

# Disability Law and the Disability Rights Movement for Transpeople

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**ABSTRACT:** Existing disability law is fairly successful at protecting transsexual people from legal discrimination, but the stigma and medicalization of disability prevent further efforts that could make disability a more useful frame for transgender activism. Furthermore, disability law is underinclusive in that genderqueers and others for whom a diagnosis of gender identity disorder (GID) is impractical cannot access current disability law protections. Still, the disability rights movement can offer possible legal change and can provide important narratives for reimagining differences and rethinking accommodations that will create less restrictive disability and other civil rights law to protect transgender and transsexual people in the long term. This Note imagines a new disability law, which defines disability socially, centers on self-identification, and changes the legal landscape of antidiscrimination protections for trans and gender-variant communities.

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## I. INTRODUCTION

This Note argues that the use of disability law for transsexuals<sup>1</sup> should be continued despite the stigma and medicalization<sup>2</sup> of disability, and that disability as a framework should be expanded to include nontranssexuals as well. Disability law has clear benefits for transsexuals, and the use of disability law for antidiscrimination protections has been growing in prominence and is increasingly successful. This Note argues that disability law works for transsexuals and, while currently inaccessible to people without diagnosed gender identity disorder (GID), could potentially protect many more gender-variant people in the future. The asymmetric nature of disability law—the fact that only people classified as having an impairment can benefit from the law<sup>3</sup>—is an important theoretical and legal construct, which will give more protection to transpeople than other civil rights laws can. This Note also argues that the disability rights movement’s view of disability as culturally mediated, but involving embodied experiences, is a stronger long-term theoretical construct for transgender than the current options of using the medical model of disability or arguing that transgender discrimination is a form of sex discrimination.

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1. I use transsexuals as separate from transgender, with transsexualism referring to people with “[a] desire to live and be accepted as a member of the opposite sex, usually accompanied by a sense of discomfort with, or inappropriateness of, one’s anatomic sex, and a wish to have surgery and hormonal treatment to make one’s body as congruent as possible with one’s preferred sex.” WORLD HEALTH ORG., INTERNATIONAL STATISTICAL CLASSIFICATION OF DISEASES AND RELATED HEALTH PROBLEMS I (10th rev. 2010), available at <http://apps.who.int/classifications/icd10/browse/2010/cn#/F64.0>. In contrast, I use “transgender,” “transpeople,” and “trans” as umbrella terms, while acknowledging that transgender has a history of referring to a specific group of nontranssexual people and that “trans” is frequently imagined as referring only to transsexuals. Within trans communities, “transgender” refers to people who live as men or women without hormones and/or surgery, but this older definition has in many respects given way to an all-encompassing definition of “transgender” as an umbrella term, which includes transsexuals, cross-dressers, genderqueers, and other people who exhibit or identify with some sort of gender variance. See JASON CROMWELL, TRANSMEN AND FTMS: IDENTITIES, BODIES, GENDERS AND SEXUALITIES 22 (1999); LESLIE FEINBERG, TRANSGENDER WARRIORS: MAKING HISTORY FROM JOAN OF ARC TO DENNIS RODMAN, at x (1996); DAVID VALENTINE, IMAGINING TRANSGENDER: AN ETHNOGRAPHY OF A CATEGORY 39 (2007) (“The flexibility of transgender can result in the listing of people at the edges of the boundaries, like feminine gay men or butch lesbians, while omitting others, whether male transvestites or FTMs. Alternately, it enables one group—frequently transsexuals—to stand in for others while giving the impression of collectivity.”). Using “transgender” and “transgender rights movement” allows for more fluidity in my writing, but it could also hide that the different groups covered by the collective name have different goals and concerns for the social movement. For that reason, I use “trans,” “transgender,” and the “transgender rights movement” to reflect current common usage and for ease of writing, but I specify identities like “transsexual,” “transgender,” “genderqueer,” or “gender-variant” where applicable.

2. “Medicalization” is a sociological term that refers to the process by which social facts are known through medical knowledge or power. Disability is subject to medicalization inasmuch as it is now viewed as a medical problem to be fixed rather than a social difference, a moral failing, or an act of divine providence.

3. See Elizabeth F. Emens, *Integrating Accommodation*, 156 U. PA. L. REV. 839, 876-78 (2008) (explaining how the Americans with Disabilities Act is unique among civil rights laws in promoting asymmetry).

Both transgender and transsexual people should increase their litigation efforts to gain protections through disability law, despite litigation's potential to inscribe notions of binary identity upon all transpeople—including those who see themselves as outside of the gender binary. Current efforts to use disability law for transpeople have made use of what is known as the “medical model” of disability, which relies upon medical diagnoses and regards disability as “a biological reality of impairment,” a defect or sickness within the individual rather than the environment or culture.<sup>4</sup>

New disability law defines disability more broadly, emphasizing its social aspect, and we can change our litigation strategy to similarly emphasize the social. The “social model” of disability separates bodily incapacity from the socially disabling consequences of that impairment, but recognizes both as having real effects. Law that incorporates this model is based on ideas of valuing bodily difference and insisting that that difference be valued in law. This can include trans and gender-variant people who see themselves as having a bodily impairment and those who do not. In contrast, existing sex discrimination and gender-identity-and-expression cases and statutory language fail to recognize a distinction between the physical and the social, conflating issues that may require more flexibility. This Note argues that all transgender, transsexual, and otherwise gender-variant or genderqueer<sup>5</sup> activists can benefit from gender identity protections informed by the social model of disability, which could remove the immutability and coherent-group requirements of sexual orientation and sex discrimination civil rights laws by emphasizing lived experiences and self-identification.

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4. Gareth Williams, *Theorizing Disability*, in HANDBOOK OF DISABILITY STUDIES 123, 125-26 (Gary L. Albrecht, Katherine D. Seelman & Michael Bury eds., 2001).

5. “Genderqueer” is one term used in reference to people who identify outside the gender binary. I use it rather than other terms because it connotes adherence to some level of feminism, frequently conflicting with essentialized ideas of sex and gender, and so has special relevance to groups seeking legal remedies through civil rights claims for which essentialized ideas of sex and gender may be necessary. Genderqueer is variously defined as: “a new trans generation that is college-educated, raised on gender deconstruction, and not so interested in realness,” Elizabeth Cline, *Transmale Nation: Remaking Manhood in the Genderqueer Generation*, VILLAGE VOICE (June 15, 2004), <http://www.villagevoice.com/issues/0425/clinc.php>; “those who cannot be classified into any of these [butch lesbian or transsexual] categories,” Aeyal Gross, *Gender Outlaws Before the Law: Courts of the Borderland*, 32 HARV. J.L. & GENDER 165, 224 (2009); “an identity that combines sexual minority status with gender critique,” Cris Mayo, *Disruptions of Desire: From Androgynes to Genderqueer*, PHIL. OF EDUC. 2007, at 49, 55 (2007); and “the newest form of expressing nongenderness, omni-genderness, or gender variance,” John M. Ohlc, *Constructing the Trannie: Transgender People and the Law*, 8 J. GENDER RACE & JUST. 237, 275 (2004). See generally KATE BORNSTEIN, *GENDER OUTLAW: ON MEN, WOMEN, AND THE REST OF US* (1994); LESLIE FEINBERG, *TRANS LIBERATION: BEYOND PINK OR BLUE* (1998).

## II. BENEFITS OF DISABILITY LAW FOR TRANSEXUALS

Transsexuals have been successful in securing protections against employment discrimination using disability law and state constitutions in state courts.<sup>6</sup> These legal protections appear at present to be limited, but they should not be minimized for the transsexuals who can benefit from them. Employment discrimination is one of the most promising fields, and transsexuals have won protections on the basis of disability, but transsexuals have also recently won employment discrimination protections through sex discrimination claims.<sup>7</sup> I focus on disability law's potential for employment discrimination protections for nontranssexuals, as well as the benefits of using a disability frame for transsexuals seeking healthcare access,<sup>8</sup> young students seeking permission to wear the gendered clothing of their choice in public school,<sup>9</sup> or for individuals seeking to deduct their transition-related medical expenses on their taxes.<sup>10</sup> Almost all of these cases are on the state level, and the presence of a diagnosis of gender identity disorder (GID) has usually been determinative.<sup>11</sup>

Discussions of one's body parts and desires to change those body parts have been a constant presence in cases about transgender and transsexual people.<sup>12</sup> Anthropologist Jason Cromwell claims that framing identities within a medical scope has "negated individual identity" and made invisible "those whose histories, identities, bodies, and sexualities did not fit within the criterial

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6. By "disability law," I am referring to both state and federal disability antidiscrimination laws. On the federal level, this includes the Fair Housing Act, 42 U.S.C. §§ 3601-3631 (2010), the Rehabilitation Act, 29 U.S.C. §§ 701-796 (2000), the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (2010), and the Americans with Disabilities Amendments Act, *id.* Most states have copied the Americans with Disabilities Act in whole or in part into their own state codes. Early successful cases focused on securing sex reassignment surgeries through public health insurance, but these cases are no longer good law. See *J.D. v. Lackner*, 80 Cal. App. 3d 90 (1978); *Davidson v. Actna Life & Casualty Ins. Co.*, 420 N.Y.S.2d 450 (1979); *Pinneke v. Preisser*, 623 F.2d 546 (8th Cir. 1980).

7. The EEOC has stated its willingness to treat transsexual employment discrimination claims as falling under sex discrimination, but protections under sex discrimination apply only to a narrow group. See *infra* notes 81-82, 84 and accompanying text.

8. See *infra* note 89.

9. See *infra* notes 287-29 and accompanying text.

10. See *infra* note 42.

11. Gender identity disorder is a diagnostic category of the DSM-IV of the American Psychiatric Association. Criteria for diagnosis in adults include: "a strong persistent cross-gender identification. . . . [T]he disturbance is manifested by symptoms such as a stated desire to be the other sex, frequent passing as the other sex, desire to live or be treated as the other sex, . . . the conviction that he or she has the typical feelings and reactions of the other sex. . . . preoccupation with getting rid of primary and secondary sex characteristics (e.g., request for hormones, surgery, or other procedures to physically alter sexual characteristics to simulate the other sex) or belief that he or she was born the wrong sex. The disturbance is not concurrent with physical intersex condition. The disturbance causes clinically significant distress or impairment in social, occupational, or other important areas of functioning." AM. PSYCHIATRIC ASS'N, DSM-IV 537 (4th ed. 1994).

12. Mary Bernstein, Anna-Maria Marshall & Scott Barclay, *The Challenge of Law: Sexual Orientation, Gender Identity, and Social Movements*, in *QUEER MOBILIZATIONS: LGBT ACTIVISTS CONFRONT THE LAW* 1, 9-10 (Scott Barclay, Mary Bernstein & Anna-Maria Marshall eds., 2009).

boundaries of ‘true transsexuals.’”<sup>13</sup> Cromwell would argue that pursuing claims based on disability furthers this medicalization, as courts have investigated and evaluated trans identities and experiences through a medical lens.

Courts have required both a diagnosis of GID and detailed facts justifying the diagnosis to support disability claims. They have been unwilling to accept a doctor’s letter and have instead insisted on evaluating the biomedical evidence on the record in court. In Florida, for example, Linda Kantaras argued that Michael Kantaras could not be a man without a penis, and so her marriage to him was invalid.<sup>14</sup> Observers of the trial agreed that the medical experts’ testimony regarding the appropriate medical treatment for GID was vital for Michael Kantaras’s win.<sup>15</sup> Detailed facts were also important for a Massachusetts court, which held that a diagnosis of GID combined with a history of psychotherapy and medical treatment in the form of synthetic hormones established a prima facie case of discrimination on the basis of “handicap.”<sup>16</sup> Similarly, a 1988 New Hampshire employment discrimination case held that “[t]he only reasonable reading of DSM III is that transsexualism is a mental handicap as that term is used by knowledgeable medical experts.”<sup>17</sup> A New Jersey court held that a plaintiff must prove her gender disorder “was diagnosed by accepted clinical or laboratory diagnostic techniques.”<sup>18</sup> The court said the record was unclear as to whether the plaintiff’s doctor’s techniques were “accepted,” as there was no evidence from the doctor “explaining the condition as it manifested itself in plaintiff, and detailing the methods the doctor utilized to diagnose plaintiff.” The court therefore held that the case could not move forward.<sup>19</sup> This Note discusses the social model of disability as a means of giving more relevance to self-identification, instead of relying on a GID diagnosis. As of now, self-identification receives little or no deference from courts.<sup>20</sup>

Although the medical model has its limitations, disability protections sometimes have succeeded where sex discrimination and sexual orientation protections have failed. In *Evans v. Hamburger Hamlet & Forncrook*, an Illinois case, the plaintiff’s allegation of sexual orientation discrimination was

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13. CROMWELL, *supra* note 1, at 125.

14. *Kantaras v. Kantaras*, 884 So. 2d 155 (Fla. Dist. Ct. App. 2004).

15. See DEBORAH RUDACILLE, *THE RIDDLE OF GENDER* 212 (2005).

16. *Lie v. Sky Publ’g Corp.*, No. 013117J, 2002 WL 31492397 (Mass. Super. Ct. Oct. 7, 2002).

17. *Jane Doe v. Electro-Craft Corp.*, No. 87-E-132, 1988 WL 1091932, at \*9 (N.H. Super. Ct. Apr. 8, 1988).

18. *Enriquez v. W. Jersey Health Sys.*, 777 A.2d 365, 377 (N.J. Super. Ct. App. Div. 2001) (internal citation omitted).

19. *Id.*

20. Using a social model of disability rather than a medical one would assign the power of identification to the individual and would challenge the attitudes of the discriminating individual or entity instead of the plaintiffs’ status as authentic or not. See *infra* Part IV.

dismissed because the plaintiff had been discriminated against for being transsexual, and the Human Relations Commission held that the sexual orientation protections only covered individuals being discriminated against for their heterosexuality, homosexuality, or bisexuality.<sup>21</sup> The Commission further found that the Seventh Circuit and its affiliated courts had held transsexuality to not be covered under sex discrimination protections.<sup>22</sup> Despite dismissals of the sexual orientation and sex discrimination claims, the plaintiff's complaint survived a motion to dismiss on the ground of disability discrimination.<sup>23</sup> Her complaint survived because GID is in the Diagnostic and Statistical Manual of Mental Disorders (DSM), which lists symptoms that the Chicago Human Rights Ordinance could evaluate as to whether they impede a major life activity and so are disabling.<sup>24</sup>

Transgender and transsexual youth have been successful using the medical model of disability, winning protections against housing and public accommodations discrimination using the diagnosis of GID where possible. Although young people are less likely to have diagnoses or be able to afford to transition,<sup>25</sup> they are grouped by sex and forced to follow sex-based dress codes in schools. A transsexual foster youth was protected under New York's State Human Rights Law because she had GID, which had been diagnosed by two physicians "using the medically accepted standards set forth in the DSM-IV."<sup>26</sup> Similarly, in the Massachusetts case *Doe v. Yunits*, a student's case survived a motion to dismiss claims of disability discrimination and sex discrimination thanks to her GID diagnosis.<sup>27</sup> The court held that for someone who was biologically male but with a female gender identity, being forced to come to school in traditionally male clothing could "endanger her psychiatric health."<sup>28</sup> The court relied on an affidavit from a certified social worker who had experience with gay, lesbian, bisexual, and transgender children in describing the existence of this harm.<sup>29</sup> The presence of an expert and a diagnosis signals to courts that this identity and issue, which are new to most courts, are valid.

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21. No. 93-E-177, 1996 WL 941676, at \*3 (Chi. Comm'n on Human Relations 1996).

22. *Id.* at \*4.

23. *Id.* at \*9.

24. *Id.* at \*8.

25. Johanna Olson et al., *Management of the Transgender Adolescent*, 165 ARCHIVES PEDIATRICS & ADOLESCENT MED. 171 (2011); Arnold H. Grossman & Anthony R. D'Augelli, *Transgender Youth: Invisible and Vulnerable*, in CURRENT ISSUES IN LESBIAN, GAY, BISEXUAL, AND TRANSGENDER HEALTH 111, 124 (Jay Harcourt ed., 2006) (explaining the difficult financial and personal situations of many, if not most, transgender youth).

26. *Doe v. Bell*, 754 N.Y.S.2d 846, 851, 194 Misc. 2d 774 (N.Y. Sup. Ct. 2003).

27. No. 00-1060A, 2001 WL 664947 (Mass. Super. Ct. Feb. 26, 2001).

28. *Id.* at \*6.

29. *Id.*

Demedicalizing efforts fail to acknowledge both that there are benefits from some medicalization of transgender status and that a demedicalization strategy is unlikely to succeed in practice. The broad vision of transgender as expressed by the transgender rights movement<sup>30</sup> does not fit into the medical boxes required by existing transsexual litigation, prompting my call here for an expanded vision of disability. In contrast, many in the transgender rights movement would ignore disability and instead seek a demedicalization of transgender, despite the court cases described above that depend on it.<sup>31</sup> Those in favor of demedicalization want to liberate transgender and transsexual people from the medico-legal gaze, even as they admit that the medical strategy is more successful than their preferred strategy of gender discrimination claims.<sup>32</sup> Demedicalization would mirror the gay rights movement's very successful efforts to frame gayness as good rather than a disease. Activist Pauline Park says:

When it comes to GID I'm at the outer edge of the movement. I think it should be abolished. And I think it's disabling for the trans community and that it only serves to pathologize transgendered people. I like to say I don't have a gender identity disorder. Society has a gender disorder.<sup>33</sup>

Society's gender disorder negatively affects transgender and transsexual people, though, and that impact can be challenged through disability-based antidiscrimination provisions. Complete demedicalization reduces access to health care within companies and jurisdictions that provide health care to their

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30. See *supra* note 1 for a discussion of the diversity of trans communities.

31. Dean Spade, *Resisting Medicine, Remodeling Gender*, 18 BERKELEY WOMEN'S L.J. 15 (2003) [hereinafter Spade, *Resisting Medicine*] ("Gender should be self-determined, period."); Dylan Vade, *Expanding Gender and Expanding the Law: Toward a Social and Legal Conceptualization of Gender That Is More Inclusive of Transgender People*, 11 MICH. J. GENDER & L. 253, 287 (2005). See *In re Marriage of Joy & John R.*, No. E039132, 2007 WL 2319143 (Cal. Ct. App. 4th Aug. 15, 2007); *In re Custody of T.J.*, No. C2-87-1786, 1988 WL 8302, at \*2 (Minn. Ct. App. Feb. 9, 1988) (basing a decision in part on a psychologist's testimony about the gender dysphoric parent's insight into his gender dysphoria); *In re Marriage of Magnuson*, 141 Wash. App. 347, 354, 170 P.3d 65, 68-69 (Ct. App. 2007) (Kulik, J., dissenting) (disagreeing with trial court's finding a lack of stability in the prospective custodial parent based on the parent's transgender status and upcoming sex reassignment surgery); Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731, 749 (2008) (describing the wide-ranging impacts of administrative regulations classifying gender on the basis of sex reassignment surgeries). See also PAISLEY CURRAH, RICHARD M. JUANG, & SHANNON PRICE MINTER, *TRANSGENDER RIGHTS*, at xviii (Paisley Currah et al. eds., 2006) [hereinafter *TRANSGENDER RIGHTS*] (describing trans advocacy as "arguing that trans men *are* men and that trans women *are* women, rather than attacking the state's ability to define one's legal gender").

32. See Spade, *Resisting Medicine*, *supra* note 31, at 30-32.

33. *In Her Own Image: Transgender Activist Pauline Park*, THEGULLY.COM (July 2, 2002), [http://www.thegully.com/essays/gaymundo/020702\\_transgender\\_p\\_park.html](http://www.thegully.com/essays/gaymundo/020702_transgender_p_park.html). See also CROMWELL, *supra* note 1, at 125.

employees or residents.<sup>34</sup> Practical concerns require that some connection to the medical system remain.

Complete removal of transsexuals from the medical system, even if desired, is impossible so long as many transsexuals seek medical interventions to make their bodies conform to their minds. A diagnosis of GID gives many transpeople a route to the trans-related medical care that they want.<sup>35</sup> Whether or not this medical connection is a beneficial one, to remove it would deprive transgender and transsexual people of services they desire.<sup>36</sup> Deborah Rudacille describes the paradox of why complete demedicalization cannot work:

[Transsexual people] need[] endocrinologists and surgeons but, according to the Benjamin Standards of Care, they first need[] to spend up to a year in therapy in order to secure the all-important “letter” from their therapist recommending hormones or surgery. They remain locked into the health care system in a way that gays and lesbians are not.<sup>37</sup>

The letter recommending hormones or surgery contains the diagnosis.<sup>38</sup> While some health clinics attempt to empower transgender and transsexual recipients of services by considering them to be consumers and not requiring them to submit to mandatory psychological diagnoses or therapy prior to receiving hormone therapy,<sup>39</sup> accessing surgeries without a diagnosis of GID

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34. A medical framework benefits people who want to modify their bodies at the expense of people who do not. Transsexual activist Viviane Namaste writes from a Canadian perspective that removing GID from the DSM will end the coverage provided for trans health from the Canadian provincial health care system. VIVIANE NAMASTE, *SEX CHANGE, SOCIAL CHANGE: REFLECTIONS ON IDENTITY, INSTITUTIONS, AND IMPERIALISM* 8-9 (2005). That the United States has failed to provide health care to those who are without financial resources is not a fault of the DSM. Namaste argues that those who are focused on transgender rights ignore the population of transsexuals who want to transition and be done, not be activists starting a new “Gender Revolution.” *Id.* at 20. These transgender activists are “trendy” and threaten to make invisible anyone who might be somewhat accurately described by the medical framework of heterosexual transsexuals. *Id.* at 9, 19. For Namaste, whose primary allegiance is to low-income transsexuals in Quebec, Canada, the connection between transsexuality and the law is the criminalization of the sex work many transsexuals practice as the only employment they can access. *Id.* at 28-29. Withdrawing medicine and disability from that framework would only further separate these already-marginalized individuals from health care, and would do nothing to legitimize their employment.

35. *Cf. Advocating for Insurance Coverage of Your Medical Needs*, LAMBDA LEGAL, <http://www.lambdalegal.org/publications/trans-insurance> (describing the American Medical Association’s recognition of sex reassignment and hormone therapy as effective treatments for GID).

36. Notable attorneys such as Dean Spade question whether it should be law’s role to attempt to change that relationship. *See Spade, Resisting Medicine, supra* note 31, at 30.

37. RUDACILLE, *supra* note 15, at 195.

38. Official standards of care state that a therapist’s letter referring an individual for any medical treatment should include “[r]esults of the client’s psychosocial assessment, including any diagnoses.” WORLD PROF’L ASS’N FOR TRANSGENDER HEALTH, *STANDARDS OF CARE FOR THE HEALTH OF TRANSEXUAL, TRANSGENDER, AND GENDER NONCONFORMING PEOPLE* 26 (7th ed. 2011), <http://www.wpath.org/documents/Standards%20of%20Care%20V7%20-%202011%20WPATH.pdf>.

39. *See Memorandum from the Tom Waddell Health Center Transgender Team to Interested Parties* 3 (Dec. 12, 2006), available at <http://www.sfdph.org/dph/comupg/oservices/medSvs/hlthCtrs/>

appears to be impossible.<sup>40</sup> Thus, despite the costs of medicalization, harnessing disability law for trans rights may do no more harm than already results from the systems that manage and produce transsexuality.

The current legal regime is underinclusive because antidiscrimination protections are also valuable to people of diverse gender identities within trans communities. It is important to note that not all people who want legal protections in employment and other spheres are seeking hormones or surgeries. This Note argues that people should be able to access legal protections without the need to invoke the medical system in part or in whole. For example, an individual might prefer to be able to submit a letter from a doctor but not have to put forth testimony on whether, say, dressing in a masculine or feminine manner is required because of a diagnosis. Less testimony means less exposure of one's personal life and lower litigation costs. Transsexuals who can qualify for and afford a diagnosis, who can get a doctor's letter, and who can enlist a supportive medical expert to testify in court are not the only transgender people who need access to antidiscrimination protections.

Gaining protections through disability law, at least as it is currently used, does require some level of buy-in to medicalization. The 2010 case *O'Donnabhain v. Commissioner* held that sex reassignment surgery and hormones are treatments for a valid medical condition rather than merely cosmetic, using the language of GID.<sup>41</sup> The case also shows the potential for using disability in creative ways to accomplish specific goals rather than allowing the courts to define the individual through it.<sup>42</sup> The tax court had to decide if GID was a disease or just a descriptor of a cosmetic condition, and used GID's inclusion in the DSM as one factor supporting the decision to

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TransGendprotocols122006.pdf (providing an example of a transgender health protocol not dependent on diagnosis or specific mental health treatment).

40. See Kelley Winters, *Diagnosis vs. Treatment: Barriers to Medical Care*, GID REFORM WEBLOG (Aug. 8, 2008), <http://gidreform.wordpress.com/2008/08/08/diagnosis-vs-treatment-barriers-to-medical-care> (noting also that the World Professional Association for Transgender Health continues to support standards requiring a GID diagnosis for access to hormonal or surgical transition procedures).

41. 134 T.C. 34, 80 (2010).

42. The tax court held the taxpayer could deduct from her taxes the amounts she paid for hormone therapy and sex reassignment surgery as valid medical expenses associated with GID. Keri Renault, *The Real Life Experience of Rhiannon O'Donnabhain: "It's such an affirmation."*, THE BILERICO PROJECT (Feb. 4, 2010), [http://www.bilerico.com/2010/02/the\\_real\\_life\\_experience\\_of\\_rhiannon\\_odonnabhain\\_i.php](http://www.bilerico.com/2010/02/the_real_life_experience_of_rhiannon_odonnabhain_i.php) (suggesting that this win could lead to "[a]n end to unjust health insurance exclusions for transgender medical care"). Some commentators, of course, are wary. See Tony Infanti, *Sex Reassignment Surgery Is Tax Deductible*, FEMINIST LAW PROFESSORS (Feb. 2, 2010), <http://www.feministlawprofessors.com/2010/02/sex-reassignment-surgery-is-tax-deductible> ("[T]his case ineluctably contributes to the medicalization and pathologization of gender identity."); Henry Nall, Comment to *Tax Law is Crazy*, PROFESSORBAINBRIDGE.COM (Feb. 3, 2010), <http://www.professorbainbridge.com/professorbainbridge.com/2010/02/tax-law-is-crazy.html> ("So long as the DSM diagnosis of Gender Identity Disorder continues to exist then transsexual people will be ridiculed, stigmatized and oppressed.").

classify it as a disease.<sup>43</sup> The IRS, arguing against the plaintiff, called transsexualism a “social construction” and a “social phenomenon.”<sup>44</sup> Here the IRS was on the side of years of feminist theory about identity performance, theories with which many transgender and transsexual people agree.<sup>45</sup> In *Sommers v. Iowa Civil Rights Commission* in 1983, the Commission made arguments similar to the IRS’s in *O’Donnabhain*.<sup>46</sup> The court sided with the Commission, holding that a transsexual was not entitled to employment discrimination protections because transsexualism is not disabling; rather, social attitudes cause the harm. The Commission said, “While we do not approve of such discrimination, we do not believe it is prohibited.”<sup>47</sup>

The *O’Donnabhain* and *Sommers* cases encapsulate the debate among transpeople working for equality: should people who can receive benefits from a medical framework do so, even though this approach cannot work for all transpeople and requires those people who can access benefits to define their identities narrowly? Or should those opposed to medicalization win on the basis of preventing pathologization even though this may result in no financial gains for any transpeople? While individual transsexuals have the agency to decide their own case strategies, these decisions cannot be wholly individual so long as common law builds from one case to the next through precedent. *O’Donnabhain* chose medicalization, but she was skeptical of the claims she had to make: “I have to accept the stigma of being labeled as having a disorder [or] a mental condition . . . in order to get benefits. I haven’t liked this diagnosis from the very beginning. But I’ve got to play the game.”<sup>48</sup>

It is possible to use the disability framework in law, though, without subscribing to such a narrow view of selfhood in one’s personal life or political actions. *O’Donnabhain*, in speaking of “play[ing] the game,”<sup>49</sup> draws on Gayatri Spivak’s idea of strategic essentialism, in which one temporarily assumes an essentialized version of herself for political or pragmatic purposes

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43. *O’Donnabhain*, 134 T.C. at 60 (referring to the DSM-IV-TR (fourth edition, text revision)).

44. *Id.* at 59.

45. See BORNSTEIN, *supra* note 5, at 12; KATE BORNSTEIN, MY GENDER WORKBOOK: HOW TO BECOME A REAL MAN, A REAL WOMAN, THE REAL YOU, OR SOMETHING ELSE ENTIRELY 39 (1998) (“Some theorists are now saying that sociological factors have a lot to do with gender, and I think this is closer to the mark.”); PAT CALIFIA, SEX CHANGES: THE POLITICS OF TRANSGENDERISM 245 (1997); FEINBERG, *supra* note 5, at xii, 10 (asking whether sex is a social construct). See also Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 612-15 (1990) (describing feminist theory as one which identifies identity and community membership as constructed rather than discovered); Julie Nagoshi & Stephanie Brzuzy, *Transgender Theory: Embodying Research and Practice*, 25 AFFILIA 431, 432 (2010) (explaining how transgender theory uses the social constructivist approach of feminist and queer theories).

46. *Sommers v. Iowa Civil Rights Comm’n*, 337 N.W.2d 470 (Iowa 1983).

47. *Id.* at 477.

48. Tovia Smith, *Transgender Woman, IRS Fight over Tax Deduction*, NAT’L PUB. RADIO (Oct. 16, 2007), <http://www.npr.org/templates/story/story.php?storyId=15327911>.

49. *Id.*

while internally knowing herself to be more complicated.<sup>50</sup> Strategic essentialism in social movements has been contentious for the more than two decades since Spivak conceptualized the issue, but O'Donnabhain speaks of it as a necessity.<sup>51</sup> Dean Spade complained that it was painful that his “quest for body alteration had to be legitimized by a medical reference to, and pretended belief in, a binary gender system that [Spade] had been working to dismantle since adolescence.”<sup>52</sup> Spade sees the potential of the disability rights framework with regard to gender-segregated facilities or dress codes administered according to sex assigned at birth,<sup>53</sup> but fails to imagine ways in which disability could be leveraged more inclusively for employment protections and other goals. Essentializing one’s identity secures legal protections, though to some the costs feel high.<sup>54</sup> The challenge is even greater for those who identify outside the gender binary, or simply as nontranssexuals.

### III. DISABILITY LAW FOR GENDER-VARIANT NONTRANSSEXUALS

For people who believe that their gender is a malleable construct, it is much less clear that there is any benefit to a legal frame that uses the medical model of disability. The medical model of disability, after all, positions a gender/ sex mismatch as a medical problem that can be solved with hormonal and surgical treatments. Many people who see their gender as socially constructed identify as queer, feminist, and/or trans allies, not necessarily as transgender or transsexual. Members of this group may or may not believe that an individual’s gender can change over time.<sup>55</sup> This group, which could be

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50. GAYATRI CHAKRAVORTY SPIVAK, *OUTSIDE IN THE TEACHING MACHINE* 3-4 (1993). See SANGEETA RAY, GAYATRI CHAKRAVORTY SPIVAK: IN OTHER WORDS 112-13 (2009); Gayatri Chakravorty Spivak, *Subaltern Studies: Deconstructing Historiography*, in IN OTHER WORLDS 197, 205 (1988) (defining strategic essentialism and applying it to Indian cultural values); see also Suzanne A. Kim, *Skeptical Marriage Equality*, 34 HARV. J.L. & GENDER 37, 59 (2011) (portraying the fight for same-sex marriage rights as a form of strategic essentialism).

51. Opponents feel that all essentialism is dangerous and that strategic essentialisms end up naturalizing the identities they had supposedly claimed only temporarily. See Rosalind Dixon, *Feminist Disagreement (Comparatively) Recast*, 31 HARV. J.L. & GENDER 277, 304-07 (2008); Martha M. Ertman, *Reconstructing Marriage: An InterSEXional Approach*, 75 DENV. U. L. REV. 1215, 1237-38 (1998); Ratna Kapur, *Postcolonial Erotic Disruptions: Legal Narratives of Culture, Sex, and Nation in India*, 10 COLUM. J. GENDER & L. 333, 379-80 (2001).

52. Spade, *Resisting Medicine*, *supra* note 31, at 24.

53. *Id.* at 34.

54. See *infra* text accompanying note 61, suggesting the use of “temporary GID” as a way to make strategic decisions about one’s body without feeling trapped in a long-term performance.

55. See Terry S. Kogan, *Transsexuals and Critical Gender Theory: The Possibility of a Restroom Labeled “Other,”* 48 HASTINGS L.J. 1223, 1228-35 (1997) (discussing gender as a social construct and the tension between that idea and transsexualism). See also JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* 179 (1999) (stating that gender’s performativity is not “a stable identity or locus of agency from which various acts follow; rather, gender is . . . instituted . . . through a stylized repetition of [habitual] acts.”); KATE MILLETT, *SEXUAL POLITICS* 28-29 (1970) (explaining that different treatment causes gender differences; they arise from “essentially cultural,

classified as gender-variant, includes butch women, effeminate men, and others who exhibit gender diversity without seeking legal accommodations. Some people who see their gender as socially constructed may still be seeking some sort of medical treatment or accommodation in a sex-differentiated facility that would justify the expense and stigma of a lifetime diagnosis and corresponding treatment, but for the rest, disability law appears at first glance to offer little promise.

Even within the medical model, though, disability law has benefits that other civil rights laws do not. Disability law as legislation is an important model for all trans activists, even those who feel disability law's reliance on a diagnosis is too limiting or who choose to work for sex discrimination or gender-identity-and-expression protections instead. Disability law is unique in its asymmetry and allowance of mutability, characteristics which are especially important to gender-variant people.<sup>56</sup> Sex discrimination and gender-identity-and-expression protections, by contrast, rely on unchanging groups of potential beneficiaries under the law. The Americans with Disabilities Act (ADA), meanwhile, requires a showing of an impairment (which is similar to the requirement in race, sex, and gender-identity antidiscrimination law that one be categorized as a person covered under the law) that affects a major life activity.<sup>57</sup> However, the implementing regulations for the ADA are flexible in that they acknowledge that one does not need to be disabled for a lifetime. Instead, they explicitly state that one could be disabled for a period as short as six months or potentially even less.<sup>58</sup> If trans and gender-variant people were covered under the ADA,<sup>59</sup> they could move in and out of disability as needed for various accommodations. They would not need to be members of the "disabled" group beyond its usefulness to them.<sup>60</sup>

Temporary GID as a diagnosis could apply to individuals who are currently experiencing body dysphoria but wish to retain the option to return to their assigned sex at some point in the future.<sup>61</sup> Studies show that most young

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rather than biological bases"); Sally Haslanger, *Ontology and Social Construction*, 23 PHIL. TOPICS 95, 98 (1995) (arguing that women are both causally and constitutively constructed).

56. Emens, *supra* note 3, at 879-81 (explaining how the ADA is unique among civil rights laws in promoting asymmetry).

57. 42 U.S.C. § 12102(1)(A) (2010).

58. Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, 29 C.F.R. § 1630.2(j)(1)(ix) (2011).

59. This coverage could come either through the removal of the Helms Amendment or through the use of Section 511 to gain coverage as a physical impairment, *see infra* note 119.

60. Primary reasons to want the label to be only temporary might be identity-related (that one no longer identifies or presents as gender-variant) or stigma-related. The work of trans activists or other disability activists may end up reducing the stigma around disability so that some people who might otherwise shed the label may be willing to hold on to the label longer as an act of solidarity with others in the disability rights movement.

61. Temporary GID will not work for all purposes. For example, transsexuals are barred from service in the U.S. military. The current military regulation, DoDI 6130.03, bars people with a current or

people who experience gender dysphoria do not meet the criteria for GID by adolescence, and treatments for young people emphasize that their effects are reversible.<sup>62</sup> One's sense of one's sex, gender, and sexuality in adulthood is not necessarily permanent either, and both the diagnosis of GID and legal protections should reflect this.<sup>63</sup> Indeed, some trans activists recently proposed changing the definition of GID in the new DSM-V to recognize temporariness, but failed to secure passage of their proposal.<sup>64</sup> Temporary GID would also allow transpeople with stable gender identities who simply are uncomfortable wearing the mark of the medical establishment to shed the label as soon as they have received whatever legal protections they might need.

Disability law's recognition of temporary status would allow trans and gender-variant people who may not identify strongly with a disabled identity or a disability community to step into disability on a nonpermanent basis and maintain allegiance with other communities. To insist that one must claim disability for all time or not at all could have negative social-movement consequences for trans communities if members seeking antidiscrimination protections or health benefits become permanently labeled as disabled while those who are not seeking such protections maintain social connections only with the LGB community.<sup>65</sup> Creating a binary between the LGB community and the disability community would force transpeople to choose the community within which they best fit and might most easily access legal protections. Parting from the LGB community would separate some

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past "psychosexual condition[] including but not limited to transsexualism [or] transvestism." Strategic diagnosis would fail with such an expansive list of persons disqualified from service. See DEP'T OF DEF., MEDICAL STANDARDS FOR APPOINTMENT, ENLISTMENT, OR INDUCTION IN THE MILITARY SERVICES No. 6130.03 (2010), <http://www.dtic.mil/whs/directives/corres/pdf/613003p.pdf>. For example, a student who was considering future military service but in the meantime wanted to be protected in his or her right to follow a school dress code applying to the other sex would not benefit from a temporary GID diagnosis.

62. See Susan Bradley & Kenneth Zucker, *Gender Identity Disorder: A Review of the Past 10 Years*, 36 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 872 (1997); Norman P. Spack et al., *Children and Adolescents with Gender Identity Disorder Referred to a Pediatric Medical Center*, 129 PEDIATRICS 418, 419 (2012).

63. Lisa M. Diamond & Molly Butterworth, *Questioning Gender and Sexual Identity: Dynamic Links Over Time*, 59 SEX ROLES 365, 366-67 (2008). The juvenile definition of GID acknowledges temporality, but the adult version insists that GID must be longstanding.

64. See Kelley Winters, *The Proposed Gender Dysphoria Diagnosis in the DSM-5*, GID REFORM WEBLOG (June 7, 2011), <http://gidreform.wordpress.com/2011/06/07/the-proposed-gender-dysphoria-diagnosis-in-the-dsm-5> (describing the official proposed changes to the GID diagnosis as no better than the current criteria, marking "social and medical transition in themselves as perpetually symptomatic of mental illness"). Members of the American Psychiatric Association decided not to change the diagnosis at this time. John Gever, *DSM-V Draft Promises Big Changes in Some Psychiatric Diagnoses*, MEDPAGE TODAY (Feb. 10, 2010), <http://www.mcpagctoday.com/Psychiatry/GeneralPsychiatry/18399>.

65. Many transsexuals first find their identities within the gay and lesbian community's spread of gender presentations and identities. Transpeople may be more likely to be open about same-sex attractions than the nontrans world and so identify as gay, lesbian, or bisexual in greater proportion than the general population. See HOLLY DEVOR, *FTM: FEMALE-TO-MALE TRANSEXUALS IN SOCIETY* 344 (1999).

transsexuals from their histories within that community, while separation from the disability community would prevent people with disabilities, who have a great deal of experience accessing accommodations and medical care, from assisting people of diverse gender identities. Recognizing disability as potentially (though of course not necessarily) temporary could ease the stigma of being identified as disabled, thus making multi-community membership more easily imaginable.

Although disability communities are stigmatized, they may be welcoming spaces for those transpeople who feel excluded from the LGBT movement. Levi and Klein, as well as Dean Spade, suggest that transpeople are hesitant to identify as disabled because they see disability as a flaw.<sup>66</sup> Yet the disability and trans communities have already begun to work together on issues largely ignored in broader LGB activism, such as gender-neutral public restrooms.<sup>67</sup> Furthermore, internal tension exists within trans communities about whether or not transpeople should be part of the LGB movement. Transpeople fought hard to be included within an LGBT movement,<sup>68</sup> and many are reluctant to leave it. The transgender rights movement emerged in the early 1990s, though transsexual and transvestite activism has occurred at least since the birth of the gay-rights movement in the 1970s.<sup>69</sup> Transsexual and homosexual communities were already connected through early activist movements,<sup>70</sup> but very few participants in these activities had the resources needed to seek political or cultural change. Instead, as the gay and lesbian rights movement gained steam, the transgender movement grew more inclusive to cover those left behind by the gay and lesbian movement's focus on its most mainstream members and politically promising plaintiffs.<sup>71</sup> As lesbians and gay men gained legal rights

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66. Jennifer L. Levi & Bennett H. Klein, *Pursuing Protection for Transgender People Through Disability Laws*, in *TRANSGENDER RIGHTS*, *supra* note 31, at 74; Spade, *Resisting Medicine*, *supra* note 31, at 34.

67. Ashley Mog, *Threads of Commonality in Transgender and Disability Studies*, 28 *DIS. STUD. Q.* 20 (2008).

68. Despite this general acceptance, as late as 2000 some lesbian and gay activists were still willing to say publicly that they felt transgender should not be a part of the acronym. Chrissy Cada, *Issue of Transgender Rights Divides Many Gay Activists: Transgender Activists Seek A Greater Voice*, *BOS. GLOBE*, April 23, 2000, at A8.

69. CROMWELL, *supra* note 1, at 2. Early on, transsexuals and transvestites were seen as part of the gay community. Homosexuals, transsexuals, and transvestites were seen as part of the same perverted group. A manifesto published in the *Gay Liberator* in October 1972 shows this union. The anonymous author wrote: "Gay people must be included in civil rights guarantees. There must be no discrimination on the basis of sexual orientation in employment, housing, or any other area. 'Sexual orientation' includes male and female homosexuality, transsexuality and transvestism, etc." Anonymous, *Full Civil Rights*, *GAY LIBERATOR*, Oct. 1, 1972, *cited in* VALENTINE, *supra* note 1, at 49.

70. Aaron Devor & Nicholas Matte, *ONE Inc. & Reed Erickson: The Uneasy Collaboration of Gay and Trans Activism, 1964-2003*, in *THE TRANSGENDER STUDIES READER* 387, 393 (Susan Stryker & Stephen Whittle eds., 2006) (describing Reed Erickson's funding of early homophile and trans organizations in the 1960s).

71. See URVASHI VAID, *VIRTUAL EQUALITY: THE MAINSTREAMING OF GAY & LESBIAN LIBERATION* 2-3 (1995) (observing an incomplete mainstreaming of LGBT people that has freed some

and moved into the mainstream, transpeople struggled in the legal system and in public opinion.<sup>72</sup> The LGBT movement overall has experienced incredible success at normalization.<sup>73</sup> To take on another marginalized identity as disabled—instead of the more neutral one that they have already claimed as queer/LGBT—is a lot to ask of transpeople who have been welcomed into certain LGBT communities.<sup>74</sup> However, many transpeople, especially but not limited to transsexuals, do not feel that they are included in the LGBT community, or that LGBT organizations represent them.<sup>75</sup> Those transpeople who fit least well into a normalized LGBT frame, who are the least “normal,”

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more than others); Lisa Duggan, *History's Gay Ghetto: The Contradictions of Growth in Lesbian and Gay History* (1986), reprinted in *SEX WARS: SEXUAL DISSENT AND POPULAR CULTURE* 153 (Lisa Duggan & Nan D. Hunter eds., 1995) (describing the lesbian- and gay-rights movement's desire for politically palatable images for public use)

72. Lawyer and transgender activist Shannon Minter writes, “At least in part, the transgender movement has arisen in direct response to the exclusion of cross-gendered lesbians and gay men from the mainstream gay movement . . .” Shannon Minter, *Do Transsexuals Dream of Gay Rights? Getting Real About Transgender Inclusion in the Gay Rights Movement*, 17 N.Y.L. SCH. J. HUM. RTS. 589, 594-95 (2000). The terms “gay,” “lesbian,” and “homosexual” in the twentieth century became entirely about sexual-object choice rather than the inversion-based definition it held prior to the emergence of the modern gay movement. Class-based pressures accounted for at least some of that shift, as more wealthy gays and lesbians tried to assimilate with heterosexual society and dissociate from their lower-class and less gender-normative peers. See GEORGE CHAUNCEY, *GAY NEW YORK: GENDER, URBAN CULTURE, AND THE MAKING OF THE GAY MALE WORLD, 1890-1940*, at 105-06 (1994); LILLIAN FADERMAN, *ODD GIRLS AND TWILIGHT LOVERS: A HISTORY OF LESBIAN LIFE IN TWENTIETH-CENTURY AMERICA 180-81* (1991). See also MARSHALL KIRK & HUNTER MADSEN, *AFTER THE BALL: HOW AMERICA WILL CONQUER ITS FEAR & HATRED OF GAYS IN THE 90'S 187-88* (1989) (suggesting marketing more normative gays and lesbians to overcome homophobia).

73. Normalization is the process by which the more radical parts of a movement are cut off in attempts to gain recognition and eventual institutionalization of the movement's goals. See MICHAEL WARNER, *THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE* 66 (1999) (describing the lesbian and gay movement's “betrayal of the abject and the queer in favor of a banalized respectability”). See generally Dale Carpenter, *How the Law Accepted Gays*, N.Y. TIMES, Apr. 29, 2011, at A27 (arguing that “gay men and lesbians have persuaded much of the legal profession to accept the basic proposition that sexual orientation is irrelevant to a person's worth and that the law should reflect this judgment”).

74. All major lesbian and gay advocacy groups now claim also to advocate for transgender rights, though their dedication to this endeavor varies. See *About*, GAY & LESBIAN ALLIANCE AGAINST DEFAMATION, <http://www.glaad.org/mission> (last visited June 26, 2011); HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org> (last visited June 26, 2011); *About Us*, NAT'L GAY & LESBIAN TASK FORCE, [http://www.thetaskforce.org/about\\_us](http://www.thetaskforce.org/about_us) (last visited June 26, 2011). It is not uncommon for LGBT movement activists to claim that lesbian, gay, bisexual, and transgender rights are all connected because lesbians and gay men frequently face harassment because same-sex relationships break gender norms and lesbians and gay men frequently fail to be as feminine for women and as masculine for men as society tells them to be. Because transpeople break gender norms, this argument concludes, we are all basically the same. See, e.g., BORNSTEIN, *supra* note 5, at 104. See also Minter, *supra* note 72, at 617-20 (critiquing all exclusionary visions of identity as over-simple).

75. NAMASTE, *supra* note 34, at 2, 20, 51 (“[T]he transsexuals who do manage to distribute their work and ideas widely . . . almost all advocate an alliance between lesbian/gay and transsexual/transvestite communities . . . [However,] most transsexuals do not want to have any formal association with the lesbian/gay communities”); see also Kelley Winters, *HRC Throws Trans Health Equity Under the Bus – Again*, THE BILERICO PROJECT (Feb. 15, 2009, 11:30 AM), [http://www.bilerico.com/2009/02/hrc\\_throws\\_trans\\_health\\_equity\\_under\\_the.php](http://www.bilerico.com/2009/02/hrc_throws_trans_health_equity_under_the.php). See generally BOYCOTT HRC, <http://boycotthrc.wordpress.com/> (last visited June 25, 2011).

may need the legal protections the most. It is for them that disability could be a promising frame.<sup>76</sup>

The many failures of a trans-inclusive Employment Non-Discrimination Act (ENDA) demonstrate a reluctance at the federal level to include transpeople in the LGBT agenda. The negative connotations of transsexuality in U.S. politics became clear in the struggle to enact ENDA in 2007. The gay and lesbian community had for several years pushed a version of the bill that included only sexual orientation (and not gender variance) and was moderately popular, but that noninclusive bill became more legislatively viable when contrasted with a trans-inclusive version.<sup>77</sup> Congress had not passed the sexual-orientation-only bill by 2007, but in 2007 members of the House of Representatives introduced a version of ENDA that included gender identity for the first time.<sup>78</sup> Although the bill failed, after the apparently terrifying possibility of transgender inclusion the mainstream and influential gay-rights organization Human Rights Campaign (HRC) claimed it was now possible to pass the sexual-orientation-only bill they had failed with previously.<sup>79</sup> The gay-only version became markedly more acceptable to Congress in contrast to the trans-inclusive version, which was abandoned.<sup>80</sup>

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76. Homosexuality became more acceptable by separating itself from transgender, so that people who are nominally part of a movement with transpeople as part of the larger LGBT movement found the rise of a transgender movement not to be a partner in efforts for justice but instead as something negative that could hurt their own access to rights. Social movement theorists Mayer N. Zald and John D. McCarthy call people who support a movement without personally benefiting from its work “conscience constituents,” but this group is less likely to be as attached to the group’s goals, and are even described as “fickle” due to their diverse priorities. John D. McCarthy & Mayer N. Zald, *Resource Mobilization and Social Movements: A Partial Theory*, in *SOCIAL MOVEMENTS IN ORGANIZATIONAL SOCIETY* 15, 23, 33-34 (Mayer N. Zald & John D. McCarthy eds., 1987). These constituents may be more hesitant to support the more radical aspects of the politics of the group with which they are affiliating, but their customarily large financial support gives their voices an outsized role in shaping group actions. Valentine writes, “[N]ot only does transgender provide a foil against which ‘gay’—implicitly white, middle class, respectable, private, dependable, and most deeply, male—can define itself but it allows any gender-variant behavior—even from those who identify as gay—increasingly to be moved into the category transgender.” VALENTINE, *supra* note 1, at 202.

77. ENDA was introduced from the 103rd to the 108th Congresses without gender identity protections, and it never passed the House of Representatives. See Employment Non-Discrimination Act of 1997, H.R. 1858, 105th Cong. (1997); Employment Non-Discrimination Act of 1995, H.R. 1863, 104th Cong. (1995); Employment Non-Discrimination Act of 1994, H.R. 4636, 103d Cong. (1994).

78. H.R. 2015, introduced April 24, 2007, was the first trans-inclusive ENDA; the bill failed in committee. See Employment Non-Discrimination Act of 2007, H.R. 2015, 110th Cong. (2007); *id.* § 8(a)(3), (4).

79. Letter from the Leadership Conference on Civil Rights to Congressional Representatives (Nov. 6, 2007), available at [http://www.pamspaulding.com/graphics/LCCR\\_ENDA\\_%20Letter.pdf](http://www.pamspaulding.com/graphics/LCCR_ENDA_%20Letter.pdf) (including HRC as a signatory to the letter, which stated the organizations’ support for the exclusionary bill). After the fact, HRC recanted under community pressure and said it always pushed for a trans-inclusive bill, but blogger Autumn Sandeen captured Google caches proving that HRC sold out the trans community in Congress. See Autumn Sandeen, *The HRC’s Bad ENDA Behavior – And a Cover-Up?*, PAM’S HOUSE BLEND (Nov. 5, 2007, 11:45 PM), <http://pamshouseblend.firedoglake.com/2007/11/05/the-hrcs-bad-enda-bbehavior-and-a-coverup>.

80. In response to the failed trans-inclusive bill, Representative Barney Frank introduced H.R. 3685, a sexual-orientation-only version, on September 27, 2007. H.R. 3685 passed the House of

Despite the failed attempts to create a trans-inclusive ENDA, the EEOC has recently declared that transsexuals are protected under employment discrimination as a matter of sex discrimination. The EEOC's April 2012 decision in *Mia Macy v. Eric Holder*<sup>81</sup> is binding on all federal agencies and covers anyone discriminated against by virtue of his or her gender identity.<sup>82</sup> Independently, the 11th Circuit held in December 2011 that the broader rationale of "gender non-conformity" is not an acceptable justification for firing an employee.<sup>83</sup> Yet these important decisions could still be overturned by the Supreme Court and do not protect people discriminated against by municipal governments, like students in public schools, or people discriminated against in places of public accommodation.<sup>84</sup> For those cases, disability law may be a better route. Further, disability law should not be ignored as another potential path to coverage for employment discrimination, because of the ideas of asymmetry and accommodation,<sup>85</sup> as well as the option of proving one's status through social means rather than medical definitions.<sup>86</sup> For that reason a disability rights approach that follows the social model of disability might be more flexible and cover more people.

It is important to note that gender-identity-and-expression protections can be similarly insufficient where an accommodation or social model might be more successful. Nondiscrimination policies that explicitly value bodily and gender identity differences can be expressed as "gender identity and expression" clauses.<sup>87</sup> One positive effect of gender-identity-and-expression

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Representatives for the first time that year. See Employment Non-Discrimination Act of 2007, H.R. 3685, 110th Cong. (2007).

81. EEOC Decision No. 0120120821 (2012).

82. Chris Geidner, *Transgender Breakthrough*, METRO WEEKLY (Apr. 23, 2012), <http://www.metroweekly.com/news/?ak=7288>.

83. Glenn v. Brumby, 663 F.3d 1312, 1320 (11th Cir. 2011).

84. Employment discrimination is covered under Title I of the Americans with Disabilities Act; activities of municipal governments under Title II; and public accommodations under Title III. Nondiscrimination on the Basis of Disability in State and Local Government Services, 28 C.F.R. § 35.101 (2010); Nondiscrimination on the Basis of Disability in Public Accommodations and Commercial Facilities, 28 C.F.R. § 36.101 (2010). The EEOC's decision, however, applies only to Title VII. See *Macy v. Eric Holder*, EEOC Decision No. 0120120821 (2012).

85. See *infra* note 149 and accompanying text.

86. See *infra* note 127 and accompanying text.

87. As of June 2012, sixteen states, the District of Columbia, and 156 cities and counties had explicitly transgender-inclusive nondiscrimination laws, though many cover only public employees. NAT'L GAY & LESBIAN TASK FORCE, JURISDICTIONS WITH EXPLICITLY TRANSGENDER-INCLUSIVE NONDISCRIMINATION LAWS 1 (2012), [http://www.thetaskforce.org/downloads/reports/fact\\_sheets/all\\_jurisdictions\\_w\\_pop\\_6\\_12.pdf](http://www.thetaskforce.org/downloads/reports/fact_sheets/all_jurisdictions_w_pop_6_12.pdf). See, e.g., CAL. PENAL CODE § 422.56(c) (2010) (declaring that gender refers to sex and "includes a person's gender identity," and that "'gender expression' means a person's gender related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth"); Mitchell Dylan Sellers, *Discrimination and the Transgender Population: Analysis of the Functionality of Local Government Policies That Protect Gender Identity*, 44 ADMIN. & SOC'Y 1, 14 (2012) (concluding that enforcing agencies usually lack adequate power to safeguard covered classes). See also TRANSGENDER LAW & POLICY INSTITUTE & NATIONAL GAY & LESBIAN TASK FORCE, SCOPE OF EXPLICITLY TRANSGENDER-INCLUSIVE ANTIDISCRIMINATION LAWS

clauses lies in the normalization process of being placed on a list of identities deserving of protection, including genderqueers, people exhibiting diverse forms of gender-variance, and transsexuals, all in the same language. However, disability provides courts with an existing frame through which to understand the cases in front of them, obviating the creation of entirely new law. Furthermore, despite the promise of gender-expression-and-identity clauses, there are cases that these cannot reach. A transwoman excluded from a women's restroom on the basis of not having had genital surgery is excluded not due to her gender identity or gender expression, but rather because her body is different from what society expects a woman's body to look like.<sup>88</sup> Disability claims have the potential to obtain rights beyond those protected by more traditional civil rights laws. For example, only a few transpeople have won access to medical care in state courts using disability law, with no such victories in the past thirty years, but such a win is at least imaginable when using a framework of accommodation rather than antidiscrimination and equal opportunity.<sup>89</sup>

Unlike antidiscrimination, an accommodation framework acknowledges difference and supports it. An antidiscrimination framework would fail a transwoman attempting to secure medical coverage for a trachea shave,<sup>90</sup> for example, if the health insurer did not cover trachea shaves for any other population. However, under an accommodation framework, a trachea shave could be seen as a necessary body modification that could improve a transperson's mental health or employability. If the trachea shave were regarded as a health-improving treatment, health insurers would have to pay for it, just as they pay for durable medical equipment for those who need it and not for those without a medically necessary reason for it. And from an employment perspective, public health insurance might pay for the surgery as a work accommodation.<sup>91</sup> Therefore, even if a gender-variant person does not view

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(2008), [http://www.thetaskforce.org/downloads/reports/fact\\_sheets/TI\\_antidisc\\_laws\\_7\\_08.pdf](http://www.thetaskforce.org/downloads/reports/fact_sheets/TI_antidisc_laws_7_08.pdf) (clarifying which jurisdictions cover each type of antidiscrimination protection, including public accommodations, housing, employment, education, and the right to sue).

88. Thanks to Jennifer Levi for that example. Levi describes the legislative insertions of gender-identity-and-expression language as "maybe not the best approach." She continued, "We are bumbling around with really challenging language." Jennifer Levi, GLAD Transgender Rights Project Director, Panel at the Yale Law School Rebellious Lawyering Conference: The Transgender Rights Movement and the Law (Feb. 18, 2011).

89. See, e.g., *G.B. v. Lackner*, 145 Cal. Rptr. 555 (Ct. App. 1978) (finding that the claimant was entitled to benefits for surgery to treat gender identity dysphoria); *Doe v. State, Pub. Dep't of Welfare*, 257 N.W.2d 816 (Minn. 1977) (finding that the Welfare Department's denial of benefits to transsexual plaintiff was arbitrary and unreasonably).

90. A trachea shave is "one of the most common medical procedures for transsexuals," in which "[t]he surgeon reduces the cartilage in the throat to make the shape more feminine." *Trachea Shave*, TRANSEXUAL ROAD MAP (Jan. 4, 2011), <http://www.tsroadmap.com/physical/face/trachea.html>.

91. Medicaid in New York State, to draw a parallel, pays for dentures only if the recipient can demonstrate that they either effect a serious health condition or that missing teeth will hurt his or her job prospects. NEW YORK STATE MEDICAID PROGRAM, DENTAL POLICY AND PROCEDURE MANUAL 38

gender variance as a serious health problem, medical treatment may be available as a means of accessing employment. This fits with the social model of disability, which recognizes that transphobia can make a large larynx an impediment rather than just a bodily difference.

Using disability along with sex discrimination may also expand sex discrimination doctrine beyond its current bounds. Levi writes, “[B]ecause courts have been able conceptually to marginalize the impact of their decisions to a minority community (of transgender persons), it may be easier for them to allow some small incursion into widely held beliefs about the fundamental differences between men and women.”<sup>92</sup> In *Doe v. Yunits*, a transgender student was allowed an exception to a grooming code to which a nontransgender man or woman would be held because her therapist explained to the court that the transgender student’s health issues (GID) caused the code to apply differently to her. Levi writes that “different health conditions are widely understood to change the way an individual might respond to a particular job requirement, making the judge without the health condition a poor arbiter of the job requirement’s effects.”<sup>93</sup> Levi claims that judges informed of a health condition are more likely to allow the plaintiff’s claim to go forward.<sup>94</sup> This is logical, as the judge has more discretion to make a decision that need not rely on sex discrimination precedents. Thus, transsexualism in the law can break a gender norm that nontranssexual women failed to destroy.<sup>95</sup> Although the plaintiffs in trans disability cases have most often been transsexuals, trans-disability-law creation has the potential to expand visions of the body for nontrans plaintiffs by setting new precedents and expanding the body of antidiscrimination law to include individual accommodations on the basis of gender identity.

Favorable trans sex discrimination cases have usually noted that the plaintiffs are following recommended treatment for GID.<sup>96</sup> It is unclear if gender-variant people who choose not to transition, or to transition in some ways but not others, would be covered under these rulings. An example of a

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(2012), [https://www.emcdny.org/ProviderManuals/Dental/PDFS/Dental\\_Policy\\_and\\_Procedure\\_Manual.pdf](https://www.emcdny.org/ProviderManuals/Dental/PDFS/Dental_Policy_and_Procedure_Manual.pdf).

92. Jennifer Levi, *Clothes Don't Make the Man (Or Woman), but Gender Identity Might*, 15 COLUM. J. GENDER & L. 90, 103-04 (2006).

93. *Id.* at 104.

94. *Id.*

95. See *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104 (9th Cir. 2006) (holding that a grooming policy requiring female bartenders to wear makeup did not establish a prima facie case of Title VII sex discrimination). Other sources disagree, with feminist scholar Anna Kirkland claiming that many transsexual “‘victories’ are disheartening because they are only secured through legal arguments that trade on heavily normalized conceptions of gender roles.” Kirkland is concerned about how judges will “flatten” transsexual narratives. Anna Kirkland, *Victorious Transsexuals in the Courtroom: A Challenge for Feminist Legal Theory*, 28 LAW & SOC. INQUIRY 1, 7 (2003).

96. See, e.g., *Glenn v. Brumby*, 663 F.3d 1312, 1314 (11th Cir. 2011); *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004).

situation that sex discrimination law might miss would be a butch woman and a transsexual woman both being refused a job that involved staffing a dressing room in a retail establishment. For the butch woman, the issue would be that her gender expression makes the employer, employees, or customers uncomfortable; for the transsexual woman, the issue is what sex she was assigned at birth. Either or neither of these individuals could identify as genderqueer, and if either does, a judge may nevertheless decide that a genderqueer identity is invalid, in part because it lacks the support of a GID diagnosis. That a transsexual woman cannot be fired for dressing as female is important, but is not enough.

Further complicating the situation, genderqueer as a theory is built on the idea that gender is separate from sex, and that it is individual, socially constructed and potentially fluid.<sup>97</sup> This narrative of individuality and impermanence collides with the idea of class immutability necessary for antidiscrimination protections. Social and legal-rights movements build upon their predecessors, and so winning protections could be very difficult for genderqueers, as there are no models of recent social movements that have advanced by showcasing individuality and temporariness.<sup>98</sup> When an aggressive woman is told to act more feminine, *Price Waterhouse v. Hopkins* protects her,<sup>99</sup> but if that same individual identifies as genderqueer, there are no protections in current doctrine and no way to get to heightened scrutiny.<sup>100</sup> For genderqueer identity to be protected under Title VII, there would need to be a judicial or legislative declaration that genderqueer identity is valid and should be protected in itself as a separate gender option.<sup>101</sup> Transsexuals, gender-

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97. Janinc M. deManda, *Our Transgressions: The Legal System's Struggle with Providing Equal Protection to Transgender and Transsexual People*, 71 UMKC L. REV. 507, 513 n.35 (2003); Nancy J. Knauer, *Gender Matters: Making the Case for Trans Inclusion*, 6 PIERCE L. REV. 1, 18-23 (2007) (describing a personal experience of gender variance without a transgender identity, and describing how "genderqueer embraces a fluidity of gender roles and behaviors . . . [and] rejects not simply the gender role behavior and expectations associated with one's gender assigned at birth, but the act or meaning of that assignment"); Vade, *supra* note 31, at 266 n.42.

98. Craig J. Konnoth, Note, *Created in Its Image: The Race Analogy, Gay Identity, and Gay Litigation in the 1950s-1970s*, 119 YALE L.J. 316, 341 (2009) (showing how women's rights supporters and subsequently gay activists modeled their work after the successes of the civil rights movement and made analogies to race); Serena Mayeri, Note, "A Common Fate of Discrimination": *Race-Gender Analogies in Legal and Historical Perspective*, 110 YALE L.J. 1045, 1052-63 (2001).

99. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). This famous case held that Ann Hopkins suffered sex discrimination from partners at Price Waterhouse who decided she was too abrasive and not feminine enough to make partner. However, Hopkins might also have been denied partner if she had acted in a more feminine manner because the partners valued traditionally masculine characteristics, but only when these came from males. *Price Waterhouse* does not cover dress codes, hair, or makeup requirements, which the Ninth Circuit held to be legal in *Jespersen*, 444 F.3d at 1111-12.

100. Note how *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004), stating that transsexuality could be protected under Title VII, was abridged in *Vickers v. Fairfield Medical Center*, 453 F.3d 757 (6th Cir. 2006), which held that while gender nonconformity may be protected, an orientation or status is not.

101. It is possible that people who identify as genderqueer but who are being discriminated against for their expressions of that identity rather than their overtly stated identification with the label could

variant people who do not identify as “trans”—anything, and people who identify as transgender but not transsexual (such as genderqueers) *are* all protected under legislative amendments covering “gender identity and expression.” These clauses are very important where they exist and are enforced,<sup>102</sup> but this happens too infrequently,<sup>103</sup> and many transpeople go unprotected. People who appear gender-variant but insist upon being labeled as their assigned gender would probably receive protections under *Price Waterhouse*,<sup>104</sup> but discrimination against genderqueers does not fit neatly within *Price Waterhouse*; genderqueers are carefully performing something that is neither “man” nor “woman.”<sup>105</sup>

Furthermore, marking off genderqueers as a group of people who vary from expected gender norms but who are not seeking healthcare or differentiated sex-segregated accommodations may fracture any unity that currently exists in the nascent transgender rights movement. Saying “gender-variant people go here, transsexuals go there” pretends that butch dykes are not transsexuals, have no interests in common with transsexuals, and are not part of the same community. As the long-standing discussion in lesbian communities about “where have all the butches gone”<sup>106</sup> implies, gender and sexuality are

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receive sex discrimination protections by arguing that the discrimination is based on their failure to follow the rules of the gender the discriminator/harasser believes the plaintiff to be. However, that would not address the defense that the discriminator/harasser was not acting on the basis of the plaintiff’s lack of gender-appropriate behavior, but rather on the plaintiff’s positive anticonformist acts and identity. I argue that disability law would avoid having to put the plaintiff’s gender identity under the microscope like this and instead shift the focus to the rights of diverse individuals to work unmolested or to be accommodated in their specific needs.

102. See LISA MOTTET & JUSTIN TANIS, NAT’L GAY & LESBIAN TASK FORCE POL’Y INST. & NAT’L CTR. FOR TRANSGENDER EQUALITY, OPENING THE DOOR TO THE INCLUSION OF TRANSGENDER PEOPLE: THE NINE KEYS TO MAKING LESBIAN, GAY, BISEXUAL AND TRANSGENDER ORGANIZATIONS FULLY TRANSGENDER-INCLUSIVE 6 (2008), [http://www.thetaskforce.org/downloads/reports/reports/opening\\_the\\_door.pdf](http://www.thetaskforce.org/downloads/reports/reports/opening_the_door.pdf) (defining the transgender community as including both transsexuals and genderqueer); Pauline Park, *GenderPAC, the Transgender Rights Movement and the Perils of a Post-Identity Politics Paradigm*, 4 GEO. J. GENDER & L. 747, 749-51 (2003) (expressing concern about the conflation of the needs of transsexuals and a broader group of gender-diverse people).

103. See *supra* note 87.

104. *Price Waterhouse*, 490 U.S. 228.

105. People of diverse gender presentations who are not transsexual are rarely trying to “pass” as one sex or the other and so may be even more likely than transitioned transsexuals to face harassment for their gender presentations. See Jack Harrison, Jaime Grant & Jody L. Herman, *A Gender Not Listed Here: Genderqueers, Gender Rebels, and OtherWise in the National Transgender Discrimination Survey*, 2 LGBTQ POL’Y J. HARVARD KENNEDY SCH. 13, 21-23 (2012). Because of this, the legal barriers they face are also not identical to those of transsexuals.

106. Some butch communities, particularly Caucasian middle-to-upper-class ones, have all but disappeared. Though no solid empirical studies exist, many lesbians make the controversial—and some would say transphobic—claim that these butches left to transition. Others deny the existence of a butch-FTM continuum but acknowledge that the two groups are read similarly. Other communities have become mixed, with many formerly lesbian spaces now defining themselves as being for lesbian, bisexual, and transgender people. See DEVOR, *supra* note 65, at 344 (reporting that most of the transsexuals she had interviewed “were attracted to the possibilities offered by lesbian roles,” and that a not insignificant number “tried to become settled with lesbian identities” prior to transition); JUDITH HALBERSTAM, *FEMALE MASCULINITY* 149 (1998) (describing how butch and FTM bodies are read

not entirely disconnected, and many transpeople do feel ties to the LGB community.<sup>107</sup> However, there is no bar to arguing claims from both disability and gender or sexual orientation if two or more of those apply.<sup>108</sup> Disability law allows one to step outside the rubric of similarity demanded by other civil rights movements and laws and instead to talk about accommodation for one's particularized needs. Disability law can be seen as law protecting people with certain categories of disorders, but it is now more often understood as protecting people from the "[a]ttitudinal, environmental, and economic realities [that] contribute to making people disabled."<sup>109</sup> Transpeople, like others covered under disability law, should be protected from discrimination on the basis of their bodily differences.

In sum, while transsexual identities are protected under disability or sex discrimination law, genderqueer or other nonbinary identities that have not yet found success may also have claims in both of these areas, as well as under sexual orientation protections. Furthermore, disability law can contribute to a broader vision of other civil rights claims through its emphasis on a socially constructed model of disability rather than a fixed, unchanging one. Sexual orientation discrimination claims, for example, may be moving towards greater fluidity, and should be pursued if bisexuals are successful in their arguments that their sexualities can be fluid and still deserving of protection.<sup>110</sup> Future sex and sexual orientation discrimination laws should be crafted along the social model of disability to recognize that one can be a member of the group and

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"against and through each other for better or for worse"). See also Robin Bauer, *Transgressive and Transformative Gendered Sexual Practices and White Privileges: The Case of the Dyke/Trans BDSM Communities*, 36 WOMEN'S STUD. Q. 233, 237 (describing how communities that began as women's scenes transformed into ones that include genderqueers, people at all points on the female-to-male spectrum, and transwomen).

107. Affiliation with the lesbian- and gay-rights movement happened early on, as homosexuals, transsexuals, and transvestites were considered to be part of the same perverted group. CROMWELL, *supra* note 1, at 2. Trans activist Leslie Feinberg argues for a strong connection between the movements: "To the bigots and bashers, all trans expression is 'queer.' Distancing ourselves from the lesbian, gay, and bi movement will not make us safer. But fighting lesbian and gay oppression head-on will." FEINBERG, *supra* note 1, at 98. Feinberg insists that while not all lesbian, gay, and bisexual people experience oppression based on their gender presentations, "all trans people experience anti-gay bigotry." *Id.* Any discussion of a transgender or transsexual connection to gay rights would be incomplete without a nod toward the now heavily mythologized events at The Stonewall Inn in 1969, during which a variety of gay and transsexual patrons fought back together against police repression. MARTIN DUBERMAN, STONEWALL (1994); Phyllis Randolph Frye, *Facing Discrimination, Organizing for Freedom: The Transgender Community*, in CREATING CHANGE: SEXUALITY, PUBLIC POLICY, AND CIVIL RIGHTS 451 (John D'Emilio, William B. Turner & Urvashi Vaid eds., 2000).

108. See Levi & Klein, *supra* note 66, at 76.

109. Mark C. Weber, *Disability and the Law of Welfare: A Post-Integrationist Examination*, 2000 U. ILL. L. REV. 889, 894.

110. See Greg Bishop, *In a Softball Case, a Thorny Debate Over Who Qualifies as Gay*, N.Y. TIMES, June 30, 2011, at A1. The case settled, so a court has yet to rule on the issue. *Parties Settle Case Challenging Disqualification of Bisexual Players' Team at 2008 Gay Softball World Series*, NAT'L CTR. FOR LESBIAN RIGHTS (Nov. 28, 2011), [http://www.nclrights.org/site/PageServer?pagenamc=press\\_2011\\_NCLR\\_Settles\\_Softball\\_Case\\_112811](http://www.nclrights.org/site/PageServer?pagenamc=press_2011_NCLR_Settles_Softball_Case_112811).

deserving of protections at some times and not others, or based on how one is seen rather than how one identifies. The “expression” portions of gender-identity-and-expression clauses are the best ongoing attempts at this expansion of coverage, as gender expression can be read very widely. However, activists in jurisdictions that still lack sexual orientation protections should also consider defining sexual orientation broadly to include one’s practices, beliefs, history, or how one is perceived, rather than requiring some showing of a perfect match between all of those.

There may already be a case for disability law protection for genderqueers under the “perceived as” prong of many state disability statutes that have language similar to the ADA.<sup>111</sup> The social movement strategies discussed in Part V suggest that if litigators are not ready to make these claims, activists can decide as a social movement to claim the disability label so that it is more familiar to judges when litigators do adopt this approach.<sup>112</sup>

#### IV. CRITIQUES OF CURRENT EFFORTS TO USE DISABILITY LAW

The first major critique of disability law’s prospects for transgender rights is that federal protections are far from being realized. The two hallmark pieces of legislation in disability rights are the Rehabilitation Act of 1973 and the Americans with Disabilities Act of 1990 (with revisions in 2008),<sup>113</sup> both of which expressly deny coverage for transsexuals.<sup>114</sup> Senator Jesse Helms’s animus against transgender and transsexuals led to his 1989 amendment to the ADA, disallowing any transgender status resulting from a mental impairment to receive protection on the basis of disability.<sup>115</sup> Helms “expressed concern that employers would not be able to exercise their ‘moral standards’ in making

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111. See Alex Long, *State Antidiscrimination Law as a Model for Amending the Americans with Disabilities Act*, 65 U. PITT. L. REV. 597, 628-30, 648-53 (2004) (noting the influence of the ADA on the definition of disability in state disability statutes and describing each state’s statute). There are no cases making this argument yet, successfully or not.

112. Some movement lawyers feel there is no need to rush to develop a body of genderqueer law. “These are not the needs I see for my clients,” said Pooja Gehi, staff attorney at the Sylvia Rivera Law Project. While Gehi may personally prefer that identification cards not have gender markers, her clients find it to be very affirming to have the correct binary gender marker. Pooja Gehi, Staff Attorney, Sylvia Rivera Law Project, Panel Presentation at the Yale Law School Rebellious Lawyering Conference: The Transgender Rights Movement and the Law (Feb. 18, 2011).

113. Americans with Disabilities Act Amendments Act of 2008, 42 U.S.C. §§ 12101-12213 (2010).

114. Americans with Disabilities Act of 1990, 42 U.S.C. § 12211 (2010); see Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 791(g), 793(d), 794(d) (2000) (excluding transsexuals by reference to the ADA). The Rehabilitation Act actually covered transsexuals prior to its amendment in 1992. See *Dobre v. Nat’l R.R. Passenger Corp.*, 850 F. Supp. 284 (E.D. Pa. 1993) (holding that the revisions of the Rehabilitation Act of 1973, Pub. L. 102-569, § 102, 106 Stat. 4349 (1992), expressly excluded transsexuals, even though the initial Rehabilitation Act of 1973 did not).

115. 135 CONG. REC. 19,863-64, 19,870, 19,884 (daily ed. Sept. 7, 1989) (statements of Sen. Helms).

judgments about hiring of certain types of employees.”<sup>116</sup> Legal challenges to the Helms Amendment as a violation of the Equal Protection Clause appear never to have occurred.<sup>117</sup> Several claims in which plaintiffs have attempted to seek protections on the basis of disability through their state constitutions have failed because of this amendment.<sup>118</sup> There may be a path to future coverage under the ADA using Section 511 of the ADA, but no one has yet won coverage this way.<sup>119</sup>

Even where disability-based protections are available, as in some state laws, trans communities are divided over the use of any strategy that works only for some transpeople. Attorneys Jennifer Levi and Bennett Klein call disability law’s potential to protect transpeople’s rights “important” but “controversial,”<sup>120</sup> because of the stigma of disability and the trans community’s very mixed feelings about GID.<sup>121</sup> A diagnosis of a psychiatric disorder labels people who identify as a different sex as abnormal, thus carrying stigma.<sup>122</sup> Yet disability law protections are largely unavailable to those transsexuals who see a diagnosis of mental illness as irrelevant to their identities or who cannot afford psychological treatment to get a diagnosis.<sup>123</sup>

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116. L. Camille Hébert, *Transforming Transsexual and Transgender Rights*, 15 WM. & MARY J. WOMEN & L. 535, 540 n.29 (2009).

117. The only case law addressing the amendment is *James v. Ranch Mart Hardware, Inc.*, an employment discrimination case in which the plaintiff’s amended complaint, which alleged discrimination on the basis of disability, was dismissed because the text of the amendment excluded transsexuals as disabled. No. 94-2235-KHV, 1994 WL 731517, at \*2 (D. Kan. Dec. 23, 1994). The text of the Helms Amendment does not give any reasons for the exclusion of transsexuals from the category of disability, but the legislative history behind the amendment reveals Jesse Helms’s animus and his moral view of transpeople as unworthy of rights. See *supra* note 115.

118. See *Johnson v. Fresh Mark, Inc.*, 98 F. App’x 461 (6th Cir. 2004) (offering no employment protections to the plaintiff because the ADA does not cover transsexualism); *Oiler v. Winn-Dixie La., Inc.*, No. 00-3114, 2002 WL 31098541, at \*3 n.47 (E.D. La. Sept. 16, 2002) (noting that plaintiff with GID could not bring a claim under ADA); *Doc v. United Consumer Fin. Servs.*, No. 1:01 CV 1112, 2001 WL 34350174, at \*6 (N.D. Ohio Nov. 9, 2001) (holding similar to *Johnson*); *Dobre*, 850 F. Supp. at 289 (holding that the revised Rehabilitation Act excluded transsexuals).

119. My research has not turned up anyone who has actually tried. But see 42 U.S.C. § 12211 (describing gender identity disorders resulting from physical impairments); *Lie v. Sky Publ’g Corp.*, No. 013117J, 2002 WL 31492397, at \*6 n.3 (Mass. Super. Ct. Oct. 7, 2002) (suggesting that finding a genetic link for transsexualism could cause transsexuality to be seen as a physical impairment). Section 511 of the ADA seems to imply that gender identity disorders resulting from physical impairments are protected under the ADA. See 42 U.S.C. § 12211(b)(1). While this applies immediately to some intersex people who identify as genders other than those to which they have been assigned based on their ambiguous genitalia, current medical debates on moving the medical diagnosis of gender identity disorder to a diagnosis of a physical disorder could allow the ADA to cover far more people.

120. Levi & Klein, *supra* note 66, at 75.

121. *Id.* at 89. See also Winters, *supra* note 64 (critiquing the current DSM-IV as “cast[ing] difference from stereotypes of birth-assigned gender roles as pathological and . . . biased to favor harmful gender-reparative psychotherapies that enforce birth-role conformity”).

122. In contrast, some transactivists want nonmedical language to describe themselves. Jason Cromwell wants “transdiscourses,” which he describes as “non-medical, nonpathological, and noncolonizing. They are affirming, empowering, positive, and reflective of trans experiences and the lives people choose to live.” CROMWELL, *supra* note 1, at 19.

123. See Levi & Klein, *supra* note 66, at 76 (noting that a belief in the essentialism of gender is unnecessary to embrace protecting people’s lived experiences).

In practice, disability protections have been limited to those able to secure a diagnosis. Transsexual plaintiffs with medical professionals supporting their cases do the best overall.<sup>124</sup> While Levi and Klein also argue that a belief in the essentialism of gender is unnecessary, this Note details how disability law has been successful mostly at protecting people with a diagnosis of GID. Securing that diagnosis requires at least temporarily claiming an essentialized identity amidst a language of pathology.<sup>125</sup>

The intrusive examination of the intimate details of a plaintiff's life by a non-medically-trained judge is a paternalistic exercise in deciding who is worthy of legal protections. Levi writes that the ability of doctors and other medical professionals to explain treatments and their medical necessity "has validated the condition and established an accepted standard of care. Framing the plight . . . has helped humanize [transsexuals] in the eyes of the court and has contributed to debunking the myth that they are 'freakish.'"<sup>126</sup> The social model of disability instead focuses on the way a plaintiff faces discrimination in her environment rather than on her genitalia.<sup>127</sup> Plaintiffs who do have a diagnosis of GID should be able to rely on it without suffering an invasion of their privacy, and with judicial acceptance of the medical professional's testimony, but plaintiffs who are unable or choose not to acquire a GID diagnosis may prefer to argue their cases directly to the court. Currently neither choice is available.

Unfortunately for many transpeople without a diagnosis of GID and for others who cross gender boundaries without claiming the label of trans, deeply held identities on their own are not enough for courts. In *Youngblood v. School Board of Hillsborough County*, a young woman in Florida wanted to wear a shirt and tie in her yearbook photo rather than the drape required for all female

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124. The quality of a doctor's support matters. See *Enriquez v. W. Jersey Health Sys.*, 777 A.2d 365, 377 (N.J. Super. Ct. App. Div. 2001) (withholding disability protections from a transsexual claimant because the claimant's doctor failed to show evidence "confirming that he diagnosed gender dysphoria in plaintiff, explaining the condition as it manifested itself in plaintiff, and detailing the methods the doctor utilized to diagnose plaintiff," but explaining that if information showing the doctor followed accepted clinical standards for GID were in the record, the claimant could have secured protections).

125. See CROMWELL, *supra* note 1, at 20; Meredith Cecilia Lee, *The Paradox of Authenticity: The Depoliticization of Trans Identity* ii (2012) (unpublished master's thesis, The Ohio State University), available at <http://etd.ohiolink.edu/view.cgi/Lcc%20Meredith%20C.pdf?osu1339452660>, ("[T]o express authenticity and gain social recognition within the medical model of trans identity, an individual must articulate her/his desire within the normative language of the medical establishment; therefore, the quest for authenticity is already foreclosed through the structures of normalization.").

126. Jennifer Levi, *A Prescription for Gender: How Medical Professionals Can Help Secure Equality for Transgender People*, 4 GEO. J. GENDER & L. 721, 729-30 (2003).

127. Other potential routes to legal protection, like sexual orientation and sex discrimination laws, could make fewer demands on a plaintiff's privacy, but there is no guarantee that a transsexual plaintiff in a sex discrimination suit would not be forced to put forth the same health information as in a disability suit. Synthetic hormones may be a treatment for a disabling condition, but their purpose is to mimic the hormones found naturally in the bodies of the sex to which the transsexual is transitioning.

students.<sup>128</sup> Her lawyers claimed the school had violated Youngblood's rights to free expression and discriminated against her because of her sex.<sup>129</sup> They emphasized her strong masculine identity and how she had not conformed to gender stereotypes from a very young age, but could not refer to her gender nonconformity as a medical condition that should be protected. The federal district court in Florida held that Youngblood's desire to wear male clothing for her senior portrait was not expressive conduct and was "mere whimsy."<sup>130</sup>

In contrast, in *Yunits*, lawyers for the plaintiff called on disability law to protect their client's desires to wear feminine clothing to school.<sup>131</sup> There, Doe's GID diagnosis prevented the court from ruling that she was not a "qualified handicapped individual" entitled to protection under Massachusetts's law.<sup>132</sup> Through disability, Doe's advocates could protect her identity, whereas Youngblood's could only describe her expression. Levi, discussing *Yunits*, writes, "[w]hile completely irrelevant to the sex-discrimination claim, the existence of the disability claim itself allowed the introduction of evidence relating to the condition of being transgender and the sincere reasons why the plaintiff could not conform to a sex-differentiated dress requirement."<sup>133</sup> Identity politics protects those who fit in its boxes. For those who can successfully claim disability, the extensive statutory protections can be extremely useful. Youngblood's lawyers had no medical language upon which to call, nothing to distinguish between an inability to wear feminine clothing and a stubborn unwillingness. The Supreme Court has expressed a preference for immutability to support suspect class status,<sup>134</sup> and it is difficult to describe gender expression as innate. Forcing transpeople to identify and express their gender in a certain way narrows the class of people able to gain protections to those who fit a classic medical frame.

Forced narratives on consistent identities also make problematic the question of visibility in trans communities and trans law formation. Transsexuals who fail to "pass" as their identified gender are the most visible to the general public, but the transsexuals most visible to the courts are a very different, more privileged, group that might have chosen invisibility in daily

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128. Complaint at 2-3, *Youngblood v. School Board of Hillsborough County*, No. 8:02-cv-1089-T-24MAP (M.D. Fla. June 19, 2002).

129. *Id.* at 6-7.

130. Paisley Currah, *Gender Pluralisms Under the Transgender Umbrella*, in *TRANSGENDER RIGHTS*, *supra* note 31, at 3, 12. Youngblood's lawyers did eventually secure a settlement from the school after they appealed the case to the Eleventh Circuit Court of Appeals. *On the Docket*, NAT'L CTR. FOR LESBIAN RIGHTS NEWSL. (Nat'l Ctr. for Lesbian Rights, S.F., Cal.), Spring 2005, at 10, available at <http://www.nclrights.org/site/DocServer/spring2005.pdf?docID=1364>.

131. *Doc v. Yunits*, No. 00-1060A, 2001 WL 664947, at \*4 (Mass. Super. Ct. Feb. 26, 2001).

132. *Id.* at \*5.

133. Levi, *supra* note 92, at 101.

134. See Sharona Hoffman, *The Importance of Immutability*, 52 WM. & MARY L. REV. 1483, 1510 (2011).

life for safety or other reasons. Courts privilege the visible,<sup>135</sup> and transsexuals are both highly visible (when in the process of transitioning) and, at times, completely invisible (pre- and post-transition, depending on the individual's bone structure, hormones, voice, etc.). People who believe courts should be accessible to civil rights plaintiffs might worry about which groups are and are not required to prove their membership in a specific class as an additional hurdle before bringing suit. Plaintiffs suing on the basis of race or nontrans people claiming sex discrimination do not need to prove their racial or sexed identities because the identities are seen as obvious. Instead, these persons only need to prove that they are being discriminated against for that identity. This extra requirement of proving one is what one claims to be applies to people with invisible disabilities like Chronic Fatigue Syndrome, or glasses-wearers trying to prove a vision impairment is disabling enough to qualify them as "disabled."<sup>136</sup> Having to prove one has an identity that one might prefer to be in the background is a psychological hardship that is even more burdensome. Beyond disability, these visibility issues also apply to asylum claims on the basis of sexual orientation, in which more effeminate men have had an easier time accessing asylum than those whom courts imagine could "pass" as straight.<sup>137</sup> Furthermore, for ADA claims to be successful, employers must be aware of the individual's disability, so people with invisible disabilities or impairments of unclear severity must prove that the employer knew about the plaintiff's otherwise private medical information.<sup>138</sup> Transsexuals and transgender people must prove not only that the employer knew about the employee's gender identity, but also that the gender identity should qualify as a disability versus some other unprotected, deeply held identity.

Proving membership in the class of people with disabilities currently requires both legal and medical connections and coordination, shrinking the pool of those who can win to those with the economic and cultural capital to secure those connections. Requiring a diagnosis of gender identity disorder for a transperson to qualify as disabled limits protections to those who have the financial resources, binary gender identity and presentation, and cultural access<sup>139</sup> to medical professionals. LGBT legal nonprofits have represented

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135. See Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell,"* 108 YALE L.J. 485, 487 (1998).

136. See *Salomaa v. American Honda Motor Company*, 637 F.3d 958 (9th Cir. 2011) (granting a man with severe Chronic Fatigue Syndrome long-term disability benefits even though no objective tests could confirm the diagnosis); *Sutton v. United Air Lines, Inc.*, 130 F.3d 893, 895 (10th Cir. 1997) (holding that impaired vision that was correctable with glasses did not qualify as a disability even though the plaintiffs faced discrimination on the basis of their uncorrected vision).

137. Deborah Morgan, *Not Gay Enough for the Government: Racial and Sexual Stereotypes in Sexual Orientation Asylum Cases*, 15 LAW & SEX. 135, 146-47 (2006).

138. *Rask v. Fresenius Med. Care N. Am.*, 509 F.3d 466, 470 (8th Cir. 2007).

139. Individuals with disabilities experience healthcare disparities and lack of access to care, at least partially attributed to ableist attitudes within the health care workforce. Effectively navigating

plaintiffs in many of the cases seeking disability protections,<sup>140</sup> but to get a diagnosis of GID requires a doctor. Doctors' fees are rarely covered by insurance in the case of gender-reassignment-related care.<sup>141</sup> Furthermore, all employment law sets up another hurdle: that the employee would have been employed were it not for the discriminated-against characteristic. Data from the National Transgender Discrimination Survey show that transgender people are unemployed at twice the rates of the general population, with transpeople of color unemployed at up to four times the national unemployment rate.<sup>142</sup> Ninety percent of survey respondents reported experiencing harassment or mistreatment at work or reported hiding who they were to avoid repercussions at work.<sup>143</sup> While many transpeople have reason to sue, few have the resources to do so. Courts' restricting protections to those who are further able to secure a diagnosis of GID limits protections to the most privileged.

The next challenge is to imagine a different kind of disability, which would minimize the costs of medicalization while benefiting those who cannot yet obtain explicit statutory protections. This Note argues that moving away from a medical model of disability to a social model would help plaintiffs avoid the economic and psychological costs of using the GID diagnosis to secure protections. In the social model of disability, doctors are no longer the center of the story and medical professionals are only employed when desired by the individual with the disability. Rather than scrutinizing the patient's medical records, the transphobic or ableist behavior of the defendant should be under attack. Lawyers could do some of this work on their own and bring in expert witnesses such as sociologists, who may be less expensive to hire than doctors. As a legal strategy, using the social model of disability will still limit plaintiffs to those who are able to retain lawyers, but should reduce the need for medical professionals to be so closely involved in the process. More importantly, it will give plaintiffs more choice in the process, allowing them to

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health care access requires cultural change. See Linda M. Long-Bellil et al., *Access to Medical Care and the Americans with Disabilities Act: Educating Health Professionals as a Force for Culture Change*, AM. PUB. HEALTH ASS'N, <http://www.apha.org/membergroups/sections/aphasections/disability/about/accesstomedicalcare.htm> (last visited Nov. 5, 2012).

140. See the transgender rights cases at *Case Docket*, NAT'L CTR. FOR LESBIAN RIGHTS, [http://www.nclrights.org/site/PageServer?pagename=issue\\_transgender\\_caseArchive](http://www.nclrights.org/site/PageServer?pagename=issue_transgender_caseArchive) (last visited Mar. 25, 2012); *Docket (Open Cases)*, LAMBDA LEGAL, <http://www.lambdalgal.org/in-court/cases/docket?keywork=&issue=11448&region=All> and *Major Initiatives*, GAY AND LESBIAN ADVOCATES & DEFENDERS, <http://www.glad.org/work/initiatives/c/transgender-rights-project> (last visited Mar. 25, 2012).

141. TRANSGENDER LAW CTR., *TRANSGENDER HEALTH AND THE LAW: IDENTIFYING AND FIGHTING HEALTH CARE DISCRIMINATION* (July 2004), <http://www.transgenderlawcenter.org/issues/health/transgender-health-and-the-law-identifying-and-fighting-health-care-discrimination>.

142. JAIME M. GRANT ET AL., *INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY* 51 (2011), [http://cndtransdiscrimination.org/PDFs/NTDS\\_Report.pdf](http://cndtransdiscrimination.org/PDFs/NTDS_Report.pdf).

143. *Id.* at 56.

highlight their mental or bodily difference as one way of showing disability while providing alternatives for others for whom showing difference is less desirable than showing mistreatment. In practice, educating judges about the social model of disability so that plaintiffs no longer need to bring in so much medical evidence will be very difficult, but the next Part shows how the disability rights movement has begun the process of reframing disability and how transpeople can benefit from this reframing process.

#### V. THE DISABILITY RIGHTS MOVEMENT'S LESSONS FOR FRAMING TRANSGENDER RIGHTS

A leading theory of social movements is that they form out of the available resources offered by one group when mixed with the needs of another, not-altogether-separate group.<sup>144</sup> The needs of the transgender population have never fit neatly with the financial and media resources of the gay and lesbian rights movement, despite their common histories.<sup>145</sup> The disability community may not be as wealthy or well-connected to the media as today's gays and lesbians, but it offers resources in examples of legislation and activism, trans activists might wish to emulate. Disability law as legislation is an important model for all trans activists because of its unique structure, even for those who feel disability law's reliance on a diagnosis is too limiting and therefore choose to work for sex discrimination or gender-identity-and-expression protections instead. Sex discrimination and gender-identity-and-expression protections currently work in a symmetrical fashion such that men can be victims of sex discrimination and gender-normative nontrans people victims of gender identity discrimination.<sup>146</sup> Disability discrimination, by contrast, is asymmetric, benefitting only those people classified as having an impairment.<sup>147</sup>

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144. The disability label is important for more reasons than potential future legal protections, though. The social movement aspect of disability rights can benefit genderqueers and others without a GID diagnosis. Since transsexuals are already using disability discrimination laws, a disability rights perspective on genderqueer rights would make for a more unified trans community as part of or at least aligned with disability communities. See Francesca Polleta, *The Structural Context of Novel Civil Rights Claims: Southern Civil Rights Organizing, 1961-1966*, 34 *LAW & SOC'Y. REV.* 367, 382 (2000) ("[I]t would make little sense for a movement organization speaking for a marginalized subgroup to forward claims in an altogether new lexicon or to operate entirely independently of the mainstream movement, which has resources and political clout that it does not.").

145. Activists for bisexual and transgender rights seeking membership in a shared LGBT community and equal access to the gains of the movement have been called a "new" group that "must wait their turn and cannot expect to 'piggyback' or 'ride on the coattails.'" Minter, *supra* note 72, at 599 (citing Cada, *supra* note 68, at A8).

146. Seven black lesbians were charged and punished, one with a jail sentence of eleven years, after a white man yelled racial and sexual epithets at them and allegedly ripped off one of their weaves. Anemona Hartocollis, *Woman in Gang Assault Trial Says Man Started the Fight*, *N.Y. TIMES*, Apr. 14, 2007, at B4; *Four Lesbians Sentenced Over Attack On Man*, *NBC NEWS.COM* (June 15, 2007, 6:10 AM), <http://www.msnbc.msn.com/id/19233888>.

147. Emens, *supra* note 3, at 876-78.

The asymmetric nature of disability law allows for a more comprehensive provision of rights than coverage under a different, facially neutral class. Disability law is asymmetric in that only people with disabilities can sue for animus or for reasonable accommodations, and people without disabilities cannot claim they are disadvantaged by an accommodation made for disabled persons.<sup>148</sup> Asymmetry marks people with disabilities as special, as deserving of rights that have tangible costs to employers and businesses but are not available to everyone. Even if a curb cut would benefit the shopper pushing a grocery cart, only the person who travels via wheelchair may sue for it. Disability law, then, endorses a redistribution of resources in favor of the disabled individual.<sup>149</sup> If the addition of a gender-neutral bathroom were to reduce by one the number of bathrooms available only to one gender, an asymmetric statute that protected a gender-variant person as having a disability would prevent the gender-normative person from suing for loss of a bathroom. No one can claim that it is an imposition on nondisabled employees to make a reasonable accommodation for another employee's disability.

Disability law's asymmetry both is a reflection of and has had important effects on disability rights as a social movement. Disability law provides strong legal language in part because its drafters expected the group who would use it to be small.<sup>150</sup> Social movements conform to the shape to which the social structure and surrounding discourse limit them, and legislators help to create those limits.<sup>151</sup> They underestimated the potential strength of the disability rights movement and, perhaps as a response, gave people with disabilities more leverage than other groups might have received. When the disability rights community came together to pass the legislation, there was little media coverage, and the legislation underwent little public scrutiny before passage.<sup>152</sup>

The successes of the ADA have, case by case, realized Congress's stated goal of erasing barriers preventing people with disabilities from achieving full citizenship, but every case has struggled in the face of old-fashioned ideas of what disability is and of who should participate in the public sphere.<sup>153</sup> After the ADA's enactment, many people believed that the text of the ADA itself should have been sufficient, regardless of whether public accommodations

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148. 42 U.S.C. §§ 12101-12213 (2010).

149. See Hoffman, *supra* note 134, at 1507-08.

150. MARY JOHNSON, MAKE THEM GO AWAY: CLINT EASTWOOD, CHRISTOPHER REEVE & THE CASE AGAINST DISABILITY RIGHTS 18 (2003).

151. FRANCES FOX PIVEN & RICHARD A. CLOWARD, POOR PEOPLE'S MOVEMENTS: WHY THEY SUCCEED, HOW THEY FAIL 3 (1977); Michael W. McCann, *Legal Mobilization and Social Reform Movements: Notes on Theory and Its Application*, 11 *STUD. L., POL., & SOC'Y* 225, 239 (1991).

152. JOHNSON, *supra* note 150, at 11-16.

153. Andrew I. Batavia & Kay Schriener, *The Americans With Disabilities Act as Engine of Social Change: Models of Disability and the Potential of a Civil Rights Approach*, 29 *POL'Y STUD. J.* 690, 693 (2001).

were made in accordance with the law.<sup>154</sup> When litigants did attempt to enforce the ADA, they were seen as whiners who were asking for too much.<sup>155</sup> The asymmetry of the law only protects people with disabilities rather than those without disabilities, who might in some circumstances be discriminated against in favor of someone with a disability, such as business owners who must expend money to add a ramp or an elevator.<sup>156</sup> People with disabilities who spoke out against the ADA as too expensive or unnecessary were hailed by the media as inspirational and clear-thinking.<sup>157</sup> In response to this conservative backlash, courts increasingly narrowed the group protected by the ADA throughout the 1990s and 2000s by interpreting it to protect the “wheelchair bound,” not people with “carpal tunnel or bad backs.”<sup>158</sup>

The disability rights movement has achieved strong legal protections, but was from the start weak in the area of social movement organization. The disability rights movement lacked any strong central figures to make the case for the ADA or for a vision of people with disabilities as full participants in society who should, for example, be able to ride mainstream public transit—not be segregated into substandard paratransit.<sup>159</sup> Instead, it was not until the ADA had already passed that many members of the disability community began to see themselves as a community.<sup>160</sup> Some people with disabilities still insist that as access laws take effect, more architects build using Universal Design principles, and technology improves medical outcomes, there will be less of a need for a disability identity as an outsider identity.<sup>161</sup> Others say that the history of discrimination will bond people with disabilities as it has for racial and ethnic groups.<sup>162</sup> The future of disability rights as a social movement is still uncertain, and transpeople’s inclusion may change it in ways yet to be seen.

Along with an evolving movement, disability rights law is growing and changing, too. The new Americans with Disabilities Act Amendments Act (ADAAA) showcases the maturation of the disability rights movement into a more sophisticated network which has redefined what disability is and who should be protected. The recently released ADAAA regulations expand the definition of disability and may presage a future in which even those in the

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154. JOHNSON, *supra* note 150, at 39.

155. *Id.* at 24.

156. The ADA contains an economic loophole that does not exist in other civil rights laws. People believed that removing barriers to blacks and women entering buildings was costless, in contrast to the tangible action of adding a ramp or Braille signage. JOHNSON, *supra* note 150, at 11.

157. *Id.* at 63-64.

158. Transcript of Oral Argument, at 39, *Toyota Motor Mfg. v. Williams*, 534 U.S. 184 (2002), available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/00-1089.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/00-1089.pdf).

159. JOHNSON, *supra* note 150, at xii, 11.

160. JOSEPH P. SHAPIRO, *NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT* 25 (1994).

161. RENEE ROMANO, *THE CIVIL RIGHTS MOVEMENT IN AMERICAN MEMORY* 329, 335 (2006).

162. SHAPIRO, *supra* note 160, at 104.

trans community currently unable to use disability laws can eventually secure legal rights and social acceptance. The regulations define disability very broadly, and emphasize that identifying “disability” should not require extensive analysis from courts.<sup>163</sup> The ADAAA also reduces the degree to which an individual’s major life activities must be affected by the disability.<sup>164</sup> This would be very helpful to the many transgender and transsexual potential plaintiffs whose gender identity has no daily effect on their lives, aside from the impact or impediment caused by discrimination.<sup>165</sup>

Unfortunately, the ADAAA does not remove the coverage ban within the original ADA on anything related to transgender. There were no legislative efforts connected to the ADAAA that even attempted to repeal that ban. Future iterations of the ADA could remove the exclusion, but in the meantime transpeople will have to rely on state legislation. As the ADAAA was based in part on states’ refusal to follow the Supreme Court’s narrow interpretation of the ADA, it is likely that states will be liberal in applying the ADAAA to their own laws.<sup>166</sup>

Most importantly, there is enormous expressive value to the disability rights movement’s lexicon of reasonable accommodation of difference and of disability as difference rather than as handicap. Whether or not people without GID diagnoses can claim reasonable accommodations as a legal measure, reasonable accommodation is an important narrative that will be useful for all transpeople and more productive than the narrative of sameness currently told by the lesbian and gay rights movement.<sup>167</sup> Reasonable accommodation is a burden on the employer that the law says may have some cost. The law acknowledges that disability does not affect the essential functions of the job, but that some issue exists that will decrease the worker’s productivity if it is not accommodated. For a transperson, inability to access a bathroom while at work or not being issued the uniform of the proper gender could certainly impair productivity, and it would not be improper for a court to hold that an employer had to make a reasonable accommodation for that employee. Claims of sex or sexual orientation discrimination fall flat if the plaintiff would actually feel most comfortable in a nongendered bathroom.<sup>168</sup>

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163. Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, 76 Fed. Reg. 16,978 (Mar. 25, 2011) (to be codified at 29 C.F.R. pt. 1630).

164. *Id.*

165. Levi, *supra* note 92, at 106.

166. Alex Long, *State Antidiscrimination Law as a Model for Amending the Americans with Disabilities Act*, 65 U. PITT. L. REV. 597 (2004).

167. The lesbian and gay movement works from an argument of sameness, something like “We are a little different, but underneath we are just like you and so we deserve the same rights.” See WARNER, *supra* note 73, at 48-49 for a critique of this normalizing narrative.

168. See *supra* text accompanying note 87.

Even though no courts have used the reasonable accommodation framework yet for transpeople, the idea of such an accommodation as a duty avoids the oft-repeated connection of gay rights and “special rights.”<sup>169</sup> Disability provides a frame in which someone’s inability to meet a general standard is not caused by the individual’s moral failure. Levi writes, “A disability claim gives a court a construct for understanding why someone cannot conform to a gender stereotype and does so in language a judge can understand.”<sup>170</sup> Unlike the gender-identity-and-expression clauses discussed above, the disability frame uses existing and more commonly understood language.

It matters that disability law uses the language of accommodation and asymmetry rather than equality, because equality is not enough. An example from disability law is that people with mobility impairments might have an equal right to attend school, but without accommodations, their rights are illusory. For transpeople, equality might mean that one could not be fired simply for identifying as trans in some way, but it would provide no scaffold on which to build an argument for coverage for trans-specific health care, or access to the bathroom corresponding to one’s gender identity. Framing law in terms of equality elides real differences and needed accommodations.

The disability rights movement provides an important model for these claims extending beyond basic equality. The disability rights model instead says something to the effect of, “We are different *and* we deserve rights too *and* these rights may look different for us.” The movement provides a model of progressive politics, celebrating difference rather than asserting its unimportance like the LGB movement sometimes does.<sup>171</sup> Disability rights focuses on the changes society needs to make to be accessible, rather than the immutability or specific characteristics of one’s disability. “The disability rights movement has as its goal the empowerment and collective rights of disabled people, whereas other organizations seek to provide services for persons with disabilities. . . .”<sup>172</sup> Disability rights as a theory focuses on a social model of disability; in contrast to the medical model which sees the person as afflicted with a disability, the social model sees a society organized around limiting principles that unfairly favor some traits over others.<sup>173</sup> This is a “social-relations approach to difference,” with difference “constructed by,

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169. See, e.g., Barry D. Adam, *The Defense of Marriage Act and American Exceptionalism: The “Gay Marriage” Panic in the United States*, 12 J. HIST. SEXUALITY 259, 269 (2003).

170. Levi, *supra* note 92, at 104.

171. DORIS ZAMES FLEISCHER & FRIEDA ZAMES, *THE DISABILITY RIGHTS MOVEMENT* 201 (2001); RUDACILLE, *supra* note 15, at 59; Park, *supra* note 102, at 764.

172. JACQUELINE VAUGHN SWITZER, *DISABLED RIGHTS: AMERICAN DISABILITY POLICY AND THE FIGHT FOR EQUALITY* 71 (2003).

173. Bryan S. Turner, *Disability and the Sociology of the Body*, in *HANDBOOK OF DISABILITY STUDIES* 252, 257 (Gary L. Albrecht, Katherine D. Scelman & Michael Bury eds., 2001).

and residing in, social relationships.”<sup>174</sup> The power of the disability rights movement is in articulating how a physical difference is affected by the surrounding social milieu as much as by anything intrinsic.

Transgender people who choose to join the disability rights movement, rather than just bring claims, would have to face the stigma of disability head-on in everyday activism through embracing this previously disparaged “disabled” label. If a major component of the trans movement’s hesitancy to embrace disability law is the stigma, perhaps a new descriptive diagnosis, not linked to psychology, could help.<sup>175</sup> If the stigma attaches to anything medical at all, though, then perhaps those who view this as a stigma should consider the possibilities of new models of disability rights. Genderqueers claiming a disability rights model would be promoting a universalist disability rights movement, one that holds that any difference should be accommodated. Just as autistic persons have done, transpeople could redefine what it means to have a diagnosis.<sup>176</sup> The autism pride movement has begun to talk about “neurodiversity,” in which someone with high-functioning autism or Asperger’s Syndrome merely has one variety of an infinite diversity of brains and behaviors, while still acknowledging that there are some brains and behaviors that would benefit greatly from services and support.<sup>177</sup> Perhaps autism presents a way for transgender and transsexual people to reimagine both diagnosis and difference. In contrast, the gay and lesbian movement, having dumped the diagnosis of homosexuality as a mental disorder, can offer no such reframing suggestions.<sup>178</sup>

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174. SAMUEL R. BAGENSTOS, *LAW & THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT* 19 (2009) (internal quotation marks omitted).

175. David Snow’s framing perspective includes an analysis that “meanings do not automatically or naturally attach themselves to objects, events, or experiences we encounter, but often arise instead through interactively based interpretive processes.” Individuals and groups have the power to affect the meanings of the language they use on a daily basis. David A. Snow, *Framing Processes, Ideology, and Discursive Fields*, in *THE BLACKWELL COMPANION TO SOCIAL MOVEMENTS* 380, 384 (David A. Snow, Sarah A. Soule & Hans Peter Kriesi eds., 2003).

176. Ari Ne’eman, *The Future (and the Past) of Autism Advocacy, or Why the ASA’s Magazine, The Advocate, Wouldn’t Publish This Piece*, 30 *DISABILITY STUD. Q.*, no. 1, 2010, at 17, available at <http://www.dsq-sds.org/article/view/1059/1244> (urging a focus on strengths rather than a cure). Autism and transgender share similar taxonomies of incoherence, with the diagnosis of autism shifting massively over time, so that now many people are covered by it rather than mental retardation or other diagnoses. Marissa D. King & Peter S. Bearman, *Socioeconomic Status and the Increased Prevalence of Autism in California*, 76 *AM. SOC. REV.* 320, 324 (2011).

177. Kate Jenkins, Cultural Studies Association Annual Meeting Conference Presentation: *Queering Cognition: On the Limits of a Neurologically-Based Identity Politic* 3-4 (Mar. 19, 2010) (transcript available from author).

178. Gays and lesbians sought to end the classification of homosexuality as a mental disorder as a rejection of the pathologization of their identities and unwillingness to be constricted to a medical frame. See *The History of Psychiatry & Homosexuality*, GROUP FOR ADVANCEMENT PSYCHIATRY, [http://www.aglp.org/gap/1\\_history](http://www.aglp.org/gap/1_history) (last visited Nov. 8, 2012) (“[T]he designation of homosexuality as a mental disorder had only exacerbated antihomosexual societal prejudices.”). While in some ways a mirror to the current transgender movement, the gay departure from psychiatry can be differentiated by

Like transgender, disability is both identity and beyond identity. In many ways the organized disability rights movement has privileged impairments of movement over cognitive or psychological impairments as it creates a disabled subject. The greatest success of the disability rights movement has not been the fulfillment of its original goal of changing society to be more just,<sup>179</sup> but of creating the disabled citizen, “not achieved through a claim founded on their equality with nondisabled people but through a particularistic claim based on their difference.”<sup>180</sup> Like the transgender rights movement, the disability rights movement is not a single movement but a multifaceted one with different projects and goals. Some of those projects are normative, oriented toward existing within current social structures, and some are transformative, trying to change those underlying social structures for all. Some disabilities are highly stigmatized and others are not, and there is no single experience of being disabled.<sup>181</sup>

Yet there is transformative potential in the idea that everyone is only temporarily able-bodied,<sup>182</sup> and most people will join the disability community as they age. Disability is “not a discrete but rather a porous category. Anyone can become disabled, and it is also possible for a person with disabilities to be ‘cured’ and become ‘normal.’”<sup>183</sup> Disability is amorphous; rather than requiring immutability as other civil rights law does, disability law recognizes that disability changes. Definitions of race and gender are less malleable than definitions of disability, and the legislatively created definitions of disability have been quite broad.<sup>184</sup> People can be temporarily, rather than permanently, disabled, have a record of an impairment and still be suffering from discrimination related to that record, or be seen as disabled without identifying as such and still be eligible for legal protection under the ADA.<sup>185</sup> Despite the

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the practical desires for trans-related medical care as well as changes in the meaning of disability brought on by the disability rights movement.

179. See Michael Davidson, *Universal Design: The Work of Disability in an Age of Globalization*, in *THE DISABILITY STUDIES READER* 117, 126 (Lennard J. Davis ed., 2d ed. 2006) (“If we think of disability as located in societal barriers, not in individuals, then disability must be seen as a matter of social justice.”); Williams, *supra* note 4, at 123, 125 (describing disability activists’ goal of civil rights).

180. Tom Shakespeare & Nick Watson, *Making the Difference: Disability, Politics, and Recognition*, in *HANDBOOK OF DISABILITY STUDIES*, *supra* note 4, at 546, 559 (referencing IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* 160-67 (1990)).

181. See Jerome E. Bickenbach, *Disability Human Rights, Law, and Policy*, in *HANDBOOK OF DISABILITY STUDIES*, *supra* note 4, at 565, 576.

182. FLEISCHER & ZAMES, *supra* note 171, at 109.

183. Lennard J. Davis, *Identity Politics, Disability, and Culture*, in *HANDBOOK OF DISABILITY STUDIES*, *supra* note 4, at 535, 536.

184. SHARON BARNARTT & RICHARD SCOTCH, *DISABILITY PROTESTS: CONTENTIOUS POLITICS 1970-1999*, at xv (2001).

185. See, e.g., Rehabilitation Act, 29 U.S.C.A. § 705(20)(B) (2010) (defining “individual with a disability” to follow the definition given in the ADA); Americans with Disabilities Act, 42 U.S.C.A. § 12102 (2010) (defining “individual with a disability” as: “[W]ith respect to an individual—(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an

legislative intent of broad interpretations of disability, the courts have not looked altogether favorably on disabled plaintiffs.<sup>186</sup> However, this may be changing.<sup>187</sup> If the legislative move toward broader definitions of disability is successful, the transgender rights movement could use that flexibility to allow people who are outside of specifically transsexual identity and diagnosis to access protections.

While the disability rights movement has suffered from courts' overzealous policing of its boundaries and benefits, the ADAAA presages a much brighter future for disability plaintiffs and the disability rights movement.<sup>188</sup> If the courts could overturn the Helms Amendment or if transpeople could be covered through the physical impairment category,<sup>189</sup> the lesbian and gay movement's inability to pass a trans-inclusive ENDA and the lack of any progress or attempts to repeal the Helms Amendment legislatively could all become moot. Disability scholar and activist Samuel Bagenstos writes, "A case for a universalist disability rights law would be well worth making, but its prospects are very doubtful politically."<sup>190</sup> Expanding ideas of disability to include protecting gender diversity beyond those with GID diagnoses is unlikely to succeed, but the process of making that argument will have social-movement benefits for all transpeople.

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impairment..."); Fair Housing Act Amendments Act of 1988, 42 U.S.C.A. § 3602(h) (2010) (mimicking the ADA language for the definition of a disability); Air Carrier Access Act, 49 U.S.C.A. § 41705(a) (2010) (echoing, again, the ADA language for the definition of a disability).

186. Plaintiffs in disability law cases have historically lost more often than almost all other identifiable groups of plaintiffs, second only to plaintiffs in prisoner cases. BAGENSTOS, *supra* note 174, at 1. Despite the expansive language in the definition of disability in the ADA and related statutes, the Supreme Court has traditionally read the texts quite narrowly. *Id.* at 8; see Bickenbach, *supra* note 181, at 577 (describing statutory definitions as "confusing" because of how they combine "the social phenomena of disability with the medical determinants of impairment" and noting that while "the legislative history of the ADA makes it clear that what was intended is a social conception of disability, nonetheless some ADA plaintiffs lose their complaints because they cannot provide sufficient or sufficiently unambiguous medical evidence about their impairments.").

187. Unfortunately, no legal scholars appear to have conducted analysis of the post-Americans with Disabilities Act Amendments Act case law. *But see* Joni Kletter, *Recent Case Law Suggests That ADAAA Has Significantly Lowered the Bar For Plaintiffs Alleging Disability*, MEYER, SUOZZI, ENGLISH, & KLEIN, P.C. (Dec. 28, 2011), [http://www.msek.com/uploaded\\_files/ADAAA\\_NELANY\\_New\\_Article\\_2011.pdf](http://www.msek.com/uploaded_files/ADAAA_NELANY_New_Article_2011.pdf) (describing individual cases and noting the general trend toward easier access to the courts for plaintiffs).

188. *See* Americans with Disabilities Act Amendments Act of 2008, 42 U.S.C. §§ 12101-12213 (2010); *see also* Michelle A. Travis, *Impairment as Protected Status: A New Universality for Disability Rights*, 46 GA. L. REV. 937, 957-58 (2012) (describing how much broader a spectrum of people can access disability protections under the amended ADA, and arguing that this new universality has the potential to strengthen the disability rights community).

189. *See supra* note 118. Debates about moving the medical diagnosis of gender identity disorder to a diagnosis of a physical disorder could allow the ADA to cover far more people. Because the ADA covers even those who are perceived to have a disability whether or not they identify with it, gender-variant people who do not self-identify with the label "transgender" could still be protected.

190. BAGENSTOS, *supra* note 174, at 54.

All gender-variant people, including genderqueers who are far less likely to benefit from the current legal side of the disability rights movement,<sup>191</sup> stand to gain from the social aspects of the disability rights movement. These social aspects include being in alliance with other groups seeking respect for bodily autonomy and should benefit all gender-variant people from butch women to transsexuals. That alliance means an increase in the number of people who are likely to learn about transgender and transsexual perspectives on an issue about which they care already, and to thus care about trans issues. Also, the diversity of the disability rights movement, which houses many different disabilities and a multiplicity of identities, could lead the trans movement to be more welcoming to its own diversity.

The resource-mobilization experience of the disability rights movement may be useful to a trans and genderqueer movement as well. Zald and McCarthy's work on resource mobilization partially explains why the lesbian and gay rights movement has become a home for a nascent transgender rights movement. Zald and McCarthy argue that financial involvement from outsiders to a collective is usually vital to the collective's work.<sup>192</sup> The trans movement currently receives a significant amount of funding and support from non-trans-focused individuals and foundations, particularly from other parts of the LGBT movement.<sup>193</sup> Social movements do not emerge entirely from a marginalized population's desire for change, but are also contingent upon the discretionary time, money, and engagement of their constituents.<sup>194</sup> Aligning with the disability rights movement may mean simply using different language and strategies while keeping the same friends and funders, but it may also mean a

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191. See *supra* Part III.

192. See McCarthy & Zald, *supra* note 76, at 19.

193. For example, the Transgender Law Center started as a project of the National Center for Lesbian Rights. See *Transgender Law*, NAT'L CENTER FOR LESBIAN RIGHTS., [http://www.nclrights.org/site/PageServer?pagename=issue\\_transgender](http://www.nclrights.org/site/PageServer?pagename=issue_transgender) (last visited Apr. 27, 2011). The Sylvia Rivera Law Project in New York, serving "low-income people and people of color who are transgender, intersex, or gender non-conforming," lists as its identified funders: the Arcus Foundation Gay and Lesbian Fund, the Astraea Lesbian Foundation for Justice, Kicking Assets Fund of Tides Foundation, the New York Women's Foundation, the Foundation for an Open Society, and the Third Wave Foundation. *About the Sylvia Rivera Law Project*, SYLVIA RIVERA LAW PROJECT, <http://srp.org/about> (last visited Apr. 27, 2011); *Support for the Sylvia Rivera Law Project*, SYLVIA RIVERA LAW PROJECT, <http://archive.srlp.org/support> (last visited Apr. 27, 2011). Obviously, potentially losing access to those funders would be traumatic. The organization Funders for LGBTQ Issues compiles a database of funders willing to give money to progressive causes. Seven foundations that included transgender as part of LGBT or explicitly listed transgender in addition to LGBT showed up in the results from a search for funding projects related to transgender issues. Four other foundations funded LGBT issues, transgender issues, and disability issues, but no foundations funded transgender issues and disability issues without also funding LGBT issues. See *LGBTQ Funders Directory*, FUNDERS FOR LGBTQ ISSUES, <http://www.lgbtfunders.org/seekers/form.cfm> (last visited Oct. 18, 2012) (click "Transgender Issues" box; then click "Find Organizations" hyperlink). The one fund with "trans" in its name, the Transgender Scholarship and Education Legacy Fund, appears to be defunct. TRANSGENDER SCHOLARSHIP & EDUCATION LEGACY FUND, <http://www.tself.org> (last visited Apr. 27, 2011).

194. McCarthy & Zald, *supra* note 76, at 25-26, 30.

more drastic change. The disability rights movement is not a well-funded movement, partly because people with disabilities tend to be low-income.<sup>195</sup> However, people with disabilities have been incredibly successful at securing government and foundation funding for their needs.<sup>196</sup> Furthermore, they have a great deal of experience working with media to attempt to tell their stories in nonpaternalistic ways.<sup>197</sup> These knowledge-based resources can be helpful to a trans movement that has previously affiliated with the money-heavy lesbian and gay rights movement but has little funding of its own.

## VI. CONCLUSION

The disability rights movement and its lexicon of accommodation and disability as difference offer a new way to envision transgender rights both within and outside the legal system. Transgender and transsexual people must be free to choose their alliances, and disability may a better choice than feminism or the LGB movement. Disability law and disability antidiscrimination protections are successful legal strategies for transsexuals who can use GID diagnoses to secure protections not yet available through other means. However, these strategies are currently limited because only a narrow set of populations can use them, and because of the psychological cost of medicalization. The disability rights movement, however, offers narratives of disability as cultural pride in difference, acknowledgement of service needs without pathologization, and new ideas for mobilizing resources and managing media.

By altering the narratives and doing the reframing work now, trans plaintiffs can win long-term success as part of an inclusive disability politic, instead of perpetuating the existing “contentious and oppressive relationship between the medical establishment and gender transgressive people.”<sup>198</sup> Disability communities accept those who are not currently legally recognized as being worthy of protection with the aim of expanding eventual protections, just as those with intellectual disabilities expanded disability law over time to recognize them as having “unique rights to ‘appropriate treatment, services, and habilitation for such disabilities . . . designed to maximize the developmental potential of the person.’”<sup>199</sup> The current system fails too many

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195. LENNARD J. DAVIS, BENDING OVER BACKWARDS: DISABILITY, DISMODERNISM & OTHER DIFFICULT POSITIONS 28 (2002).

196. SHAPIRO, *supra* note 160, at 45-46, 49, 136-37, 151-52.

197. *Id.* at 16-19, 38-40, 179 (identifying the media tropes used to marginalize people with disabilities and showcasing how people with disabilities have begun to redraw their media presence).

<sup>198</sup> *Id.* at 18.

199. ALLISON C. CAREY, ON THE MARGINS OF CITIZENSHIP: INTELLECTUAL DISABILITY AND CIVIL RIGHTS IN TWENTIETH-CENTURY AMERICA 144 (2009) (quoting the Developmental Disabilities Assistance and Bill of Rights Act of 1975).

people, from the transsexuals forced to essentialize their identities for basic protections to the genderqueers and other transgender people without a GID diagnosis who cannot access disability law.

One final concern is that people who are currently classified as having disabilities may have no interest in welcoming transpeople to the disability rights movement. Other people with disabilities have been completely left out of the discussion of whether and how to include transpeople within the disability movement. Those conversations need to start, even if activists and lawyers ultimately conclude that expanding disability law beyond transsexuals will be too difficult to be worth it. If they are willing to struggle with starting the conversation, dealing with the stigma, and overcoming the hesitancy from trans communities now, both transsexuals and the existing disability rights movement will benefit from the cooperation. Forming a strong partnership with the disability rights movement is the right thing to do and will lead to better law based on accommodation of difference and perception of disability rather than forced identification with a diagnosis.

