Rosa appeared traditionally masculine, in one she appeared traditionally feminine, and in one she appeared gender ambiguous. The loan office responded with disgust and would not help her until she 'went home and changed' to look more like the identification card in which she appeared traditionally masculine." [FN55]

Rosa brought suit under the federal Equal Credit Opportunity Act and a state public accommodations law, both prohibiting discrimination based on sex. The district court granted the bank's motion to dismiss, in a cursory page and a half opinion, with the bare conclusion that "the issue in this case is not [Rosa's] sex, but rather how he chose to dress when applying for a loan." [FN56] The First Circuit reversed the motion to dismiss, concluding it could not say "that the plaintiff has no viable theory of sex discrimination consistent with the facts alleged." For example, the court observed, it is reasonable to infer that the loan officer told Rosa to go home and change clothes

"because she thought that Rosa's attire did not accord with his male gender: in other words, that Rosa did not receive the loan application because he was a man, whereas a similarly situated ***647** woman would have received the loan application." If so, the court concluded, that would state a claim for discrimination on the basis of sex. [FN57]

In Doe v. Yunits, a fifteen year old student, Pat Doe, sought an injunction to prohibit her school from requiring that she not dress in girls' clothes or accessories. [FN58] Doe was born biologically male, but has a female gender identity. A Massachusetts Superior Court granted the injunction, finding that Doe had a likelihood of succeeding on the merits of her claim that her right to attend school free of sex discrimination had been violated. [FN59] The school argued that its rule was gender neutral, because it would equally discipline a female student for wearing distracting items of men's clothing, such as a fake beard. But the court's response was that the school had not framed the issue correctly. As the court explained: "Since plaintiff identifies with the female gender, the right question is whether a female student would be disciplined for wearing items of clothes plaintiff chooses to wear. If the answer to that question is no, plaintiff is being discriminated against on the basis of her sex, which is biologically male." [FN60]

And finally, in November 2000, the Connecticut Commission on Human Rights and Opportunities issued a declaratory ruling that discrimination against an individual based on transgender status constituted discrimination based on sex under Connecticut law. [FN61] The Commission had received a petition on behalf of John/Jane Doe requesting such a declaratory ruling, and several groups intervened to support the petition. [FN62] The Commission adopted a definition of transgender people, which includes transsexuals (both pre-and post-operative), intersexed people, anyone whose self-described gender identity is other than their sexual identity at birth (regardless of whether such individuals have had hormonal treatment or surgery), and also apparently effeminate men and masculine women. [FN63] With regard to all such individuals, the reasoning of the Connecticut Commission was straightforward. As the Commission noted, quite succinctly, "more and more courts have ruled that having specific expectations that a person will manifest certain behavior based upon his or her gender is not only conceptually outmoded sexual stereotyping, but also an unlawful form of sex discrimination." [FN64]

The renewed focus by courts on using Price Waterhouse to prohibit discrimination based on gender stereotypes is something that gay men and lesbians should take note of as well. Indeed, in two recent cases, gay plaintiffs tried to make the argument on appeal that they had suffered harassment because of gender stereotyping. Both lost--but not because the courts felt their arguments lacked legal viability under Title VII. Rather, the plaintiffs lost because they had not made their argument at the trial level, and had not backed it up with sufficient evidence.

Analyzing these two cases--Higgins v. New Balance [FN65] and Simonton v. Runyon [FN66]--in light of the brief historical overview presented in this essay, is fascinating. One of the earliest cases in which a gay man sought protection under Title

VII was Smith v. Liberty Mutual Insurance Company. [FN67] In that case, Bennie Smith applied for employment in Liberty Mutual's mailroom, and was denied the job because the supervisor felt Smith was "effeminate." The defendant conceded that Smith had been rejected because the interviewer "considered Smith effeminate." Smith did not, however, apparently argue that Title VII prohibits employers from requiring men to act in a "masculine" fashion, but rather that the law "forbids an employer to reject a job applicant based on his or her affectional or sexual preference." [FN68] That argument went down to swift defeat, with the Fifth Circuit upholding the district court's summary judgment in favor of the defendant. [FN69]

The district court's analysis is particularly illuminating, however, because it captures how inconceivable it seemed to some judges that gender stereotyping could be a violation of Title VII. As the court explained:

> Plaintiff points out that defendant employed a female black applicant for the position sought by plaintiff. He thus argues that the defendant accepted an employee presumably displaying effeminate characteristics, resulting in plaintiff's having been discriminated against because he was male. The Court views the situation differently. It appears that the defendant concluded that the plaintiff, a male, displayed characteristics inappropriate to his sex, the counterpart being a female applicant displaying inappropriate masculine attributes. [FN70]

In Higgins and Simonton, the reaction of the appellate courts to the argument that the plaintiffs had suffered harassment because of gender stereotyping was light years away from the response Bennie Smith received from federal district court. The First Circuit noted that the combination of Price Waterhouse and Oncale made clear that "just as a woman can ground an action on a claim that men discriminated against her because she did not meet stereotyped expectations of femininity, . . . a man can ground a claim on evidence that other men discriminated against him because he did not meet stereotypes expectations of masculinity." [FN71] And the Second Circuit concluded that a plaintiff could legitimately argue that harassment based on "failure to conform to gender norms, regardless of [the plaintiff's] sexual orientation," states a claim under Title VII. As the court explained: "This would not bootstrap protection for sexual orientation into Title VII because not all homosexual men are stereotypically feminine, and not all heterosexual men are stereotypically masculine. But it would plainly afford relief for discrimination based on sexual stereotype." [FN72]

In both Higgins and Simonton, the plaintiffs were not arguing that all gay people are covered under Title VII, but rather only those that experienced discrimination based on their gender non-conformity. Indeed, covering all gay people under Title VII might be, as the 2nd Circuit explained, inappropriately "bootstrap[ping] protection for sexual orientation" into Title VII.

But the Second Circuit's concern with bootstrapping sexual orientation protection into Title VII is not relevant if one is comfortable with a strict textualist approach to Title VII, as manifested in Oncale, or if one is able to divine a more general purpose to sex

discrimination law beyond that of advancing economic opportunity for women. Discrimination based on gender stereotyping does not exhaust the meaning of discrimination "because of sex." As a textual matter, it should be relatively easy to ground protection for all gay people (not just gender non-conforming gay people) in sex discrimination laws. That is, if a woman who is attracted to and engages in sexual activity with a man is permitted to remain on a job, but a woman who is attracted to and engages in sexual activity with a woman is fired from a job, what is that other than discrimination because of sex? Of course, covering gay people is not what the Congress that enacted Title VII specifically had in mind in 1964. But how is the act of discrimination not, from a simple textual matter, discrimination "because of sex"? [FN73]

Although most lawyers have not vigorously pursued sex discrimination claims for their gay clients, ever since such claims were brusquely rejected by courts in the 1970s (based on congressional intent), [FN74] the argument has been enjoying a bit of a recent renaissance. For example, both the Hawaii Supreme Court and the Court of Appeals of Oregon have used sex discrimination law to ground their analyses of, respectively, the reservation of marriage for opposite-sex couples, and the denial of benefits to same-sex domestic partners. [FN75]

A more simple, textual analysis can also apply to transsexuals who choose to change their sex. As other commentators have observed, if an employer fires an individual because she converts from Christianity to Judaism, one presumes that would be considered discrimination "because of religion." [FN76] That is, discrimination because of a "change in religion" is logically subsumed under the term "because of religion." Thus, an employer should not allowed to escape liability by arguing he has no problem with hiring people who are either Christian or Jewish, but simply he has a moral problem with hiring people who have converted from one religion to another. Similarly, if discrimination occurs because someone has announced a change of his or her sex from the one assigned at birth (either through surgery, hormones, or simply by a statement of identity), that should constitute discrimination because of sex.

If these textualist approaches were adopted, the remaining individuals who would then benefit from a gender stereotyping analysis under Title VII would be those individuals, gay or straight, who identify with the sex assigned to them at birth, but who manifest characteristics normally associated with the opposite sex, or those individuals who resist identification with any particular gender. Such individuals contest gender lines and gender stereotypes. Hence, if such individuals experience discrimination on such bases, that discrimination should appropriately be viewed as "because of sex" based on sexual stereotypes.

So, where does this new line of cases leave us with regard to the questions I posed in the beginning of this part of the essay? Should gay litigators ground their claims more vigorously on sex discrimination laws? Should gay political groups seeking enactment of ENDA argue that gay people are already covered under sex discrimination laws, but that a law such as ENDA is still important to ensure that courts consistently apply such protection? And what does all of this mean with regard to the political

controversy that involved me in this issue in the first place: the exclusion of transgender status from ENDA?

I do not purport to have definitive answers to these questions. But I do have some thoughts that have been triggered by my review of this recent line of caselaw.

First, there is no doubt in my mind that the positive judicial opinions we have begun to see regarding transgender people (and I use the term here in its broadest sense, to include transsexuals, intersex people, and effeminate men and masculine women) [FN77] have been possible solely because of attitudinal changes in society. This is a basic, common-sense observation that has been true of every stigmatized, minority group. As members of the general public begin to better know people who are (fill in the blank) Jewish, African- American, gay, or transgender, their view of such individuals as less than human or as immoral begins to waver. Sometimes, the public begins to know such individuals solely through a television show, a movie, or a news article. [FN78] But ultimately, personal contact with a member of a stigmatized group is the best mechanism for changing people's hearts and minds about the group. Thus, I strongly believe that anyone who cares about gender equality must support enhanced visibility of transgender people and increased education about the lives and realities of such individuals.

Second, I believe those who litigate on behalf of gay rights, women's rights, and/or transgender rights have an obligation to work together to enhance the judicial outcomes for all groups under sex discrimination laws. Such an effort certainly has begun, [FN79] but it seems to me these efforts can and should be redoubled. For example, the national gay rights groups should bring some cases in which claims for relief are grounded in sex discrimination law. Presumably, such claims will more likely prevail on behalf of gay clients who are gender non-conforming. But, as a true believer in incrementalism, [FN80] I see no harm in using a strategy that will initially benefit only a sub-group of gay people. Moreover, if courts begin to accept either a strict textualist approach to sex discrimination law, or a broad legal process approach, there is no reason why all gay people could not ultimately be protected under sex discrimination law. But to achieve such results, those who litigate on behalf of gay rights, women's rights, and/or transgender rights must work together. [FN81]

Third, the argument that protection for discrimination based on transgender status should not be added to local, state, or national laws because such protection already exists under sex discrimination laws (properly construed) needs to be rethought. Based on the existing case law, the same argument could be made with regard to protection for discrimination based on sexual orientation.

Obviously, when Bella Abzug introduced the first federal gay rights bill in 1974, [FN82] it did not seem likely that courts would interpret sex discrimination law to prohibit discrimination based on sexual orientation. Thus, the only avenue at the time appeared to be enactment of a new law. But even in 2001, when there is a renewed possibility that sex discrimination laws could cover many, or even all, gay people, local, state, and

national gay rights groups still believe new laws should be enacted to explicitly prohibit discrimination based on sexual orientation. Why? The reality is that it could well take a long time for all courts, and ultimately the Supreme Court, to adopt the interpretation of "because of sex" described in this essay. Thus, it makes sense, as a strategic matter, to adopt a two-track approach: argue in the courts for an interpretation of sex discrimination law that protects gay people, and at the same time, seek enactment of legislation explicitly prohibiting discrimination based on sexual orientation. Obviously, the second track will be used by some, if not many, courts to undermine the judicial claims made in the first track. [FN83] But those courts that wish to adopt a textualist reading, or a broader purposive reading, of sex discrimination law will not be hampered by the fact that Congress may have decided to protect a group in two separate laws. [FN84]

There are also educational and visibility advantages in seeking legislation that explicitly prohibits discrimination based on sexual orientation. Tom Stoddard, in the last piece he wrote before his untimely passing, eloquently describes the ways in which public debate on legislation helps change attitudes in ways that can ultimately affect societal views in more meaningful ways. [FN85] The hearings, the lobbying, and the debate on ENDA are useful not only as a means to an end; they are useful as an end in themselves.

These same considerations should apply when one considers whether transgender status should be added to a sexual orientation bill, a sex discrimination law, or a separate bill entirely. [FN86] That is, the same reasons for adopting a two-track approach for gaining protection based on sexual orientation should apply with regard to obtaining protection for transgender status. Obviously, adding transgender status to a national bill such as ENDA carries the possibility that courts will use such an addition to undermine the claim that sex discrimination law prohibits discrimination based on transgender status. But that is not substantially different than the situation that currently obtains for gay people. Certainly, transgender people should be allowed to take the same calculated risk, if they so desire. [FN87] Moreover, the advantages of pushing for explicit legislation remain as well: the visibility and educational components, and the immediate guarantee of real protection once the law is enacted. [FN88]

Finally, I would like to add a few comments regarding statutory interpretation. A strict textualist approach to statutory interpretation, advocated most effectively by Justice Scalia over the last decades, has resulted--I believe--in a salutory effect on Capitol Hill. I notice that Members of Congress and their staffs are more attuned to the need to carefully choose and understand the words of a bill (and not depend as heavily on legislative history), and I teach my students, in the Federal Legislation Clinic, to do the same.

I personally, however, continue to be a strong advocate of the legal process school of statutory interpretation. [FN89] That is, I believe the words of a statute are the most important beginning and ending places of interpretation. [FN90] I also believe, however, that words will not necessarily always have one, obvious meaning that can

naturally be discerned by a court. [FN91] In some rare cases, it will be impossible to imagine alternative meanings for a word, and of course, courts may not simply delete words from a statute. [FN92] But, in many situations, I believe courts are obliged to give meaning to words in light of the underlying purpose of the legislation in which those words are found. Depending on the situation, it may be appropriate for a court to use the "specific intent" of the enacting legislature (i.e., what the legislature specifically intended when it used particular words, if the legislature had a specific intent), the "general intent" of the enacting legislature (what general goal the legislature was seeking to achieve through passage of the legislation), or the "meta-intent" of the enacting legislature (what interpretation is most consistent with the legislature's general purpose, assuming the legislature could have known the impact of intervening judicial decisions or societal changes). [FN93]

I believe one can interpret existing sex discrimination laws to prohibit discrimination based on transgender status, sexual orientation, and gender non-conformity under a legal process theory of statutory interpretation. To do so, however, one must believe it is appropriate to interpret words in light of a general purpose of the enacting legislature, and one must divine such a purpose in sex discrimination law. This does not seem, to me, particularly difficult. One could well imagine that the general purpose of a sex discrimination law is to create a world in which the "natural order" that presumes women and men must act in certain ways (e.g., with regard to dress, sexual attraction, consistency to sex at birth) must give way to a world in which equality for all is the norm. [FN94] Indeed, the Court of Justice of the European Communities, in P. v. S. and Cornwall County Council, articulated a purpose along these lines when it held that a Council Directive prohibiting sex discrimination covered discrimination based on gender reassignment. [FN95]

But a strict textualist approach might work as well (or even better) for those seeking to achieve broad protection for gay people and transgender people. Under such an approach, the intent of the enacting Congress (or state legislature) is not as important as the words the legislature chose to use. As Judge Grady observed in his ruling in favor of Karen Ulane in 1984: "We not only got an act [Title VII] including race discrimination, which he [the Southern senator who added sex] had sought to bar, but we got sex as well. The question we are confronting here today is: What did we get when we got sex?" [FN96] From a textualist perspective, there should be no reason to believe we did not achieve protection for people who change their sex, protection for people who love someone of the same sex, and protection for people who do not meet societal expectations of sex. [FN97]

Of course, in practice, litigators and courts will probably use a mix of methodologies in arguing and deciding cases. Indeed, it should come as no surprise that advocates in litigation and legislative arenas often use whatever methodology best serves their goals. Neither conservatives nor liberals have a monopoly on this way of doing business. Nevertheless, I believe it behooves us to be aware of what methodology we are adopting and to be cognizant of the implications of that methodology.

Conclusion

It is time for gay men, lesbians, and bisexuals to start thinking seriously about using gender law to prohibit discrimination based on sexual orientation. I understand gay rights litigators might well feel apprehensive about making such claims, given the adverse reaction of courts to such claims in the 1970s and 1980s. But our trans brothers and sisters have been leaders in reinvigorating sex discrimination law to prohibit discrimination against gender non-conformity. Now it is up to us to open our eyes and figure out how we can both help advance the struggle and benefit from it. At a minimum, our work must include a concerted joint effort on both the litigation and legislative fronts. Let us do work that Art Leonard will be proud to record over the next twenty years.

[FNa1]. Professor of Law, Director, Federal Legislation Clinic, Georgetown University Law Center. I want to thank Lisa Mottet, not only for her research help and her work on trans issues generally, but also for nudging me so effectively to write this essay. The first part of this essay captures one aspect of seven intense years of working on the Employment Non-Discrimination Act (ENDA), and I wish to thank a number of people who played major roles in that effort. Nancy Buermeyer is one of the unsung heroes of the gay political movement, and of ENDA in particular, and I am grateful to have been able to work with her over the past decade. Elizabeth Birch was always supportive of my work, and she worked superbly with Daniel Zingale, the magnificent public policy director of HRC. Jessica Xavier and Sharon Stuart taught me and my research assistant Erin Leveton most of what we knew about transgender issues as of 1996; Dana Priesing and Riki Wilchins carried on the job of education and prodding. Kerry Lobel and Rebecca Isaacs of the National Gay and Lesbian Task Force helped me realize my dream of creating a legislative lawyering project at a gay rights organization, and were wonderful friends and colleagues during their tenure at NGLTF. Finally, I owe a special debt of gratitude to Shannon Minter and Jennifer Levi. As I say in the piece, it is only by knowing transgender people that one's heart and mind can truly be changed. My personal commitment to equality for transgender people, and my conceptual understanding of the issues, owe much to early conversations with Shannon, and to continuing conversations with both Shannon and Jennifer. And thank you, Anne Lewis, for supporting me through all my passions.

[FN1]. See, e.g., Employment Non-Discrimination Act of 1999, H.R.2355, 106th Cong. (1999).

[FN2]. Sexual orientation, of course, is more than about desiring "sex with" another person. In truth, it is about the desire to be intimate with, have pleasure with, and perhaps spend a lifetime with, a person of the same sex or the opposite sex. For

example, a heterosexual person is not only a person who wishes to have "sex with" a person of the opposite sex, but also presumably someone who wishes to have his or her emotional, intimate, and perhaps daily life, shared with a person of the opposite sex. There are many married, heterosexual couples who have sex quite rarely, if at all, but who still view themselves (in my view, correctly) as heterosexual. That is because they are intimate with someone of the opposite sex, and because, if they did have sex, it would be with someone of the opposite sex (hopefully, their spouse, albeit not necessarily). The same holds true for gay men and lesbians. Thus, although I say in this piece that sexual orientation refers to "whom the individual is oriented to have sex with," I mean to include in that phrase the broader aspects of intimacy and emotional connection that usually are concomitant with sexual activity.

[FN3]. See, e.g., Mark Fajer, Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men, 46 U. Miami L. Rev. 511 (1992); Samuel Marcosson, Harassment on the Basis of Sexual Orientation: A Claim of Sex Discrimination Under Title VII, 81 Geo. L.J. 1 (1992); Andrew Koppelman, Why Discrimination Against Lesbians and Gay Men is Sex Discrimination, 69 N.Y.U. L. Rev. 197 (1994); 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 (1995). See also Ruth Colker, Bi: Race, Sexual Orientation, Gender and Disability, 56 Ohio St. L.J. 1 (1995). For additional, more recent writings, see, e.g., Paisley Currah, Defining Genders: Sex and Gender Non-conformity in the Civil Rights Strategy of Sexual Minorities, 48 Hastings L.J. 1363 (1997); Robert Wintemute, Recognising New Kinds of Direct Sex Discrimination: Transsexualism, Sexual Orientation and Dress Codes, 60 Mod. L. R. 334 (1997); Theodore Schroeder, Fables of the Deconstruction: The Practical Failures of Gay and Lesbian Theory in the Realm of Employment Discrimination, 6 Am. U. J. Gender & L. 333 (1998); Jennifer Nevins, Getting Dirty: A Litigation Strategy for Challenging Sex Discrimination Law by Beginning with Transsexualism, 24 N.Y.U. Rev. L. & Soc. Change 383 (1998); Jennifer Nye, The Gender Box, 13 Berkeley Women's L.J. 226 (1998); Toni Lester, Protecting the Gender Nonconformist From the Gender Police-Why the Harassment of Gays and Other Gender Nonconformist is a Form of Sex Discrimination in Light of Supreme Court's Decision in Oncale v. Sundowner, 29 N.M. L. Rev. 89 (1999).

[FN4]. It made sense to ignore the theoretical connection between sexual orientation and sex discrimination in light of the fact that, throughout the 1970s, courts uniformly rejected the argument that sexual orientation discrimination was a form of sex discrimination. See DeSantis v. Pacific Telephone & Telegraph Co., 608 F. 2d 327 (9th Cir. 1979) (holding that discrimination based on sexual orientation is not discrimination based on sex under Title VII); Phillips v. Wisconsin Personnel Commission, 482 N.W. 2d 121 (Wisc. 1992) (holding that discrimination against same-sex partners in providing employee benefits is not sex discrimination); Baker v. Nelson, 191 N.W. 2d 185 (Minn. 1971) (holding that denying same-sex couples the right to marry is not sex

discrimination under the Constitution), appeal dismissed for want of substantial federal question, 409 U.S. 810 (1972). However, the argument that sexual orientation discrimination is sex discrimination has been accepted in more recent decisions. See infra note 73. The question this essay deals with is whether changes in judicial trends, and changes in society's view of gender, make it worthwhile for us to reconsider our legislative and litigation strategies.

[FN5]. Employment Non-Discrimination Act of 1996, S. 2056, 104th Cong. (1996); Employment Non-Discrimination Act, of 1995, H.R. 1863, 104th Cong. (1995); Employment Non-Discrimination Act of 1994, H.R.4636, 103rd Cong. (1994).

[FN6]. See Chai R. Feldblum, The Federal Gay Civil Rights Bill: From Bella to ENDA, in Creating Change: Sexuality, Public Policy, and Civil Rights 149 (John D'Emilio et al. eds., 2000) [hereinafter Creating Change]. A comprehensive description of the evolution of ENDA under the auspices of the Leadership Conference on Civil Rights drafting committee may be found in that article.

[FN7]. Employment Non-Discrimination Act, S. 2238, 103rd Cong. (1994). The definition was later changed to "homosexuality, heterosexuality, and bisexuality, whether such orientation is real or perceived." See Employment Non-Discrimination Act of 1995, H.R. 1863, 104th Cong. (1995).

[FN8]. Drafting a good bill is about combining law and politics. See Feldblum, Five Circles of Effective Advocacy, and The Concept of Legislative Lawyering, available at http://www.law.georgetown.edu/clinics/flc/five_ circles.html.

[FN9]. Of course, if a plaintiff could prove that an employer had used marital status as a pretext for discriminating on the basis of sexual orientation, the employer would be liable under ENDA.

[FN10]. This political judgment was reinforced when, many years later, Rebecca Isaacs from the National Gay and Lesbian Task Force (NGLTF) and I asked the lead Senate sponsors of ENDA to add coverage of transgender individuals to ENDA. See infra note 28.

[FN11]. The Supreme Court, in 1989, had laid the groundwork for using federal sex discrimination law to remedy discrimination based on gender non- conformity. See Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). At the time of our drafting sessions in 1993, however, no court had considered whether the reasoning of Price Waterhouse

would extend coverage to transsexuals under Title VII. Federal courts prior to Price Waterhouse had determined that transsexuals were not protected by Title VII. See, e.g., Ulane v. Eastern Airlines, 742 F. 2d 1081 (7th Cir. 1984); Sommers v. Budget Marketing, 667 F. 2d 748 (8th Cir. 1982); Holloway v. Arthur Anderson Co., 566 F. 2d 659 (9th Cir. 1977).

[FN12]. For example, people with disabilities first received significant anti-discrimination protection in sections 501-504 of the Rehabilitation Act of 1973. See Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (1973). These federal provisions covered only the federal government, federal contractors, and programs that received federal financial assistance. Fifteen years later, people with disabilities received protection against discrimination in the sale and rental of private housing. See Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619 (1988). Finally, two years later, people with disabilities received more expansive protection in the Americans with Disabilities Act. See Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (1990).

[FN13]. See Feldblum, supra note 7, at 179-180.

[FN14]. See, e.g., Phyllis Randolph Frye, Facing Discrimination, Organizing for Freedom: The Transgender Community, in Creating Change, supra note 7, at 451.

[FN15]. In my view, an employer who fired a lesbian for being "too male" would either be found to be using the argument that the woman was "too male" as simply a pretext for discrimination based on sexual orientation (and hence would be liable under ENDA), or would be found to be discriminating based on gender stereotypes (and hence would be liable under Title VII).

[FN16]. Despite clear statements by HRC staff that the organization was not changing its position on ENDA, at least some participants missed that message. For example, Phyllis Frye recounts the meeting as follows: "It was a long and anger-filled meeting. HRC agreed to have Jessica Xavier and Sharon Stuart work with Chai Feldblum on drafting a transgender-inclusive ENDA." See Frye, supra note 15, at 464. Frye gives no explanation as to why HRC would suddenly change its position and support a "transgender-inclusive ENDA." Nevertheless, Frye goes on to recount that "in November of 1996, the next large transgender community meeting with HRC took place. ... The thrust of the meeting was to reposition old stances. HRC was not going to put us into ENDA. We, on the other hand, were going to settle for nothing less." Id. at 465. In fact, HRC never changed its position between 1995 and 1996. The organization was willing to devote support and resources to the transgender community, and it was willing to withhold opposition if an effort to amend ENDA to include gender

identity was made. It was never, however, willing to recommend to the civil rights community, or to ENDA's Congressional sponsors, that ENDA should include gender identity. Id.

[FN17]. GenderPAC's mission is described as follows: "The Gender Public Advocacy Coalition (GenderPAC) is a not-for-profit organization, composed of individuals and groups, and dedicated to a broad-based, inclusive national movement for 'gender, affectional, and racial equality." ' See www.gpac.org.

[FN18]. There are also a few of us who attend on an invitation basis.

[FN19]. As background for the meeting, Dana Priesing from GenderPAC prepared a memo setting forth a summary of Title VII caselaw with regard to gender expression and identity, as it existed at that point. Memorandum from Dana Priesing, Gender Expression and Employment Discrimination Under Title VII (1997) (on file with author).

[FN20]. In the memo to the roundtable, I had written: "In addition, there are some interesting conceptual questions around defining sexual orientation as including a particular gender projection. Shannon thinks a solid theoretical case can be made for that; Chai is more uncertain about making that argument." Memorandum from Chai R. Feldblum & Shannon Minter, Title VII, ENDA, and Gender Expression (1997) (Appendix C).

[FN21]. As a femme, I think it was hard for me to conceptualize my femininity as being part of my sexual orientation. For that reason, I also resisted characterizing a lesbian's butchness as being part of her sexual orientation. In my mind, one's masculine and feminine characteristics were simply irrelevant to the issue of one's sexual orientation--that is, irrelevant to the question of the gender of the person one seeks to have sex with. But, interestingly enough, my resistance to conceptualizing femininity as part of sexual orientation may well have been related to the fact that society does not view lesbianism and femininity as compatible. By contrast, a majority of the public does presume that masculine features and expression are co-extensive with lesbianism. Hence, a judge or a jury would probably more easily accept that a lesbian's butchness is part of her sexual orientation. Yet, the reality is that my femininity is an aspect of my sexual orientation: one of the reasons I like to "look like a woman" is my intuition that that will make me more attractive to butch lesbians. I think that would be harder for a judge or jury to understand and accept.

[FN22]. See Feldblum & Minter, supra note 21, at 5.

[FN23]. This is what I call the "Five Circles Theory of Effective Advocacy." See Feldblum, supra note 9.

[FN24]. See Frye, supra note 14.

[FN25]. The full mission statement reads: "Founded in 1973, the National Gay and Lesbian Task Force works to eliminate prejudice, violence and injustice against gay, lesbian, bisexual and transgender people at the local, state and national level. As part of a broader social justice movement for freedom, justice and equality, NGLTF is creating a world that respects and celebrates the diversity of human expression and identity where all people may fully participate in society." See www.ngltf.org. Interestingly enough, this change in NGLTF's mission statement did not come with an accompanying explication as to why fighting discrimination against transgender people was more consonant with the organization's previous mission than, for example, fighting discrimination against women in general.

[FN26]. Participants in the meeting included Shannon Minter from the National Center for Lesbian Rights, Liz Seaton from Free State Justice (a Maryland group), Rebecca Isaacs from the National Gay and Lesbian Task Force, Dana Priesing from GenderPAC, Nancy Buermeyer from the Human Rights Campaign, Lisa Mottet from the National Gay and Lesbian Task Force, Melinda Whiteway from the National Lesbian and Gay Law Association (via phone), Jennifer Levi from Gay & Lesbian Advocates & Defenders (via phone), and Beatrice Dohrn from Lambda Legal Defense and Education Fund (via phone).

[FN27]. I also asked those attending the meeting whether they believed NGLTF should still support ENDA, even if (as we expected) the request to add gender identity was denied. With the exception of one person (who felt she could not speak for her organization), the answer was affirmative. That approach was consistent with my strategic sense. While I was now willing to try to get gender identity added to ENDA, I did not think it made any strategic sense to withdraw support of the bill pending such an addition. I was, therefore, quite surprised when I found out several months later (through a news media report) that NGLTF had announced it would not support ENDA without transgender inclusion. Rather than leave my consultancy with the organization over that disagreement, however, I told Lobel and Isaacs that I would "agree to disagree" on that issue and that I would continue to work to pass ENDA in my private capacity as a law professor.

[FN28]. The groups included National Gay and Lesbian Task Force, Human Rights Campaign, Lambda Legal Defense and Education Fund, and ACLU Lesbian & Gay

Rights Project. I attended as a consultant to NGLTF.

[FN29]. Lisa Mottet also worked for NGLTF during summer 1999, and then worked as my research assistant from Sept. 1999 through May 2001. Lisa received a NAPIL fellowship to run a Transgender Civil Rights project at NGLTF for 2001-2003.

[FN30]. For reviews of transgender jurisprudence, see Kristine W. Holt, Reeavaluating Holloway: Title VII, Equal Protection, and the Evolution of a Transgender Jurisprudence, 70 Temple L. Rev. 283, 306 (1997); Julie Greenberg, Defining Male and Female: Intersexuality and the Collision Between Law and Biology, 41 Ariz. L. Rev. 265 (1999); Richard F. Storrow, Naming the Grotesque Body in the "Nascent Jurisprudence of Transsexualism," 4 Mich. J. Gender & L. 275 (1997). See Jon W. Davidson, Gender Neutral, L.A. Daily J., Jan. 3, 2001.

[FN31]. Almost all the cases using sex discrimination law took place in the context of employment.

[FN32]. The primary Congressional intent identified by the courts was to provide economic opportunity to women. See, e.g. Smith v. Liberty Mutual Ins. Co., 569 F. 2d 325, 327 (5thCir. 1978) ("Congress by its proscription of sex discrimination intended only to guarantee equal job opportunities for males and females."); Holloway v. Arthur Anderson Co., 566 F. 2d 659, 662 (9th Cir. 1977) (explaining that Congress intended to "remedy the economic deprivation of women as a class"). Providing protection to gay people or transgender people did not fall within this purpose. Various courts also stressed the fact that there was no positive indication in the legislative history that Congress wished to cover gay people or transgender people. See, e.g., Ulane v. Eastern Airlines, 742 F. 2d 1081, 1085 (7th Cir. 1984) ("Had Congress intended more, surely the legislative history would have at least mentioned its intended broad coverage of homosexuals, transvestites, or transsexuals ..."). Moreover, courts relied on the fact that Congress had consistently failed to pass legislation that would add protection for gay people to federal civil rights law. See, e.g., Holloway v. Arthur Anderson Co., 566 F. 2d 659, 662 (9th Cir. 1977) (noting the failure of several bills to pass which would prohibit discrimination based on "sexual preference"). Courts interpreted the failure of such bills as evidence that "sex" was to be given a narrow, traditional definition with regard to both gay people and transgender people.

[FN33]. See Holloway, 566 F. 2d 659, 664 (Goodwin, J., dissenting).

[FN34]. Judge Grady ruled in favor of Karen Ulane at the district court level. See Ulane v. Eastern Airlines, Inc., 581 F. Supp. 821 (N.D.Ill. 1983), rev'd by Ulane v. Eastern

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

[FN35]. See Holloway, 566 F. 2d at 664 (Goodwin, J., dissenting) ("While I agree with the majority in the belief that Congress probably never contemplated that Title VII would apply to transsexuals, I dissent from the decision that the statute affords such plaintiffs no benefit. .... The only issue before us is whether a transsexual whose condition has not yet become stationary can state a claim under the statute if discharged because of her undertaking to change her sex. I read from the language of the statute itself that she can.") (emphasis added); Ulane, 581 F. Supp. at 822 ("The legislative history of the statute I have just quoted is hardly a gold mine of information. ... [T]hose who have looked a little further into this matter know that this amendment introducing sex into the picture was a gambit of a Southern senator who sought thereby to scuttle the whole Civil Rights Act, and much to his amazement and no doubt undying disappointment, it did not work. We not only got an act including race discrimination, which he had sought to bar, but we got sex as well. The question we are confronting here today is: What did we get when we got sex?") (emphasis added).

[FN36]. See Holloway, 566 F. 2d at 664 (Goodwin, J., dissenting).

[FN37]. Ulane, 581 F. Supp. at 824. ("Prior to my participation in this case, I would have had no doubt that the question of sex was a very straightforward matter of whether you are male or female. That there could be any doubt about the matter had simply never occurred to me... [a]fter listening to the evidence in this case, it is clear to me there is no settled definition in the medical community as to what we mean by sex.") (quoting Grady, J.).

[FN38]. Id. at 825.

[FN39]. Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (plurality opinion).

[FN40]. Price Waterhouse, 490 U.S. at 248.

[FN41]. Hopkins' supervisor told her to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." Price Waterhouse, 490 U.S. at 234-235.

[FN42]. Id. at 248.

[FN43]. Id. at 250-251.

[FN44]. Even Justice Brennan sought to tie his result in Price Waterhouse to Congress' intent. Justice Brennan did not dispute that a principal goal of adding sex to Title VII was to provide women with better economic opportunity. Rather, he simply expanded the view of what might preclude women from achieving such opportunity: for example, employers' use of sex stereotypes often precluded women from certain jobs. Id. at 251 ("An employer who objects to aggressiveness in women but whose position require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not. Title VII lifts women out of this bind.") This is consistent with Justice Brennan's general approach to statutory interpretation, in which he viewed it as critical to determine a purpose of the enacting Congress that was consistent with his interpretation of the words Congress used. See, e.g., United Steelworkers of America, AFL- CIO-CLC v. Weber, 443 U.S. 193 (1979) [hereinafter Weber]. For a contrasting, albeit not entirely opposing approach to statutory interpretation, see Justice Blackmun's concurrence in Weber. Justice Blackmun was willing to concede that the enactingCongress may have had one purpose in mind, but in the interest of creating a coherent body of interpretation, he believed the legislature was willing to have the courts modify that purpose. See Weber, 443 U.S. 193 at 209 (Blackmun, J., concurring).

[FN45]. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79-80 (1998). I do not quote this sentence lightly. It was penned by Justice Scalia, author of the Oncale opinion, and is clearly intended as an endorsement of a strict textualist approach to statutory interpretation, rather than a "legal process" approach to such interpretation. See, e.g. Henry M. Hart, Jr. & Albert M. Sacks, The Legal Process: Basic Problems in the Making and Application of Law (William Eskridge, Jr. & Philip Frickey eds., 1994). My personal approach to statutory interpretation hews more closely to a legal process approach. Nonetheless, one need not read too much into this sentence. Oncale was a unanimous decision, and hence all nine Justices clearly felt the language used in the opinion could be read as consistent with the particular approach to statutory interpretation held by each Justice. See infra for further comments on statutory interpretation.

[FN46]. Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669 (1983).

[FN47]. Oncale, 523 U.S. at 79.

[FN48]. Id.

[FN49]. Id. at 79-80.

[FN50]. Schwenk v. Hartford, 204 F. 3d 1187, 1193-94 (9thCir. 2000).

[FN51]. Id. at 1201.

[FN52]. Id. at 1201-02.

[FN53]. Id. at 1202.

[FN54]. Id.

[FN55]. See Jennifer Levi, Paving the Road: A Charles Hamilton Houston Approach to Securing Trans Rights, 7 Wm. & Mary J. Women & L. 5, 33 (2000).

[FN56]. Rosa v. Park West Bank & Trust Co., Civ. Action No. 99-30085-FHF, slip op. at 1 (D. Mass. Oct. 16, 1998), rev'd 214 F. 3d 213 (1st Cir. 2000). The district court and the First Circuit referred to Rosa with the masculine pronoun. I prefer to use the pronoun preferred by the individual, which is feminine. See Levi, supra note 56.

[FN57]. Rosa, 214 F. 3d at 214.

[FN58]. Doe v. Yunits et. al., No. 00-1060-A, slip op. (Mass. Super. Ct. Oct. 11, 2000), aff'd sub nom, Doe v. Brockton Sch. Comm. No. 2000-J-638, slip op. (Mass. App. Ct. Nov. 30, 2000). Jennifer Levi served as Doe's attorney.

[FN59]. Id., slip op. at 10-12. The court also concluded that Doe was likely to succeed on her claim that her freedom of expression under the Massachusetts constitution had been unconstitutionally abridged. Id.at 5- 9.

[FN60]. Id. at 11. Doe had specifically been prohibited from wearing padded bras, skirts or dresses, or wigs. Id. at 3. The court also pointed out that cases which failed to cover discrimination against transsexuals under sex discrimination law "have been criticized and distinguished under both Title VII and the First and Fourteenth Amendments." Id. at

11-12.

[FN61]. See Declaratory Ruling on Behalf of John/Jane Doe (Conn. Comm'n Human Rights & Opportunities Nov. 9, 2000), available at http://www.state.ct.us/chro/metapages/HearingOffice/HODecisions/declaratoryrulings/DRDoe.htm [hereinafter CT Declaratory Ruling].

[FN62]. The following organizations intervened, with a document principally authored by Jennifer Levi: Connecticut Coalition for Lesbian, Gay, Bisexual and Transgender Civil Rights; Connecticut Women's Education and Legal Fund; Gay & Lesbian Advocates & Defenders; Human Rights Campaign; National Center for Lesbian Rights; Female-to-Male International and GenderPAC. Levi also made an appearance before the Commission. The Connecticut Civil Liberties Union Foundation intervened, with a separate document.

[FN63]. See CT Declaratory Ruling, supra note 62 at 23-27.

[FN64]. See CT Declaratory Ruling, supra note 62 at 10. For additional cases along these lines, see Maffei v. Kolaeton Industry, Inc., 626 N.Y.S. 2d 391 (Sup. Ct. 1995) (interpreting sex in New York's anti-discrimination law to include transsexuals); Rentos v. OCE-Office Sys., No. 95 Civ. 7908LAP, 1996 WL 737215 (S.D.N.Y. Dec. 24, 1996).

[FN65]. Higgins v. New Balance Athletic Shoe, Inc., 194 F. 3d 252 (1st Cir. 1999).

[FN66]. Simonton v. Runyon, 2000 U.S. App. LEXIS 21139, *11 (2nd Cir. 2000).

[FN67]. Smith v. Liberty Mutual Ins. Co., 569 F. 2d 325 (5thCir. 1978).

[FN68]. Id. at 325.

[FN69]. As usual, the appellate court's reasoning was that "Congress by its proscription of sex discrimination intended only to guarantee equal job opportunities for males and females," and the prohibition on sexual discrimination could not be "extended to situations of questionable application without stronger Congressional mandate." Id. at 326-27.

[FN70]. Smith v. Liberty Mutual Ins. Co., 395 F. Supp. 1098, 1099 n.2, aff'd by Smith v. Liberty Mutual Ins. Co., 569 F. 2d 325 (5thCir. 1978).

[FN71]. Higgins, 194 F. 2d at 261.

[FN72]. Simonton v. Runyon, 2000 U.S. App. LEXIS 21139, at *13 (2nd Cir. 2000). Not all recent cases, however, have been equally open to this argument. See Hammer v. St. Vincent Hospital and Health Care Center, 224 F. 3d 701, 704 (7th Cir. 2000) (relying on Ulane to construe sex to cover biological males and females only).

[FN73]. Robert Wintemute makes this point in a very neat and elegant manner in his piece, Recognising New Kinds of Direct Sex Discrimination: Transsexualism, Sexual Orientation and Dress Codes, 60 Mod. L. Rev. 334, 344- 352 (1997). As Wintemute explains, "[t]o analyse a case of discrimination against a gay, lesbian, or bisexual individual... as based on the sex of the individual ... the comparison and comparator must be changed. Instead of comparing the treatment of sexual orientations ... one compares the treatment of persons of both sexes who are attracted to (or engage in sexual activity with) persons of a given sex .... Thus, a gay or bisexual man dismissed from the armed forces compares himself with a heterosexual woman who is also attracted to men and is permitted to serve, and a lesbian or bisexual woman compares herself with a heterosexual man who is also attracted to women and is permitted to serve. In each case, 'but for' the sex of the individual, they would have been treated differently. Being attracted to men is acceptable in a woman but not in a man, and being attracted to women is acceptable in a man but not a woman." Id. at 345. Wintemute also points out how the analysis in Loving v. Virginia, 388 U.S. 1 (1967), similarly explains how a prohibition of different-race marriages (which applied equally to both races) was still race discrimination. Id. at 345, n. 45.

[FN74]. See generally, supra note 5.

[FN75]. See Baehr v. Lewin, 852 P. 2d 44, 60 (Haw. 1993) ("Rudimentary principles of statutory construction render manifest the fact that, by its plain language, HRS ß 572-1 (Hawaii's marriage statute) restricts the marital relation to a male and a female .... Accordingly, on its face and (as Lewin admits) as applied, HRS ß 572-1 denies same-sex couples access to the marital status and its concomitant rights and benefits. It is the state's regulation of access to the status of married persons, on the basis of the applicants' sex, that gives rise to the question whether the applicant couples have been denied the equal protection of the laws ...") (emphasis added); Tanner v. Oregon Health Sciences University, 971 P. 2d 435, 442 (Or. App. 1998) ("The statute prohibits discrimination on the basis of the 'sex ... of any other person with whom an individual associates.' Plaintiffs allege that [the defendant] discriminated against them by denying

them the option of providing their domestic partners insurance benefits because their domestic partners are of the same sex. Discrimination of that sort hinges on the sex of the individual with whom plaintiffs associate. It plainly falls within the wording of the statute."). Title VII has been interpreted to prohibit discrimination based on the race of the person with whom an employee or applicant associates. See also Ray v. Antioch School Dist., 107 F. Supp. 2d 1165, 1170 (N.D. Cal. 2000) (court rules it is reasonable to infer that a student targeted for harassment "due to his perceived sexual status as a homosexual" was being attacked because of a "perceived belief about Plaintiff's sexuality, i.e., that Plaintiff was harassed on the basis of sex.").

[FN76]. See Kristine W. Holt, Reeavaluating Holloway: Title VII, Equal Protection, and the Evolution of a Transgender Jurisprudence, 70 Temp. L. Rev. 283, 306 (1997); Richard F. Storrow, Naming the Grotesque Body in the "Nascent Jurisprudence of Transsexualism," 4 Mich. J. Gender & L. 275, 334 (1997); Jennifer Levi & Maureen M. Murphy, Public Policy Analysis and Position Statement of the Proposed Intervenors for Declaratory Ruling on Behalf of John/Jane Doe (March 8, 2000); see Paisley Currah & Shannon Minter, Unprincipled Exclusions: The Struggle to Achieve Judicial and Legislative Equality for Transgender People, 7 Wm. & Mary J. Women & L. 37, 41-50 (2000).

[FN77]. See generally Currah & Minter supra note 79; Levi, supra note 56, at 17-18.

[FN78]. For example, I think it is hard to underestimate the effect the movie Boys Don't Cry has had on increasing the public's understanding of transgender people. See also Deb Price, Transgendered Have Lessons for Society, Detroit News, June 26, 2000, at 9; Eric Bailey, Teacher Quits in Settlement of SexChange Furor, L.A. Times, Nov. 6, 1999, at A3.

[FN79]. For example, the GayLegal Roundtable has discussed gender non- conformity issues at several sessions following the one that Shannon and I requested, and various gay and women's groups have signed onto amicus briefs dealing with transgender issues. For example, in Hernandez-Montiel, NCLR, Lambda, and the ACLU of Southern California jointly submitted an amicus brief arguing that being feminine was an intrinsic part of gay identity for some gay men. In a well-crafted opinion, the Ninth Circuit agreed. See Hernandez- Montiel v. Immigration and Naturalization Serv., 225 F.3d 1084, 1094 (9th Cir. 2000) ("Gay men with female sexual identities outwardly manifest their identities through characteristics traditionally associated with women, such as feminine dress, long hair and fingernails .... Their female sexual identities unite this group of gay men, and their sexual identities are so fundamental to their human identities that they should not be required to change them."). See also intervenor groups on the Connecticut petition, supra note 63.

[FN80]. I have also sometimes described this quality of mine as being a "pragmatist with a passion."

[FN81]. I also believe it is useful to have a group, such as GenderPAC, which does not identify with any one constituency (e.g., women, men, gay men, lesbians, bisexuals, or transgender people), but instead advocates for gender equality across the board for all such constituencies. Such a group, however, cannot substitute for a national group devoted primarily to the rights of transgender people. Such litigation and political groups currently exist for women, see, e.g., National Organization for Women Legal Defense and Education Fund, National Organization for Women, National Women's Law Center, and National Partnership for Women and Families. Such groups also exist for gay men, lesbians, and bisexuals, see, e.g., Human Rights Campaign, Lambda Legal Defense and Education Fund, ACLU Lesbian and Gay Rights Project. (While neither the ACLU project nor LAMBDA include transgender people in their mission, in practice both organizations have brought litigation on behalf of transgender and gender non-conforming plaintiffs.) Finally, there are also groups who have gay men, lesbians, bisexuals, and transgender people as their explicit constituencies. See, e.g., National Gay and Lesbian Task Force, Gay & Lesbian Advocates & Defenders, Parents and Friends of Lesbians and Gays, and National Center for Lesbian Rights (lesbians and transgender people). (Several months after I delivered this speech, but prior to publication of this essay, the Human Rights Campaign added "gender expression and identity" to its mission statement.) I am enough of a believer in the usefulness of identity politics, however, that I believe a vibrant, national transgender group would be a useful addition to the scene.

[FN82]. See Feldblum, supra note 7.

[FN83]. See, e.g., Simonton, 2000 U.S. App. LEXIS 21139, at *6; Holloway v. Arthur Anderson Co., 566 F. 2d 659, 662 (9th Cir. 1977) (noting the failure of several bills to pass which would prohibit discrimination based on "sexual preference").

[FN84]. For example, people with disabilities who work for employers that receive federal funds and have more than fifteen employees are protected under both Section 504 of the Rehabilitation Act and the Americans with Disabilities Act. See Currah & Minter, supra note 79, at 44-65. I do believe, given the recent trend in the case law, that supporters of ENDA should clarify that existing sex discrimination law (properly construed) already protects gay people, but that ENDA is still necessary to ensure such protection is uniformly and immediately applied.

[FN85]. See Thomas B. Stoddard, Bleeding Heart: Reflections on Using the Law to

Make Social Change, 72 N.Y.U. L. Rev. 967 (1997). See also Nan D. Hunter, Response: Lawyering for Social Justice, 72 N.Y.U. L. Rev. 1009 (1997); Chai R. Feldblum, Response: The Moral Rhetoric of Legislation, 72 N.Y.U. L. Rev. 992 (1997).

[FN86]. See generally, Currah & Minter, supra note 79. (describing pros and cons of various approaches); see generally Paisley Currah & Shannon Minter, Policy Institute of the Nat'l Gay and Lesbian Task Force & National Center for Lesbian Rights, Transgender Equality: A Handbook For Activists And Policymakers (2000), available at http://www.ngltf.org/library/index.cfm, for excellent survey of protection for transgender individuals.

[FN87]. See, e.g., Jennifer Levi, Letter to the Editor, Washington Blade, Jan. 19, 2001 (calling for a two-track approach of litigation and legislation). Obviously, the legal landscape for transgender people in 2001 is different (as this essay makes clear) than the comparable legal landscape was for gay people in 1974. Nevertheless, even had the legal landscape been comparable, I doubt gay rights groups would have foregone the introduction of a gay rights bill. However, given the greater exposure a national bill can garner, and in light of the fact that it may be useful to provide courts a window in which to accept a broader view of sex discrimination without the complication of a non-moving federal bill, it might make more sense to focus on enacting transgender inclusive legislation on the state and local level.

[FN88]. See generally, Currah & Minter, supra note 79; see also Levi, Letter to the Editor, supra note 90.

[FN89]. See Hart & Sacks, supra note 46. My view of a legal process mode of interpretation is quite broad and would probably encompass what William Eskridge terms "dynamic statutory interpretation." See William N. Eskridge, Jr., Dynamic Statutory Interpretation, 135 U. Pa. L. Rev. 1479 (1987). Thus, for example, I agreed with the approach of Justice Blackmun's concurrence in Weber, and with the results in Yellow Cab and Shine--examples of what Eskridge terms "dynamic statutory interpretation." See Weber, 443 U.S. 193 at 209 (Blackmun, J., concurring); Li v. Yellow Cab Co. of Calif., 532 P. 2d 1226 (Calif. 1975); Shine v. Shine, 802 F. 2d 583 (1st Cir. 1986). I believe, however, that it is possible to understand these results as carrying out the legitimate "meta-intent" of the enacting legislature.

[FN90]. See Chai R. Feldblum, Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It?, 21 Berkeley J. Emp. & Lab. L. 91 (2000) (acknowledging that the words I helped craft for the Americans with Disabilities Act for the definition of "disability" did not effectively coincide with the group of individuals we were intending to protect).

[FN91]. 94 For example, in one of Justice Scalia's most famous cases, MCI Telecommunications Corp. v. American Telephone and Telegraph Co., 512 U.S. 218 (1994), he pronounced that the word "modify" obviously meant "to change slightly," and could not simply to mean "to change." Id. at 225. If it meant the latter, he explained, one would always have to add an adjective (such as "significantly" or "somewhat") before the word "modify" to give it an exact meaning. The day I taught this case in my Legislation class, I told my students I was planning to modify the syllabus for the class. I then asked them what they thought I meant. The students presumed I was planning to change the case readings, but they presumed I would still be teaching Legislation and not Torts. But several students wanted to know if I was planning to change the readings "a lot" or "a little." That seemed to indicate to me that the word "modify" does not inherently mean "change a little."

[FN92]. A court may legitimately change the reading of a statute only when the plain meaning of the statute would create an absurd result. But the "absurd result" standard is a very high one. The fact that a judge believes a legislature has adopted a poor public policy should not be confused with a judicial conclusion that the statute creates an "absurd result."

[FN93]. This last approach is, as I understand it, the essence of "dynamic statutory interpretation." See Eskridge, supra note 92.

[FN94]. Thus, it is not even necessary to go to a "meta-intent" of a legislature to construe sex discrimination laws as including protection for transgender people and gay people.

[FN95]. "The principle of equal treatment 'for men and women' to which the directive refers in its title, preamble and provisions means, as Articles 2(1) and 3(1) in particular indicate, that there should be 'no discrimination whatsoever on grounds of sex.' Thus, the directive is simply the expression, in the relevant field, of the principle of equality, which is one of the fundamental principles of Community law. .... Accordingly, the scope of the directive cannot be confined simply to discrimination based on the fact that a person is of one or other sex. In view of its purpose and the nature of the rights which it seeks to safeguard, the scope of the directive is also such as to apply to discrimination arising, as in this case, from the gender reassignment of the person concerned." (emphasis added). See P. v. S. & Cornwall County, Case C-13/94, 2 C.M.L.R. 247, 263 (1996).

[FN96]. See Ulane v. Eastern Airlines, Inc., 581 F. Supp. 821. 822 (N.D.Ill. 1983), rev'd

by Ulane v. Eastern Airlines, 742 F. 2d 1081 (7th Cir. 1984).

[FN97]. See generally, Robert Wintemute, Recognising New Kinds of Direct Sex Discrimination: Transsexualism, Sexual Orientation and Dress Codes, 60 Mod. L. Rev. 334 (1997).

***661** Appendix A

Statement Of Chai Feldblum Re:

Enda And Discrimination Against Transgendered People

I am an Assistant Professor of Law at Georgetown University Law Center in Washington, D.C., where I direct a Federal Legislation Clinic and where I have taught, among other things, Sexual Orientation and the Law. I have also served as legal consultant to the Human Rights Campaign Fund (HRCF) since January 1993. In that capacity, I served as the lead lawyer, within the advocacy community, for the drafting and negotiating of the Employment Non- Discrimination Act of 1994 (ENDA 1994) and subsequently of ENDA of 1995.

I am writing this statement because there appears to be significant misunderstanding about the decision not to include within ENDA a prohibition against discrimination on the basis of gender identity. I use as the basis for this response the various flyers and internet notices posted by the Transsexual Menace, but I have also benefited greatly from a conversation I had with Phyllis Frye and other transgender activists in October 1994 at the Lavender Law conference in Portland, Oregon. Unfortunately, I now find that that conversation is used on flyers and postings to create distorted quotes on my part, but perhaps this statement will clear up those distortions.

As a starting point, I think it is excellent to have a conversation about this issue because I believe our unified goal should be the same: solid, uniform, federal legal protection against any form of discrimination that occurs because a person is gay, lesbian, heterosexual, bisexual or transgendered. Another way of saying this is: solid, uniform, federal legal protection against discrimination whether that discrimination is based on sexual orientation or on gender identity.

It is a mistake, in this context, however to focus exclusively on decisionmaking on the part of HRCF. One of the most dramatic changes in the political landscape in Washington, D.C. over the past two years has been the development of a real civil rights coalition, encompassing many groups, in support of gay rights--and specifically, in support of ENDA. The existence and nurturance of that ***662** coalition is one of the most important achievements of the past years, and it is one of the main elements that will help us to achieve significant successes in the future. We still have more difficulty in forming and holding our coalitions than do women or racial minorities, but the two-year

process in which ENDA was formed represents a sea change in coalition politics. Assuming that HRCF on its own could ever unilaterally make any decision regarding the substantive content of ENDA is a throwback to a previous era when we had no coalition partners and we were, indeed, on our own.

ENDA, as it was agreed to by the coalition, prohibits only discrimination based on sexual orientation, including perceived sexual orientation. Thus, if a transgendered person is discriminated against in employment (or in the terms or conditions of employment) because that person is gay, lesbian, bisexual or heterosexual, that employment action may be challenged under ENDA. In addition, if a transgendered person is discriminated against in employment because that person is perceived to be gay, lesbian, bisexual, or heterosexual, that employment action may be challenged under ENDA.

The gap in ENDA is the following: if a transgendered person is discriminated against because he or she is transgendered--i.e., if he or she wishes to, is in the process of, or has completed the process of changing his or her gender-- that employment action may not be challenged under ENDA. In other words, discrimination on the basis of gender identity, as opposed to discrimination on the basis of "sexual orientation," is not prohibited by ENDA.

This basic legal fact explains why some of the rhetoric from the Transsexual Menace's flyers and postings is misleading. Contrary to the implications from those statements, adverse employment actions against butch dykes and femme dykes, effeminate fairies and fag hags are all potentially covered under ENDA. The limitation is that the adverse action must be the result of that person's sexual orientation and not the result of some other factor that would be uniformly applied to all employees regardless of the person's sexual orientation.

The fact that there is no federal law that explicitly and clearly prohibits gender identity discrimination is significant and unfortunate. There is hurtful and harmful discrimination that occurs against transgendered people. Indeed, in my mind, transgendered ***663** people are often more vulnerable to discrimination than many gay people who are able to (and who choose to) "pass" as straight.

The experience faced by some transgendered people is not unlike the differential experience that butch dykes face as compared to femme dykes, or that effeminate gay men face as compared to macho gay men. A butch dyke is covered under ENDA just as much as a femme dyke is. But unless the femme dyke makes it clear (through comments, or a picture of a lover on a desk, or through whatever means) that she is a lesbian (as I do, often), the butch dyke will always be more vulnerable to discrimination as a result of her sexual orientation. This is not because the butch dyke is "less covered" under ENDA or because she is "more lesbian," but simply because she cannot pass as easily.

Transgendered people are similarly more vulnerable to discrimination and they

encounter it often. That discrimination does not necessarily occur because of their sexual orientation (although, if it does, that discrimination would be covered under ENDA), but because of their desire to change their gender identity.

One way to address this discrimination would be to expand ENDA so that discrimination on the basis of gender identity, as well as discrimination based on sexual orientation, would be prohibited. Indeed, early on in the drafting of ENDA (over two years ago), that suggestion was made. The suggestion was also made that ENDA should prohibit marital status discrimination, since such discrimination also has an adverse impact on gay people; that ENDA should cover all religious organizations; and that ENDA should require provision of domestic partner benefits.

The suggestion to include protection against gender identity discrimination only works to achieve real protection, however, if such a provision makes it through the entire Congressional process and becomes part of the final version of the law. The same fact is true for all the other suggestions made above.

The quote attributed to me about the inclusion of gender identity discrimination in ENDA "costing" advocates of the bill "twenty votes" seems to be derived from a mistaken understanding of this political reality--which I apparently failed to make sufficiently clear in my conversation with Phyllis and others last October. (The irony, of course, is that anyone who knows me knows I never count votes. My job is to research and write the substance; I leave vote-***664** counting to my very able colleagues who are lobbyists and Congressional staffers.)

Certainly, if a prohibition on gender identity discrimination were part of ENDA, various opponents would distort the practical impact of that provision and use it to whip up frenzied opposition to the bill--and that frenzy would impact adversely on ENDA. No doubt. That is true, as well, with regard to coverage of religious institutions and mandated partner benefits. But the more relevant political point is that given the current state of affairs in Congress (now and, probably, for the likely future), it is quite unlikely that such provisions would ever remain in ENDA. Thus, the final, substantive result would be that Congress would explicitly reject a provision prohibiting gender identity discrimination (or covering religious institutions or mandating benefits)--and the initial inclusion of the provision and/or the battle to retain it would still affect ENDA adversely.

Apart from this political fact, in which prohibition of gender identity discrimination faced hurdles similar to other provisions we wanted, there is an additional legal/strategic consideration to weigh if we are to "keep our eyes on the prize" of attaining real, solid protection against this form of discrimination.

As I noted above, the discrimination we are seeking to prohibit is gender identity discrimination against transgendered people, not sexual orientation discrimination against transgendered people. (The latter discrimination would be prohibited by ENDA if and when the bill became law.) But the fact is we already have an existing federal law, and numerous state laws, that prohibit "sex" discrimination by private employers. (The

federal law is Title VII of the Civil Rights Act of 1964; the state laws tend to be patterned on this federal law.) Unfortunately, the federal judges, in their "infinite wisdom," have almost uniformly rejected the argument that "gender identity" discrimination is a form of "sex" discrimination. That argument, however, seems intuitively correct to me--and one that we should pursue. Indeed, in a recent 1995 New York state case, the judge soundly rejected the reasoning of a line of federal cases that had rejected claims brought by transgendered people and concluded instead that discrimination on the basis of gender identity was indeed prohibited by the city's gender discrimination law.

The key point is that the U.S. Supreme Court has never ruled on this precise question nor have a significant number of the federal ***665** appeals courts and state courts. So, we should be doing everything we can to argue that sex discrimination does include gender identity discrimination under these existing laws. This makes sense from a purely pragmatic perspective: Title VII and state laws are laws we currently have--as compared to ENDA which is a bill we certainly assume will become law, but probably will not for at least a few years. Thus, to the extent we are able to derive protection against gender identity discrimination from existing laws, the better off we are.

The existence of Title VII and state laws, and the potential for making the argument that gender identity discrimination is covered under those laws, means the decision whether or not to include gender identity discrimination in ENDA carries significant legal/strategic implications. If ENDA had included a provision upon introduction that covered gender identity discrimination (or if ENDA were amended now to include such a provision and reintroduced), the bill would obviously be around Congress for a while before it would be considered by a Committee or by the full Senate or full House (which is when the provision could be struck). During this time period, some courts might use the fact that Congress has included this provision in ENDA as demonstrating a legislative intent that gender identity discrimination is not already part of the existing Title VII (because if it is, why would Congress bother with a new provision in a separate law?) This negative implication would run directly counter to what we should be trying to achieve in the courts through litigation under Title VII and comparable state laws--that is, arguing that such coverage already exists.

This potential scenario only gets worse if and when the gender identity provision is actually struck from ENDA. At that point, not only will such discrimination not be covered under ENDA, but the courts can then use that action as direct evidence that Congress obviously doesn't want to prohibit such discrimination. Again, this will work against any possible strategy of trying to achieve such protection from existing sex discrimination laws.

This is all to say that this issue is a lot more complicated than an assertion that "HRCF does not know how to spell i-n-c-l-u-s-i-o-n." Not only does this assertion reflect a lack of understanding of the importance and strength of today's coalition movement, it also misses the nuances of a complicated legal decision.

***666** I believe there are several efforts HRCF and the transgendered community could

and should work on together--including devising a long-term legal and political approach for achieving protection against gender identity discrimination under existing laws. The fact that the judicial trend has been to the contrary doesn't mean the trend cannot and should not be turned around. But to do so will require effective coordination with a range of groups, including women's groups. And, to do so, the Transsexual Menace and other transgender advocates will need to engage seriously in an effort to develop a strategy--rather than simply engage in HRCF-bashing.

I hope this statement can be useful in starting us towards a productive effort to achieve solid, uniform federal protection against discrimination on the basis of gender identity.

Appendix B

Potential Gender Identity Amendments for ENDA

I. Introduction

Proposed gender identity amendments to the Employment Non Discrimination Act of 1995 (ENDA) would prohibit covered employers from discriminating on the basis of actual or perceived gender identification or expression. The amendments would also include an affirmative duty for employers to provide reasonable accommodations in certain instances.

ENDA is patterned on Title VII of the Civil Rights Act, prohibiting discrimination by covered employers on the basis of race, color, religion, sex, or national origin, and the Americans with Disabilities Act (ADA) and the Rehabilitation Act of 1973, prohibiting employment discrimination based on disability. Thus, Title VII, ADA, and Rehabilitation Act have been used as the bases for the proposed amendments.

II. Proposed Gender Identity Coverage Provisions

A. Add 'or Gender dentity ' Language

A BILL To prohibit employment discrimination on the basis of sexual orientation or gender identity.

SEC 2. DISCRIMINATION PROHIBITED. A covered entity, in connection with employment or employment opportunities, shall not -

(1) subject an individual to different standards of treatment on the basis of sexual orientation or gender identity;

(2) discriminate against an individual based on the sexual orientation or gender identity of persons with whom such individual is believed to associate or to have associated;

(3) otherwise discriminate against an individual on the basis of sexual orientation or gender identity.

SEC. 4. NO DISPARATE IMPACT. The fact that an employment practice has a disparate impact, as the term 'disparate impact' is used in section 703(k) of the Civil Rights Act of 1964 (42 U.S.C. 20OOe-2(k)), on the basis of sexual orientation ***668** or gender identity does not establish a prima facie violation of this Act.

SEC. 5. QUOTAS AND PREFERENTIAL TREATMENT PROHIBITED.

(a) QUOTAS - A covered entity shall not adopt or implement a quota on the basis of sexual orientation or gender identity.

(b) PREFERENTIAL TREATMENT - A covered entity shall not give preferential treatment to an individual on the basis of sexual orientation or gender identity.

B. ADD 'REASONABLE-ACCOMMODATION' PROVISION

The new provision would require employers to provide reasonable accommodations to transgender employees and applicants with the limitation of undue hardship. Failure to provide reasonable accommodations that do not impose an undue hardship would constitute prohibited discrimination.

SEC 3. REASONABLE ACCOMMODATION.

The discrimination prohibited in section (2) includes a refusal to provide a reasonable accommodation to an otherwise qualified applicant or employee, who may require such accommodation based on the individual's gender identity, unless a covered entity can demonstrate that providing the accommodation would impose an undue hardship on the operation of the business of such entity.

C. ADD NEW DEFINITIONS

Gender identity, reasonable accommodation, otherwise qualified individual, and undue hardship would be defined.

SEC. 18. DEFINITIONS. As used in this act. . .

(12) The term "gender identity" means having or being perceived as having a self-image, expression or identity not traditionally associated with one's sex at birth.

(13) The term "reasonable accommodation" means modifications to an employer's practices and procedures, including those relating to common employee areas, dress

codes and work ***669** reassignments that enable an individual to achieve optimal levels of performance consistent with his or her gender identity.

(14) The term "otherwise qualified individual" means an individual who, with reasonable accommodation if necessary, can perform the essential functions of the employment position such person holds or desires.

(15) The term "undue hardship" has the meaning given such term in section 101(10) of the Americans with Disabilities Act of 1990 (42 U.S.C.A ss 12101 et seq.).

III. EFFECT OF THE PROPOSED LANGUAGE

A.GENDER IDENTITY

The term 'gender identity' is defined in the proposed amendments to mean having or being perceived as having a self-image, expression or identity not traditionally associated with one's sex at birth. This definition is intended to include pre-operative and post operative transsexuals, bigendered people, and cross-dressers. In addition, this definition will reinforce the protections already in ENDA for mannish women, effeminate men, and androgynous people.

Amendments addressing gender identity are necessary because Title VII has not been interpreted, although it should be, to forbid such discrimination. [FN1] Minnesota is the only state that has a law which forbids discrimination based on sexual orientation as defined as heterosexuality, homosexuality, bisexuality, and transsexuality. In addition, the cities of San Francisco and Santa Cruz California; Seattle Washington; Cedar Rapids, Iowa; and Minneapolis and St. Paul, Minnesota, have municipal ordinances that specifically protect individuals from discrimination based on their gender identity or expression. The proposed definition is derived from a definition considered in developing a similar law in Maryland that would prohibit discrimination on the basis of gender identity.

***670** Constitutionally speaking, several of the courts have rejected transsexuals as a 'suspect 'class. Thus, although the standard should be higher, any law which discriminates against transsexuals must be rationally related to a legitimate governmental purpose to pass constitutional muster under the Equal Protection and Due Process Clauses of the Fifth and Fourteenth Amendments. [FN2]

B.REASONABLE ACCOMMODATION

The definition of reasonable accommodation, otherwise qualified individual, and undue hardship in these amendments are patterned after the ADA.

1. Reasonable Accommodation Requirement A reasonable accommodation is a

modification to enable an otherwise qualified individual to perform the essential functions of the job in question. For instance, the fact that an individual is a male-to-female employee would not affect "her" ability to serve food in a restaurant. However, such individual may not be able to wear a traditional male's uniform. In such circumstance, allowing the birth-male transgender waiter to wear a female's uniform would be a required reasonable accommodation.

Exceptions to otherwise permissible grooming codes are likely to be a commonly requested reasonable accommodation. [FN3] Transgender***671** individuals often dress in accordance to a sex not traditionally associated with their birth. In other words, many people who are considered male at birth identify with the feminine gender and prefer to dress as women. Furthermore, in the year before a sex-change operation, doctors require the patient to live as a member of the desired sex.

Transgender employees will be able to dress as a member of the opposite sex, so long as they dress appropriately in accordance with the grooming code for the desired sex. For instance, if a birth-sex male transvestite wished to work as a flight attendant, while the biological male should be allowed to dress a female, she must still wear the required flight attendant's uniform. In other words, under the reasonable accommodation provision the biologically male transvestite should be entitled to wear a female's uniform, but the term 'reasonable" (which means effective) means the employee is not entitled to wear any attire of her choosing.

2. Undue Hardship Limitation The proposed amendments incorporate the ADA's balancing test for undue hardship. The ADA defines undue hardship in terms of "an action requiring significant difficulty or expense," and sets up a balancing test that requires weighing: (1) the nature of the required accommodation; (2) the overall financial resources of the business and the number of its employees; (3) the impact of the accommodation on facility operations; and (4) the type of operation. [FN4]

The undue hardship limitation applies to both the financial and operational components of the employer's business. It takes into account the nature and size of the business and the cost and effect of the providing the accommodation. Thus, a request for an employer to install a separate bathroom for the transgender individual is likely to be an undue hardship. By contrast, requiring an employer to install locks on the current separate sex bathroom doors and changing to lockable unisex rest-rooms would probably not be an undue hardship.

***672** The same analysis applies to locker-rooms. While an employer is not likely to have to install a separate locker-room for the transgender employee, allowing him/her some other space to change and store his/her clothing is not likely to cause an undue hardship for an employer. Additionally, a transgender employee may request reassignment to a vacant position. Where the individual is qualified for the position and reassignment will not interfere with an otherwise lawful seniority system, it would not be an undue hardship for an employer to transfer the employee. Allowing the employee to dress in manner typically associated with the opposite sex typically will not be an undue

hardship. The effect on the morale of other employee's is also not an undue hardship.

3. Requirement of Otherwise Qualified A qualified individual is one who with reasonable accommodation if necessary, can perform the essential functions of the employment position that such individual holds or desires. This creates a two-part process: (1) an evaluation of the demands of the job; and (2) an individual determination of fitness for the job's demands. Only individuals who can perform the essential functions of the job are protected. [FN5]

The definition is designed to protect both employers and employees. The employer need not hire a employee who is not qualified. Yet, the employee is only required to be qualified to perform the essential functions of the job. For example, with the flight attendant, if the employee were unable to perform the essential functions of the job, the question of grooming codes would never arise; the airline would have a legitimate reason (the employee not being qualified) not to hire "him" in the first place. Once it is determined that the employee is qualified however, the employer must allow an exception to the grooming code.

[FN1]. See e.g., Ulane v. Eastern Airlines, 742 F.2d 1081, 1087 (7th Cir. 1984); Kirkpatrick v. Seligman & Latz, Inc., 636 F.2d 1047 (5th Cir. 198 1); Sommers v. Budget Mktg, 667 F.2d 748 (8th Cir. 1981); Holloway v. Arthur Anderson & Co., 566 F.2d 659 (9th Cir. 1977); Grossman v. Bernards Township Bd. of Ed. 538 F.2d 319 (3rd. Cir. 1976); Richard Green, Spelling 'Relief' for Transsexuals: Employment Discrimination and the Criteria of Sex, 4 Yale L. & Pol'y Rev. 125.

[FN2]. See Doe v. USPS, Civ. Act. No. 84-3296 (D.D.C. 1985) Memorandum Op.; Holloway v. Arthur Anderson & Co., 566 F.2d 659 (9th Cir. 1977).

[FN3]. Grooming code exceptions are commonly litigated under Title VII. Title VII requires employers to make reasonable accommodations on the basis of the employee's religion. Thus, an employer must make an exception to his/her grooming code for an employee who wishes to wear traditional religious garb. See Isaac v. Butler's Shoe Corp., 511 F.Supp. 108 (N.D.Ga. 1980) (balancing the employees goal of promoting a neat appearance against the employee's right to religious expression, the court held that the employer must accommodate the employee and allow her to dress in accordance with her religious beliefs).

No-beard rules also create trouble with religious accommodations. Orthodox Jews and Sikhs have challenged these on several occasions and tend to be successful unless the nature of the business requires the rule. For instance, a court ordered back-pay for whereas a computer-programmer who was forced to chose between keeping his beard or quitting his job. However an employee who worked in a dangerous environment was not able wear a beard because safety required him to wear a respirator mask. Carter v. Bruce Oakley, Inc., 849 F.Supp. 673 (E.D.Ark. 1993); Bhatia v. Chevron U.S.A., Inc.,

734 F.2d 1382 (9th Cir. 1982). See also Kohli v. Looc, Inc., 654 A.2d 922 (Md. Ct. App. 1995) (Sikh employee has the right to wear beard despite food business employer's interest in a clean business-like appearance).

[FN4]. 42 U.S.C.A. s 12111(10) (1991).

[FN5]. 42 U.S.C.A. s 121111(8). See also Lucero v. Hart, 915 F.2d 1367 (9th Cir. 1990) (individual who could type 44, but not 45-words-per-minute on account of her handicap was not 'otherwise qualified' where the employer required all secretarial employees to type at 45).

***673** Appendix C

M E M O R A N D U M

TO: Legal Roundtable Members

FROM: Chai Feldblum

Shannon Minter

DATE: September 11, 1997

RE: Title VII, ENDA and Gender Expression

The attached document, prepared by Dana Priesing of GenderPac, surveys current employment discrimination case law relevant to issues of gender expression and gender identity in the workplace. Dana's document is designed to set out the "state of the law" as it relates to workplace dress and grooming codes, sexual stereotyping, and cases involving transsexuals under Title VII.

This cover memo summarizes where we think we are with regard to protecting gender non-conformity in the workplace under Title VII. In addition, we consider how some cases of gender expression discrimination might fare under ENDA.

Our goal for this segment of the Roundtable is as follows. First, we would like to have a conversation about how well we think masculine-appearing women and feminine men (gay and non-gay) are currently protected in the workplace under Title VII if they suffer adverse employment action because of their gender non-conformity. One might think the Supreme Court's 1989 decision in Price Waterhouse would take care of this problem completely. We'd like to talk about: a) what the possible limitations are in using Price

Waterhouse; b) why there are not as many cases as one would expect using Price Waterhouse to challenge gender conformity rules in the workplace; and c) whether, as a litigation matter, gay legal groups should be spending resources pushing the Price Waterhouse envelope on gender non-conformity.

As a second and related matter, we would like to discuss whether lesbians and gay men who are gender non-conforming will ***674** be as well protected under ENDA as lesbians and gay men who appear more gender conforming. That is, without answering the question of whether all gay individuals are, by definition, gender non-conforming, we believe we can safely say that some gay individuals seem outwardly to conform to expected gender norms better than others. So, for example, does ENDA, as currently drafted, adequately protect a butch lesbian employee whose employer argues he has fired her not because of her sexual orientation, but because of her butch appearance? (I.e., the employer can point to four femme lesbians and two macho gay men who have risen to high positions in the company and who are openly gay in the company.)

A brief comment on what this discussion is not: We do not intend, or expect, this discussion to focus on whether gay legal groups have a responsibility to litigate transsexual discrimination cases as part of their definitional mandate. Both of us believe this is an important question for the Roundtable to address at some point. But the discussion for this Roundtable is intended to be more limited, as indicated by the description of the issues above.

To be frank, though, at least for me (Chai), my concern about whether we are adequately protecting gender non-conforming folks, under either Title VII or ENDA, has been informed by the work I have done with members of the transgender community over the past two years. My sense is that, even if we put aside for the moment the question of whether discrimination against transgendered people and discrimination against gay people are inherently intertwined, there are necessarily common issues regarding gender non-conformity that should be addressed by the Roundtable.

So here goes . . . .

A. Title VII and Gender Expression

Assume a lesbian is fired from her job because she dresses and acts too much "like a man." Under the Supreme Court's 1989 decision in Price Waterhouse v. Hopkins prohibiting the use of sex stereotyping, this employee could have a viable cause of action under Title VII. An informal employer "code" of acceptable behavior that is different for men and women is precisely what was proscribed by the Court in Price Waterhouse. Similarly, employer dress codes that discriminate between women and men are based on stereotypes ***675** about how each sex should dress and, at least logically, also should constitute sex discrimination under the rationale of Price Waterhouse. Under Title VII, the only legal distinctions based on sex that an employer should be allowed to make are those required by a bona fide occupational qualification.

As Dana's document indicates, prior to Price Waterhouse, federal courts generally upheld employer grooming and dress standards that differentiated between men and women, such as policies forbidding men from having long hair or wearing earrings. The courts held that hair length was not, like the person's sex itself, an immutable characteristic, and that Congress intended to proscribe discrimination against employees solely because of immutable characteristics when it adopted Title VII. Thus, while these courts assumed that an employer who required dress or grooming standards for one sex only would be violating Title VII, they did not believe that an employer who had different standards for men and women was similarly violating Title VII.

In Price Waterhouse, the plaintiff (a heterosexual woman) was denied a partnership in the firm in part because some of the partners believed she was not sufficiently feminine in her grooming, her dress and her manner. Finding this to be a violation of Title VII, the Supreme Court wrote that "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group."

Although the earlier dress and grooming code cases upheld differing standards for men and women, the rationale of these cases seems to us to be sharply limited by Price Waterhouse. The plaintiff in that case, Ann Hopkins, did not have to demonstrate that her failure to wear makeup or have her hair coifed (feminine improvements suggested by one coworker) were immutable characteristics that she could do nothing to alter. In the wake of Price Waterhouse, courts should be more receptive to arguments that other instances of discrimination based on employees' failure to adapt to certain sex stereotypes violate Title VII and analogous state laws.

There are two problems that we see in this simple reliance on Price Waterhouse. First, there have not been enough (if any!) published cases that clearly establish the rule that forcing men and women to adhere to the dress and appearance norms that are expected for their respective genders violates Title VII. Moreover, we believe such a rule would also need to establish that there is no ***676** legitimate business reason for an employer to mandate gender conformity by its employees. That is, while an employer can force everyone in the workplace to dress "professionally," if a woman dresses in the garb that is considered professional for the men in the workplace, that should be fine. This rule has not been established in any published cases we have found.

The only post-Price Waterhouse cases we have been able to find thus far that could be helpful to our argument are summarized in Dana's document, pp. 12-14. These cases essentially hold that an employee cannot be harassed by coworkers for nonconforming dress or behavior. A divided Seventh Circuit overturned a summary judgment for defendants and found that a male employee who was harassed for wearing an earring and thus did not conform to masculine stereotype could advance a sexual harassment claim under Title VII. Doe v. City of Belleville. Also following the rationale of Price Waterhouse, a New Jersey court held that harassment of a male

employee perceived by coworkers to be effeminate is sex stereotyping constituting sexual harassment under state law. Zalewski v. Overlook Hospital.

The second obstacle to using Price Waterhouse to cover all the situations that should appropriately be covered (and, obviously, a subject for Roundtable conversation can be--what situations do we think should be covered) is the "absurd result/slippery slope" argument. As summarized in Dana's memo, most of the courts rejecting the "long hair" challenges by men based their ruling on the "immutable characteristic" argument--which is probably pretty weak after Price Waterhouse--or on the argument that Title VII was intended to enhance economic opportunities for women--an argument which is also pretty weak given the courts' application of Title VII to men.

But the district court in Willingham v. Macon Telegraph Publishing Co. based its ruling as well on the "absurd result" argument that allowing men to have long hair would necessarily result in also allowing them to wear dresses. That result conjures up for every court the concomitant result of protecting transsexuals. And, to date, every federal court has rejected the application of Title VII to transsexuals claiming discrimination. In other words, those individuals who actually cross sexual borders, or who seek to live as a member of a gender different from the person's assigned sex at birth, have not been protected under Title VII--even when the ***677** motivating factor in the adverse employment action has been discomfort with the person's gender non-conformity in dress and appearance. In these cases, the courts have consistently held that Congress intended a narrow, conventional definition of the word "sex" in Title VII.

While most of the cases concerning transsexuals were litigated before Price Waterhouse, the few that have come after have been no more successful. None of these later cases, by the way, seemed to have argued that the employers were engaged in invalid sex stereotyping of one gender. (It is unclear how successful such an argument would have been.) In any event, this line of cases--and the apparently strong desire of courts not to reach an "absurd result"--pose some legal obstacles when considering how far federal courts will go in using Title VII to protect employees who do not conform to their expected sex stereotypes.

It should also be noted, however, that at least one lower federal court and one state supreme court have interpreted New York's state anti- discrimination law--which is similar to Title VII--as encompassing discrimination against postoperative transsexuals under sex discrimination. See Rentos v. Oce-Office Systems; Maffei v. Kolaeton Industry, Inc. These courts held that the more restrictive definition of sex intended by Congress did not apply to state anti-discrimination laws, which could be interpreted more broadly. Thus, part of our discussion should focus on whether we think all courts will necessarily come to the same conclusion today regarding coverage of transsexuals under Title VII.

ENDA and Gender Expression

Back to the hypothetical again: a lesbian is fired from her job because she dresses and acts too much "like a man." But now assume ENDA is law and employment discrimination based on sexual orientation is illegal. The employer insists, however, that the employee is not being fired because she is a lesbian, but because she is "too butch." As noted above, assume the employer can point to three femme lesbians and two macho gay men who are openly gay and merrily enjoying employment in this particular company. Would the employee be protected by ENDA?

Some of us started a conversation about this type of hypothetical when we were considering whether the language in section 4 of ENDA (prohibiting "different treatment or different standards" ***678** based on sexual orientation) might cause us some unexpected trouble in litigating ENDA cases. But assume, for the moment, that section 4 was rewritten to read just like Title VII. We think we still may have a tough case here.

The employee could argue that dressing "butch" is part of her sexual orientation, that is, her way of expressing her gender is an integral element of her sexual orientation. On this theory, discriminating against her "masculinr" dress and manner would be the kind of discrimination prohibited by ENDA.

This type of argument, however, has been rejected in a few cases brought under state sexual orientation discrimination laws. In these cases, the courts have construed the term "sexual orientation" to mean sexual preferences and practices, i.e. the sex of the person's sexual partner, and not the person's own gender expression or identity. See Maffei v. Kolaeton Industry Inc. (harassment aimed at transsexual not the result of transsexual's sexual preference); Underwood v. Archer Mgmt Services, Inc. (discrimination based on transsexuality--"the medical condition of being transformed from a man to a woman"--does not constitute a claim for sexual orientation discrimination). Unless ENDA's definition of sexual orientation were amended to explicitly include modes of gender expression (remember when it did say something about expression?), courts may choose not to interpret ENDA's current definition of sexual orientation as including discrimination based on dress or "acting like a man."

In addition, there are some interesting conceptual questions around defining sexual orientation as including a particular gender projection. Shannon thinks a solid theoretical case can be made for that; Chai is more uncertain about making that argument.

So, here are our views on the Title VII and ENDA questions we pose above and to which we invite Roundtable response:

1) We believe Price Waterhouse has significant potential for protecting gender non-conforming individuals in the workplace. That is, if cases are brought in a strategic manner, we believe we may be able to establish that Title VII protects employees who are discriminated against for transgressing gender norms, including dressing or behaving differently from the stereotypes suggested by their birth sex. Workplace rules of behavior or dress that apply to both sexes equally--e.g. all employees must act professionally; no ***679** employee may wear shorts at work, etc.--would continue to be

permissible. But employers would not be able to use workplace rules to force a particular sex stereotype on any individual.

2) We believe there are not sufficient published cases out there to feel comfortable that we have a strong Title VII principle on which to depend for gender non-conformity protection. Given that some significant percentage of gay people are gender non-conforming, we think some resources of the gay legal groups should be devoted to developing a litigation strategy that would establish this principle. Such a strategy should be developed in conjunction with the women's legal groups--and such groups should be made to feel invested in having Title VII protection established more clearly in this area.

3) If, based on our current assessment of the state of the law--or based on our assessment of the law after we try to bring some cases--we decide Title VII, as currently written, will not provide the protection we want, we should think about what changes in Title VII's language might be appropriate to call for to adequately address this issue.

4) We think that ENDA, as currently written, might have some weaknesses in protecting gender non-conforming gay people. We think a discussion of potential changes in ENDA's language that would both help and be politically feasible is worthwhile.

NOTE: Thanks go to Joan Mulhern for her assistance in describing the state of the law under Title VII for this memo. Joan, a recent Georgetown grad who has been working with Chai on gay issues for the past month, has been wonderful in collecting, reading, and analyzing these cases--in a very short time period.

***680** Appendix D
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***681** GenderPac
TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

***682** Appendix E
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***683** Gender Bias Questionnaire
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***687** Appendix F

Appendix A to Sexual Harassment Guidance Comments

by Lisa Mottet

How "on the Basis of Sex" Includes Action Based on Sex Stereotyping

An analysis of Title VII case law and constitutional jurisprudence demonstrates that "harassment on the basis of sex" includes harassment based on a student's perceived conformity or non-conformity to sex stereotypes.

The Supreme Court has ruled that the equal protection clause of the federal Constitution prohibits sex stereotyping as a form of sex discrimination. In almost all cases, the Court has stated this prohibition in the context of stereotyping against groups--that is, when a statute treats all men differently than all women based on a stereotype of men or women generally. In some cases, however, the Court has also protected individuals who do not conform to sex stereotypes. The following cases highlight the Supreme Court's early jurisprudence in the area of sex stereotyping:

•Weinberger v. Wiesenfeld, 420 U.S. 636 (1975). The Court struck down a provision of the Social Security Act that provided support for widows and their children, but only the children of widowers (not the widowers). This differential treatment was intended to allow the widow to stay home and care for her children, while a widower was expected to work. The Court held that, "such a gender-based generalization cannot suffice to justify the denigration of the efforts of women who do work and whose earnings contribute significantly to their families' support." (420 U.S. at 645) (Protecting a man who prefers to take care of his children instead of working, and protecting a woman who works--both gender non-conforming.)

•Personnel Administrator v. Feeney, 442 U.S. 256 (1979). The Supreme Court upheld a civil service scheme that provided preferences for veterans and had an unintentional disparate impact on women. The Court concluded that the ***688** scheme was acceptable because, "nothing in the record demonstrates that this preference for veterans was originally devised or subsequently re-enacted because it would accomplish the collateral goal of keeping women in a stereotypic and predefined place . . ." 442 U.S. at 279.

•Mississippi University for Women v. Hogan, 458 U.S. 718 (1982). The Supreme Court invalidated a women-only admissions policy to a state-supported nursing school. The Court explained that, "although the test for determining the validity of a gender-based classification is straightforward, it must be applied free of fixed notions concerning the roles and abilities of males and females . . . ." (458 U.S. at 725, 726). Continuing, the Court further explained that the women-only admissions policy was flawed because it "lends credibility to the old view that women, not men, should become nurses." (458 U.S. at 730). (Protecting the gender non-conforming male: the male nurse.)

By the time the Court addressed the issue of sex-based pension plans under Title VII, the concept that sex stereotyping was illegitimate had become well- accepted. In City of Los Angeles, Department of Water and Power v. Manhart, 435 U.S. 702 (1978), the Supreme Court concluded that a pension plan contribution scheme in which women were required to contribute more to the pension fund due to higher life expectancies violated Title VII. In dicta, the Court referred to the issues of sex stereotyping:

It is now well recognized that employment decisions cannot be predicated on mere "stereotyped" impressions about the characteristics of males or females. Myths and purely habitual assumptions about a woman's inability to perform certain kinds of work are no longer acceptable reasons for refusing to employ qualified individuals, or for paying them less. (435 U.S. at 707) (footnote omitted)

As noted, most of these cases dealt with sex stereotyping against a group. However, in Price Waterhouse v. Hopkins, 490 U.S. 228, decided in 1989, the Court was faced with a situation in which an individual was engaging in gender non-conforming behavior. The Court's analysis in that case remained constant and clearly set ***689** forth that under Title VII sex stereotyping is prohibited against an individual as well.

Ann Hopkins was an "aggressive" female denied partnership at an accounting firm. Partners in the firm had evaluated Hopkins, both consciously and unconsciously, by considering whether she acted appropriately as a female. The Court explained in detail the offending conduct:

There were clear signs, though, that some of the partners reacted negatively to Hopkins' personality because she was a woman. One partner described her as "macho" . . . another suggested that she "overcompensated for being a woman" . . . a third advised her to take "a course at charm school" . . . Several partners criticized her use of profanity; in response, one partner suggested that those partners objected to her swearing only "because it's a lady using foul language." . . . Another supporter explained that Hopkins "ha[d] matured from a tough-talking somewhat masculine hard-nosed mgr to an authoritative, formidable, but much more appealing lady ptr candidate." . . . But it was the man who, as [the lower court judge] found, bore responsibility for explaining to Hopkins the reasons for the Policy Board's decision to place her candidacy on hold who delivered the coup de grace: in order to improve her chances for partnership, [the employer] advised, Hopkins should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." (490 U.S. at 235).

The primary thrust of the Court's plurality opinion dealt with the issue of mixed motives. [FN1] Indeed, that was the issue on which certiorari had been granted. Nevertheless, the section of the opinion dealing with the merits of Ann Hopkins' situation included a clear articulation of how requiring women to act in a manner consistent ***690** with sex stereotypes (e.g. women should not be aggressive) is a form of sex discrimination under Title VII:

As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group . . .

. . . In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender. (490 U.S. at 250, 251) (emphasis added).

When the Supreme Court invalidated the male-only admissions policy of Virginia Military Institute in 1996, United States v. Virginia, 518 U.S. 515, it clearly reaffirmed that a policy based on gender-conforming view of women was invalid under the equal protection clause of the Constitution because it was sex discrimination. As the Court explained:

"In contrast to the generalizations about women on which Virginia rests, we note again these dispositive realities: VMI's "implementing methodology" is not "inherently unsuitable to women," . . . "some women . . . do well under [the] adversative model," . . . "some women, at least, would want to attend [VMI] if they had the opportunity," . . . "some women are capable of all of the individual activities required of VMI cadets," . . . and "can meet the physical standards [VMI] now impose[s] on men" . . . It is on behalf of these women that the United States has instituted this suit, and it is for them that a remedy must be crafted . . ." (518 U.S. at 550).

As this description of cases makes clear, when a policy is based on sex stereotypes of a group, the policy is subject to challenge as a form of sex discrimination. In addition, when a particular individual is discriminated against because he or she does not conform to a sex stereotype, that too is subject to challenge as a form of sex discrimination.

[FN1]. Justice O'Connor filed a concurring opinion in which she affirmatively agreed with the plurality's treatment of sex stereotyping, making a majority of the Court in agreement on that issue. 490 U.S. at 272. Justice White's concurrence was silent on the issue, instead addressing the issues of mixed motives and causation.

***691** Appendix B to Sexual Harassment Guidance Comments

by Lisa Mottet

Sex Stereotypes - Examples and Explanations

A. Sex Stereotyping Prohibitions Under Title IX

The courts have evidenced a willingness to extend principles of sex discrimination from Title VII and the Constitution to Title IX. For example, the concept of sexual harassment was imported into Title IX after being developed in Title VII. In the 1997 Sexual Harassment Guidance, the Department explains that it believes that Title VII principles should be imported into Title IX, after making appropriate adjustments for the different contexts of private employment and education in general. [FN1] This is

consistent with Supreme Court practice, in which the Court has applied Title VII principles to Title IX, after making alterations in the areas of notice and agency. [FN2]

There are, of course, differences between school and work settings. For example, the Court noted, in Davis v. Monroe County, that adjustment from Title VII principles are needed because "children may regularly interact in a manner that would be unacceptable among adults." (526 U.S. at 631). The Court then implied this means that objectionable behavior will have to be more severe between schoolchildren before it is actionable. [FN3] Of course, another very important difference between the school and work setting that has yet to be addressed or recognized by the Court may make the harassment worse for school children than employees: children are in their formative years while in school, while adults at work have ***692** likely reached nearly full personality development. When children are teased into compliance with sex stereotypes, not only are they robbed of educational opportunity, they are also robbed of their chance to develop a personality and self-image that are unaffected by sex stereotypes. [FN4] This process is sometimes referred to as "gender policing," because the harassers are ensuring that the student does not violate gender norms.

For the purposes of legal analysis, it is useful to set forth the range of sex stereotypes that can be the basis of harassing behavior in a school setting. We believe that harassment based on any of these stereotypes is appropriately viewed as "harassment on the basis of sex" and therefore is prohibited by Title IX.

B. Gender-Policing Stereotypes - Examples and Their Operation-- Girls don't play sports (well).

-- Boys are athletic, play rough and act tough.

-- Girls wear girls' clothes, wear perfume, and style their long hair.

-- Boys wear boys' clothes and have short hair.

-- Girls should keep their legs crossed, walk demurely, and speak softly.

-- Boys should take up space, strut, and be loud.

-- Girls should not be aggressive.

-- 'Boys will be boys.'

-- Girls play with dolls, pay attention in class, and do their homework.

-- Boys play with action figures and trucks, goof off in class, and don't do homework.

-- Girls are emotional and nurturing by nature.

-- Boys don't cry and are aloof.

-- Girls are born girls and should want to continue to be girls.

-- Boys are born boys and should want to continue to be boys.

-- One's gender identity must be either male or female, and not in between.

***693** The above are just a few examples of possible sex stereotypes. In any case where a student is harassed because of his or her non-conformance to a sex stereotype, Title IX should prohibit such conduct. This is the clear application of the holding of Price Waterhouse to the educational setting.

A good example of harassment based on stereotypes is a girl who excels in baseball and is therefore targeted by her peers for harassment. She might be harassed by taunts that she is "really a boy," not a "real girl," or she may be physically assaulted with baseballs being thrown at her or by having her bra snapped. Another good example is a non-athletic boy with long hair and feminine mannerisms. He may be harassed with verbal taunts insulting his masculinity, or may have his clothing stolen from the locker room. The harassment in either case may or may not explicitly accuse the student of not conforming to a sex stereotype, and as in the examples above, may take a variety of forms. What matters to make the conduct prohibited by Title IX is whether the student is chosen to receive harassment because of his or her lack of conformity to a stereotype.

Often gay, lesbian, and bisexual (GLB) students are not perceived to conform to these sex stereotypes. These students may not even be aware of their sexual orientation and often don't disclose their sexual orientation to their peers. However, other students may pick up on the GLB student's difference and choose that student to harass because of his or her gender non-conformity. These GLB students should be fully protected by Title IX and the fact that the students are GLB or suspected of it should not matter.

Similarly, transgender students (who may because of their young age not even be aware that they are transgender) will be harassed in spite of the fact that they have not disclosed their transgender status to their peers or have not begun to transition. However, the transgender student's visible gender discordance, or deviation from sex stereotypes, often triggers severe peer harassment. There are many sex stereotypes which concern the permanence and the absolute, inflexible nature of individual gender expression. For example, it is a stereotype that one's sex and gender are permanently determined at birth. Some people are unsure about their gender identity and some are sure that their biological and mental sex are incongruent. Some students even insist that they do not have a gender. These students need to be free from ***694** harassment while they are trying to determine what sex they feel they are, during their transition from one sex to another, and while they are in a period of gender-ambiguity. During all of these times, a transgender student is deviating from sex stereotypes, and should be protected from harassment based on them.

As noted above, sex stereotypes are enforced through a variety of means, whether that be verbal sex-specific taunts or physical assaults, or any other creative harassment device. Another weapon harassers regularly use against students who do not conform to sex stereotypes is to accuse the victim of being gay, lesbian or bisexual. All students who dare to deviate from these stereotypes, whether they are straight or GLB, are at risk of subjecting themselves to accusations of homosexuality. Studies have shown that being called a fag/gay/dyke/lesbian is very feared by all students. In fact, for male students, no form of form of harassment was feared more than being called "fag," so much so that physical violence was preferable to being thought of as gay. [FN5] If the purpose of Title IX is to be realized, children must be free to deviate from sex stereotypes without this severe harassment being imposed. Since sexual orientation harassment is one of the most effective weapons of sexism against heterosexual and GLBT students alike, it should be prohibited by the Title IX Guidance when it is operating to enforce sex stereotypes.

[FN1]. Our relevant background for purposes of submitting these comments is as follows: Professor Chai Feldblum is a professor of law at Georgetown University Law Center, specializing in issues of civil rights. She has been involved in the area of gender non-discrimination, in the legislative, administrative, and judicial arenas, for the past twenty years. Lisa Mottet, a third-year law student at Georgetown, is a research assistant to Professor Feldblum. For the past year, she has been extensively researching the issue of sex-based harassment.

[FN2]. We wish to emphasize that in reality, these various aspects of harassment are not separated out for the student experiencing harassment. This is a point that should be clearly recognized in the Guidance. We are, however, separating out these variables for our initial analysis.

[FN3]. Attached to these comments is Appendix B which discusses different sex stereotypes and how they can operate in the educational context.

[FN4]. Attached to these comments is Appendix A which fully discusses caselaw relating to how sex stereotyping is a form of discrimination based on sex.

[FN5]. While we clearly agree with the addition of "sex stereotyping" to this sentence and Guidance, we have two, perhaps picky, comments about this sentence. First, the final phrase, "and is directed at individuals because of their sex," appears to be redundant of the phrase "based on sex or sex stereotyping" in the middle of the sentence. We recommend that the middle phrase replace the last phrase of the sentence. Second, the use of the word "may" to indicate that there is a violation only if

harassment "rises to a level that denies or interferes with benefits, services, or opportunities" should be eliminated because harassment based on sex stereotypes is a form of discrimination based on sex under Title IX when it "rises to a level that denies or interferes with benefits, services, or opportunities." Our recommended revision separates out two of the points this sentence makes: that harassment based on sex stereotypes is sex discrimination, and that Title IX is violated only when the harassment is severe enough to deny educational benefits.

***695** Appendix G

December 13, 2000

Jeanette J. Lim

Office for Civil Rights

U.S. Department of Education

SwitzerBuilding

400 Maryland Avenue, SW., Room 5036

Washington, DC 20202-1100

Re: Sexual Harassment Guidance Comments

Dear Ms. Lim:

We are submitting the following comments regarding the Office for Civil Rights' (OCR) "Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Practices," 65 Fed. Reg. 213, 66091 (November 2, 2000) ("Proposed Guidance"). Thank you for allowing us to submit these comments today, December 13, 2000, in conjunction with those submitted by National Center for Lesbian Rights and Gay and Lesbian Advocates and Defenders. [FN1]

I. The Range of Sex-Based Harassment

The Department of Education has contributed significantly to the protection of our nation's students through its promulgation and enforcement of Title IX regulations and guidance. However, we believe the Department limits itself, as well as the nation's students, by artificially restricting the Guidance to "sexual harassment," and distinguishing that type of harassment from what the Department calls "gender-based harassment." We respectfully submit that, with just a few additions, the Guidance could easily cover the range of sex-based harassment prohibited by Title IX. These additions would not only more closely approximate the reality of student's lives, but would also

make the Guidance a more useful guide for schools and educators.

***696** There are two aspects of harassment that should be separated for purposes of analysis. [FN2] The first aspect is the motivation for the harassment. Both harassment motivated by the physical sex of the victim, and harassment motivated by the victim's perceived conformity or lack of conformity to sex stereotypes, [FN3] meet the statutory requirement of "on the basis of sex." [FN4] The Proposed Guidance, an improvement over the 1997 Guidance, acknowledges this fact by stating:

"It is also important to recognize that gender-based harassment, which may include acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex or sex-stereotyping, but not involving conduct of a sexual nature, may be a form of sex discrimination that violates Title IX and the Title IX regulations if it rises to a level that denies or interferes with benefits, services, or opportunities and is directed at individuals because of their sex. 65 Fed. Reg. 213, 66099. (emphasis added) [FN5]

The second aspect of harassment is the nature of the harassment. Sexual and non-sexual harassment, when targeted at a student based on his or her sex, are both equally capable of denying a student the benefits of education. Whether or not a student is harassed through sexual or non-sexual conduct should be irrelevant to the inquiry of whether the harassment is severe enough to "deny or limit, on the basis of sex, the student's ability to participate in or to receive benefits, services or opportunities in the school's program." ***697** [FN6] Indeed, many times relentless non-sexual taunts may be much more effective than sexual teasing in denying a student benefits of his or her education.

Based on the motivation and the nature of the harassment, harassment can thus be divided into four types. Again, this division is artificial for purposes of the reality of the student being harassed. Since the Proposed Guidance explicitly chooses not to deal comprehensively with three of the four types of harassment, however, we have separated them out so as to explain how all four need to be acknowledged within the scope of the Guidance for the document to be truly effective.

The first type of sex-based harassment is sexual harassment directed at an individual because of his or her biological sex. The classic example of this type of harassment is a female student being repeatedly subjected to unwelcome sexual advances from a male student or employee. This type of harassment is comprehensively covered by the Proposed Guidance.

The second type of sex-based harassment is non-sexual harassment directed at an individual because of his or her biological sex. This is what the Proposed Guidance labels "gender-based harassment." As an illustration, the Guidance offers an example of a group of boys repeatedly sabotaging a girl's lab experiment because she is a girl. The Proposed Guidance asserts that a comprehensive discussion of this type of harassment is "beyond the scope" of the Guidance.

The third type of sex-based harassment is sexual harassment based on a student's

conformity or non-conformity to sex stereotypes. In this situation, the victim is often chosen because he or she is perceived as failing to act in accord with his or her biological sex. The victim is then harassed through conduct of a sexual nature. For example, a "masculine" girl may be groped by boys that want to teach her "what girls are supposed to like"; or a "girly" girl may be targeted for sexual harassment because the boys like her "feminine" behavior. The Guidance does not expressly mention this form of harassment at all, although the Department clearly did not intend ***698** to exclude such harassment, and indeed coverage of it could well be implied.

The fourth type of sex-based harassment is non-sexual harassment based on a student's conformity or non-conformity to sex stereotypes. Like the third type, the victim may be chosen for either conforming to sex stereotypes or for not conforming to them. In either case, the victim is harassed in a non-sexual manner. For example, a "feminine" boy may be called "wimp" and chased out of the locker room. Again, the Proposed Guidance asserts that a comprehensive discussion of this type of harassment is "beyond the scope" of the Guidance.

Here is a visual diagram of how we perceive the types of sex-based harassment by motivation and nature of the harassment, and how the Proposed Guidance treats each type:

Figure 1
TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

We understand that the Guidance is currently constituted to focus on sexual harassment, that is harassment that is sexual in nature. We are not recommending that the Department completely revise this Guidance. Rather, we are asking that the Department make two changes:

1. The Guidance should make clear that harassment of a sexual nature may occur because of sex stereotypes as well as because of physical sex, and explain what is meant by harassment based on sex stereotypes;

***699** 2. The Guidance should have stronger language explaining that non- sexual harassment also violates Title IX when based on sex, and should explain that the procedures and standards set out in detail for sexual harassment apply as well to non-sexual harassment based on sex.

The reason for this latter request is simple. As we noted above, dividing harassment based on sex into four types is an artificial endeavor that does not mirror the experiences of students. Students are often harassed both due to their physical sex and their perceived conformity to sex stereotypes, and this harassment manifests itself in both sexual and non-sexual ways. For this reason, it is critical that the Guidance explain that all harassment based on sex, including based on sex stereotypes, whether

sexual or non-sexual, works together to create one experience of sex discrimination for the student. The Guidance can be particularly helpful by ensuring that educators do not receive the impression that these experiences should be evaluated separately.

II. Specific Language Recommendations

The following is a recommended version of the "Applicability of Title IX" section.

Key:

Regular typeface is used for existing Proposed Guidance

Italics indicated recommended additions

Deleted text is indicated by strikethrough

Text that was moved was not indicated

Applicability of Title IX.

Title IX applies to all public and private educational institutions that receive Federal funds, i.e., recipients, including, but not limited to, elementary and secondary schools, school districts, proprietary schools, colleges, and universities. The guidance uses the terms "recipients" ' and "schools" ' interchangeably to refer to all of those institutions. The "education program or activity" of a school includes all of the school's operations.[4] This means that Title IX protects students in connection with all of the academic, educational, extra-curricular, athletic, and other programs of the school, whether they take place in the facilities of the school, on a school ***700** bus, at a class or training program sponsored by the school at another location, or elsewhere.

A student may be sexually harassed by a school employee,[6] another student, or a non-employee third party (e.g., a visiting speaker or visiting athletes). Title IX protects any "person" ' from sex discrimination. Accordingly, both male and female students are protected from sexual harassment [7] engaged in by a school's employees, other students, or third parties. Moreover, Title IX prohibits sexual harassment regardless of the sex of the harasser, i.e., even if the harasser and the person being harassed are members of the same sex.[8] An example would be a campaign of sexually explicit graffiti directed at a particular girl by other girls.[9]

It is important to note that harassment that is based on a student's conformity or non-conformity to sex stereotypes is also harassment based on sex. For example, if a girl is targeted for harassment because she enjoys sports and is a 'tomboy," or if a "feminine" boy is harassed because he is not thought to be sufficiently "masculine," this constitutes prohibited harassment.

Although Title IX does not prohibit discrimination on the basis of sexual orientation,[10] [11] sexual or nonsexual harassment directed at gay or lesbian students may does constitute sexual harassment prohibited by Title IX if that harassment is based on sex or sex stereotypes and is sufficiently severe, persistent, or pervasive. For example, if students heckle another student with comments based on the student's sexual orientation (e.g., "gay students are not welcome at this table in the cafeteria"), but their actions do not involve sexual conduct, their actions would not be sexual harassment covered by Title IX. On the other hand, harassing conduct of a sexual nature directed toward gay or lesbian students (e.g., if a male student or a group of male students target a gay student for physical sexual advances) may create a sexually hostile environment and, therefore, may be prohibited by Title IX.

It is important to note, however, that victims may be subject to sex discrimination through harassing claims that they are gay, lesbian, or bisexual. For example, instead of sabotaging a girl's lab experiments in the example above, the boys may have called her a lesbian (because she is a girl good at science or sports, or simply because she is a girl). When sexual orientation charges are used against a victim to harass based on sex, including sex stereotypes, that harassment is prohibited, regardless of the actual (or perceived) sexual ***701** orientation of the victim. This is not harassment on the basis of sexual orientation, but rather harassment on the basis of sex that uses societal fears and stigma regarding sexual orientation to engage in the harassment.

Although a comprehensive discussion of gender-based harassment is beyond the scope of this guidance, It is also important to recognize that gender-based harassment nonsexual harassment, which may include acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex or sex stereotyping, may be is a form of sex discrimination that violates Title IX if it is sufficiently severe, persistent, or pervasive and directed at individuals based on sex or sex stereotyping. For example, the repeated sabotaging of female graduate students' laboratory experiments by male students in the class could be the basis of a violation of Title IX, if the harassers have chosen the victim because of her sex. Although this Guidance is meant to address sexual harassment, all of the (standards and procedures) provisions of this Guidance apply equally as well to nonsexual harassment (e.g. notice to the school). In addition, sexual and non-sexual harassment based on sex often appear together. In assessing all related circumstances to determine whether a hostile environment based on sex exists, incidents of non-sexual gender-based harassment are to be combined with incidents of sexual harassment could create a hostile environment, even if neither the gender-based harassment alone nor the sexual harassment alone would be sufficient to do so. [13]

It is important to recognize that Title IX's prohibition against sexual harassment does not extend to legitimate nonsexual touching or other legitimate nonsexual conduct. For example, a high school athletic coach hugging a student who made a goal or a kindergarten teacher's consoling hug for a child with a skinned knee will not be considered sexual harassment.[5] Similarly, one student's demonstration of a sports maneuver or technique requiring contact with another student will not be considered

sexual harassment. However, in some circumstances, nonsexual conduct may take on sexual connotations and may be rise to the level of sexual harassment. For example, a teacher's repeatedly hugging and putting his or her arms around students under inappropriate circumstances could create a hostile environment.

***702** Thank you so much for considering our comments. We hope our research and analysis can be useful to you as you finalize this document.

Sincerely, Chai R. Feldblum

[FN1]. 65 Fed. Reg. 213, 66099 (November 2, 2000).

[FN2]. "In analyzing sexual harassment claims, the Department also applies, as appropriate to the educational context, many of the legal principles applicable to sexual harassment in the workplace developed under Title VII."

[FN3]. The Court has decided that notice standards and agency standards should be more lenient for schools (likely because of their non-profit status and the fact that public coffers are at risk). Another difference is that the teacher-student relationship is always prohibited, while relationships between coworkers, between students, or between a boss and employee are not.

[FN4]. Davis v. Monroe County, 526 U.S. 629, 631 (1999).

[FN5]. Even if the child resists conforming to the stereotypes, he or she is still being subject to harassment that he or she would not have been subjected to had they have been the other sex (being perceived as gender conforming, the student would not have been teased). See Section IV.

[FN6]. American Association of University Women Educational Foundation, "Hostile Hallways: The AAUW Survey on Sexual Harassment in America's Schools," 20 (1993). See also Massachusetts Governor's Commission on Gay and Lesbian Youth, "Making Schools Safe for Gay and Lesbian Youth," (1993).

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