IDENTITY OR CONDITION?: THE THEORY AND PRACTICE OF APPLYING STATE DISABILITY LAWS TO TRANSGENDER INDIVIDUALS

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Jean Doe was a 17-year-old transgender youth when she brought suit against the New York City Administration for Children's Services in New York Supreme Court.[1] She had been in and out of foster homes since the age of nine, and had a troubled history of "violent altercations" in many of the foster homes in which she had been placed throughout these years.[2] Her latest placement was in the Atlantic Transitional Foster Facility, an all-male facility for short-term placement of foster children who are in the care of New York City's Administration for Children's Services.[3] Upon her arrival at Atlantic Transitional, the director of the facility expressly prohibited her from expressing her gender identity by wearing "female attire," although she still could wear "scarves, 'nails,' brassieres, and enhancers."[4] When Jean Doe moved for a preliminary injunction, Atlantic Transitional tried to avoid liability by broadening its policy's reach to the rest of the facility, forbidding all residents from wearing skirts or dresses.[5] Undeterred, Doe brought a lawsuit against the facility, alleging gender discrimination, violations of her First Amendment to free

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[1] Doe v. Bell, 194 Misc.2d 774, 775 (N.Y. Sup. Ct. 2003).

[2] *Id.* at 775, 777.

[3] *Id.* at 775.

[4] *Id.* at 776.

[5] *Id.* at 777–78.

expression, and disability discrimination.[6] The court ultimately found for Doe solely on the disability discrimination claim and mentioned nothing about the other two claims in its opinion.[7]

Doe v. Bell is illustrative of the difficulties transgender advocates have had in bringing gender discrimination claims on behalf of their clients, as well as their relative success in using state disability anti-discrimination laws to garner protection for their clients. Cases that recognize gender discrimination laws as inclusive of transgender individuals, have changed the legal landscape for transgender individuals, such as the recent D.C. Circuit case of *Schroer v. Billington*, which held that a transgender plaintiff had been discriminated against in employment on the basis of sex under Title VII of the 1964 Civil Rights Act.[8] In many cases over the past two decades, advocates have demonstrated the efficacy of state disability anti-discrimination claims as applied to transgender individuals. Although federal law expressly excludes transgender individuals from the protected class of persons with disabilities,[9] many states do not follow suit. Moreover, at least one State court used the federal exclusion to show that the absence of this exclusion in that State's disability laws clearly demonstrated the State legislature's intent to actively include transgender individuals under these laws.[10]

Unsurprisingly, the use of state disability anti-discrimination laws to claim protection for transgender

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[6] Dean Spade, *Resisting Medicine, Re/Modeling Gender*, 18 BERKELEY WOMEN'S L. J. 15, 33 (2003).

[7] *Bell*, 194 Misc.2d at 774.

[8] Schroer v. Billington, 577 F.Supp.2d 293 (D.D.C. 2008); *see also* Smith v. City of Salem, 378 F.3d 566 (6th Cir. 2004).

[9] Americans with Disabilities Act (ADA), 42 U.S.C. § 12211(b)(1) (1997); Federal Rehabilitation Act of 1973 (FHA), 29 U.S.C. § 705(9) (1997).

[10] *See* Doe v. Yunits, No. 00-1060A, 2001 WL 664947, at *4-5 (Mass. Super. Ct. Feb. 26, 2001); *see also* Lie v. Sky Publishing Corp., No. 013117J, 2002 WL 31492397, at *5-6 (Mass. Super. Ct. Oct. 7, 2002).

individuals has been controversial.[11] Some transgender advocates, have noted that the word "disability" often invokes images based on medically-centered views of disabled people in which an individual's "disability" is an illness to be cured.[12] They further point out that the modern disability rights movement has instead embraced a social model of disability, in which "disability" is not inherent to the individual person, but arises from an environment that assumes only able-bodied people live in it.[13] These advocates look favorably upon the social model of disability and believe that it should be applied to claims involving disability discrimination against transgender individuals.[14]

Other transgender advocates who oppose the medicalization of transgender identity worry that the use of state disability laws as applied to transgender discrimination cases might perpetuate a problematic reliance on medicalization to exercise legal rights and protections for transgender individuals.[15] While these advocates also support a social model of disability, they recognize that courts by and large have rejected an application of the social model of disability to transgender individuals, instead focusing heavily on medical constructions of transgender identity to decide transgender discrimination cases brought under state disability laws.[16] Further, these advocates observe that courts' reliance on the medicalization of transgender identity impacts transgender individuals who cannot access transgender-affirming health care,

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[11] Jennifer Levi & Bennett Klein, *Pursuing Protection for Transgender People through Disability Laws, in* TRANSGENDER RIGHTS 74-92 (Paisley Currah et al, eds.. 2006).

[12] *Id.*, at 75.

[13] *Id.*

[14] *Id.*

[15] *See* Pooja S. Gehi & Gabriel Arkles, *Unraveling Injustice: Race and Class Impact of Medicaid Exclusions of Transition-Related Health Care for Transgender People*, 4 SEXUALITY RES. & SOC. POL'Y 7, 15–16 (2007); *see also* Spade, *supra* note 6, at 34–35.

[16] Spade, *supra* note 6, at 33.

such as low-income people, people with disabilities, and people of color.[17]

Much of the scholarship in this area has explored the applications of state and federal disability law to transgender individuals and the theoretical and policy arguments for and against using these laws to fight transgender discrimination. Other works discuss the medical construction of transgender identity and its effects on transgender individuals, especially low-income people, people with disabilities, and people of color.[18] This Article surveys state statutes and state cases to date under and in which transgender plaintiffs have brought discrimination claims using disability laws, and analyzes how courts and administrative agencies have applied these laws to these individuals in practice. As discussed in this Article, most jurisdictions that have adjudicated these claims have applied a medical model of disability to the transgender individual, a method that tends to pathologize the transgender plaintiff with its emphasis on the physical and mental "abnormalities" that constitute the transgender "condition." The very few courts and administrative agencies that have attempted to apply the social model of disability have, with one exception, done so only by outlining in general terms the kind of stigma that transgender individuals experience. This Article argues that this general stigma alone cannot be evidence of the social model and that to fully apply the social model of disability to transgender individuals, courts must take the extra step of detailing how the stigma associated with transgender individuals actually disabled the specific transgender plaintiff. Moreover, the social model's efficacy in alleviating transgender discrimination is questionable, since its application to transgender individuals may encourage a characterization of transsexuality as a "condition" as opposed to, for example, an "identity" or a "status" and may also shift the focus away from these individuals' very real health concerns.

Part I of this Article explores the history and meaning of

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[17] Gehi & Arkles, *supra* note 15. *See also* Spade, *supra* note 6, at 35.

[18] *See generally* Spade, *supra* note 6; Gehi & Arkles, *supra* note 15; Levi & Klein, *supra* note 11.

the medical and social models of disability. Part II explains what it means to apply the medical or social model of disability to transgender individuals. Part III analyzes state cases in which advocates have brought transgender discrimination claims using state disability anti-discrimination statutory schemes. This analysis demonstrates how courts and administrative agencies have applied these laws in practice to transgender plaintiffs, as well as categorizes the extent to which courts and administrative agencies have applied the medical or social models of disability. Drawing upon the observations in Part III, Part IV addresses concerns with using state disability anti-discrimination laws to protect transgender individuals. Lastly, Part V examines the various strategic options available to litigators who decide to employ state disability anti-discrimination laws to advocate on behalf of their transgender clients.

I. The Medical and Social Models of Disability

Prior to the modern disability rights movement, which gained momentum in the 1970s in both the United States and Great Britain, an understanding of disability based on a medical model was prevalent in both policy and practice.[19] This model saw disability as an illness growing out of the individual, and one that the individual, or a caretaker, should feel compelled to remedy; as a result, medical and rehabilitation professionals as well as charity organizations exerted a great deal of influence over disabled individuals.[20]

The medical focus on disability "led to the wholesale medicalization of disabled people."[21] Doctors played a prominent role in the care and treatment of a disabled individual, for example by performing surgery after a medically traumatic event or diagnosing an individual's specific

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[19] Samuel Bagenstos, *Subordination, Stigma, and "Disability,"* 86 VA. L. REV. 397, 427 (2000).

[20] *Id.*; *see also* MICHAEL OLIVER, UNDERSTANDING DISABILITY: FROM THEORY TO PRACTICE 32 (1996).

[21] ELI CLARE, EXILE AND PRIDE: DISABILITY, QUEERNESS, AND LIBERATION 81 (1999).

disability.[22] However, many choices often left to doctors were choices that a disabled person could have made on his or her own, such as "assessing driving ability, prescribing wheelchairs, selecting education provision and measuring work capabilities."[23] Doctors and rehabilitation professionals focused on "normalizing" disabled individuals so that they could integrate into able-bodied society; this strategy emphasized the disabled individual's lack of autonomy and independence over body and will.[24] For example, rehabilitation professionals referred to disabled people as "patients," and then as "consumers," as if their identities were inextricably intertwined with those two terms.[25] Moreover, post-World War II international resolutions on the treatment of disabled persons largely focused on the goals of preventing future disability and rehabilitating disabled individuals so that they could better participate in society.[26] Indeed, "as pity, tragedy, and medical diagnosis/treatment entered the picture, the novelty and mystery of disability dissipated. Explicit voyeurism stopped being socially acceptable except when controlled by the medical establishment."[27]

During this time, disabled individuals were also subjected to a notion of disability centered upon "the idea that disabled people are childlike, dependent, and in need of charity or

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[22] MICHAEL OLIVER, THE POLITICS OF DISABLEMENT 48 (1990).

[23] *Id.*

[24] SIMI LINTON, MY BODY POLITIC: A MEMOIR 82 (2007).

[25] *Id.*

[26] Michael Stein, *Disability Human Rights*, 95 CALF. L. REV. 75, 88 (2007).

[27] CLARE, *supra* note 21, at 82–84. Clare alludes in this passage to the existence and subsequent decline of the "freak show," where disabled individuals were viewed not as "monsters" but as "extraordinary creatures, not entirely human, about whom everyone . . . was curious."

pity."[28] For example, the judge in *In re Adoption of Richardson*[29] characterized two deaf parents wishing to adopt a non-deaf child with disabilities as "poor unfortunate people." Taken to the other extreme, especially after medical remedies such as the polio vaccine in the 1950s injected a "we-shall-overcome-disability" attitude throughout society, many disabled individuals "were expected to be doing anything [they] had to do, even if it meant collapsing at the end of the day."[30] Unfortunately, current applications of the medical model of disability continue to result in the exclusion or limitation of disabled individuals from social opportunity or participation: for example, disabled individuals automatically receive social welfare benefits instead of obtaining employment, or are placed in separate "special education" classes in school.

The social model of disability arose in the 1970s to combat the medical model of disability, which painted people with disabilities as inherently diseased, pitiful, or overly heroic in their ability to "overcome" their disability.[31] Erving Goffman's notion of stigma and its role in the perception of disabled people has also had a major influence on the movement.[32] As British sociologist Michael Oliver wrote,

> Disability...is all the things that impose restrictions on disabled people; ranging from individual prejudice to institutional discrimination, from inaccessible public buildings to unusable transport systems, from segregating education to excluding work

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[28] JOSEPH SHAPIRO, NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT 14 (1994).

[29] *In re* Adoption of Richardson, 251 Cal.App.2d 222 (1967).

[30] SHAPIRO, *supra* note 28, at 15.

[31] *See* LINTON, *supra* note 24.

[32] LENNARD J. DAVIS, BENDING OVER BACKWARDS: DISABILITY, DISMODERNISM, AND OTHER DIFFICULT POSITIONS 136 (2002); *see also* Levi & Klein, *supra* note 11, at 78.

> arrangements, and so on.[33]

Most disability rights advocates now endorse the social model that views disability not as an inherent condition emanating out of the individual, but as the interaction between the individual's impairment and the society that creates a "disabling environment" for that individual.[34] Instead of claiming that the individual was inherently flawed or impaired, social model proponents argued that the environment had to adapt to the individual's disability, rather than the individual having to adapt or overcome the disability.

Moreover, the social model of disability challenges the broad societal assumption that disabled individuals are not as capable as able-bodied individuals[35] by shifting the power of defining what is considered "normal" from the able-bodied to the disabled individual. As Martha Minow describes,

> The difference between buildings built without considering the needs of people in wheelchairs and buildings that are accessible to people in wheelchairs reveals that institutional arrangements define whose reality is to be the norm and what is to seem natural. Sidewalk curbs are not neutral or natural but humanly constructed obstacles . . . the meanings of many differences can change when people locate and revise their relationships to difference.[36]

In reversing this power structure, people with disabilities "defin[e] themselves," thus reclaiming their autonomy and rejecting the stigma "that there is something sad or to be

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[33] OLIVER, *supra* note 22, at 33.

[34] *See* Bagenstos, *supra* note 19, at 428.

[35] Stein, *supra* note 26, at 86–87.

[36] MARTHA MINOW, MAKING ALL THE DIFFERENCE 12, 70 (1990).

ashamed of in [their] condition."[37]

An example of this shift is embodied in the separation of the meaning of "impairment" from "disability."[38] "Impairment," as Oliver defined it, is "lacking part or all of a limb, or having a defective limb, organism or mechanism of the body," while "disability" means "the disadvantage of restriction of activity caused by a contemporary social organization which takes no or little account of people who have physical impairments and thus excludes them from the mainstream of society."[39] Thus, impaired people only become disabled when their social environments fail to take their perspectives into account.

Disability rights advocate Eli Clare understands "impairment" as the physical capabilities and limitations of his body: "My hands shake. I can't play a piano, place my hands gently on a keyboard, or type even 15 words a minute."[40] In contrast, "disability" considers reactions from outsiders, or "socially constructed limitation[s]," to the impairment: "I have failed time tests . . . because teachers wouldn't allow me extra time to finish the sheer physical act of writing. I have been turned away from jobs because my potential employer believed my slow, slurred speech meant I was stupid."[41] Yet, to Clare, this is often a murky distinction:

> [M]y experience of impairment has been so shaped by disability - that I have trouble separating the two...Even though this socially constructed limitation has a simple solution -

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[37] *Id.*

[38] Indeed, the concept of "impairment" has been contested. *See* Mary Crossley, *The Disability Kaleidoscope*, 74 NOTRE DAME L. REV. 621, 668-716 (1999); Norman Daniels, *Mental Disabilities, Equal Opportunity, and the ADA*, *in* MENTAL DISORDER, WORK DISABILITY, AND THE LAW 1, 7 (Richard J. Bonnie & John Monahan eds., 1997); OLIVER, *supra* note 22, at 37–42.

[39] DAVID HEVEY, THE CREATURES TIME FORGOT: PHOTOGRAPHY AND DISABILITY IMAGERY 9 (1992).

[40] CLARE, *supra* note 21, at 5–6.

[41] *Id.*

> access to a typewriter, computer, tape recorder, or person to take dictation—I experience the problem on a very physical level.[42]

II. Application to Transgender Individuals

Many transgender advocates are concerned about the negative social and psychological impact of the medicalization of transgender identity upon transgender individuals. Medical professionals, through diagnosis and the administration of transition-related procedures, have usurped the autonomy of transgender individuals over their bodies and minds.[43] This concern may derive not just from an understanding of transsexuality as a diagnosable condition, but also from the fact that this diagnosis is stigmatized, unlike most other types of medical diagnoses.[44]

Gender Identity Disorder (GID) is defined as a mental disorder in the fourth edition of the Diagnostic and Statistical Manual (DSM-IV).[45] As advised by the Harry Benjamin International Gender Dysphoria Association, many transgender individuals begin with a medical professional's GID diagnosis in the treatment of their condition.[46] Moreover, the medical establishment often relies on a GID diagnosis for providing hormone therapy or authorizing a transgender individual to undergo transition-related procedures or surgery.[47] Dean Spade has observed that some mental health professionals have used

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[42] *Id.* at 7.

[43] *See* Gehi & Arkles, *supra* note 15; *see also* Spade, *supra* note 6.

[44] Email with Dean Spade, Assistant Professor of Law, Seattle University School of Law, (Dec. 1, 2009) (on file with author).

[45] AM. PSYCHIATRIC ASS'N TASK FORCE ON DSM-IV, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS: DSM-IV-TR (4th ed. 2000) [hereinafter DSM-IV].

[46] WORLD PROFESSIONAL ASSOCIATION FOR TRANSGENDER HEALTH *sub nom.* HARRY BENJAMIN INT'L GENDER DYSPHORIA ASS'N, STANDARDS OF CARE FOR GENDER IDENTITY DISORDERS (2001), *available at* http://www.wpath.org/publications_standards.cfm.

[47] Spade, *supra* note 6, at 23–24.

the "credibility" of a GID diagnosis as reason to involuntarily commit gender nonconforming people.[48]

People outside the medical profession often rely heavily upon the medical establishment's definition of transsexuality before allowing transgender individuals to access certain benefits or protections. For instance, city and state administrative agencies rely on the medical model of transgender identity for allowing gender changes in identity documentation, access to state health insurance and sex-segregated facilities, or protection via anti-discrimination laws.[49] No state explicitly grants Medicaid coverage of transition-related treatment, and to change the gender on many state and federal identification papers, the government often requires multiple letters from medical professionals indicating that the individual has GID or has completed sexual reassignment surgery.[50]

Several transgender advocates have incorporated the social model of disability into understanding transgender experience. As Pooja Gehi and Gabriel Arkles of the Sylvia Rivera Law Project explain, "the primary problem [does not reside] in individuals and communities that are uncomfortably different or even sick, but [stems] from a coercive, violent binary gender system or an intolerant, inaccessible, and ableist society."[51] On one hand, transgender individuals' "impairments" are the mental or physical discomforts they have with their gender identity or expression. On the other hand, their "disability" becomes also the societal stigma associated with noncompliance with gender norms. Under the social model of disability, the transgender individual does not have an inherent sickness that must be cured; instead, transgender individuals "themselves, rather than their

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[48] Id. at 35.

[49] Gehi & Arkles, *supra* note 15, at 15–19.

[50] *Id.* at 9, 17.

[51] *Id.*

health care providers, should be the ones making decisions about how to lead their own lives."[52]

Jennifer Levi and Bennett Klein, lawyers at Gay and Lesbian Advocates and Defenders, have used the social model of disability to argue that state anti-discrimination laws are important litigation tools for fighting transgender discrimination. As Levi and Klein observe, most state disability anti-discrimination laws, modeled after the ADA, define "disability" in three ways: as (1) an impairment that substantially limits one or more major life activities, as (2) a record of having such an impairment, or as (3) being regarded as having such an impairment.[53] Transgender individuals, they argue, satisfy all three prongs of this definition.

First, Levi and Klein argue that, since GID, gender dysphoria, and transsexualism are mental and physical disorders, the regulatory definition of "physical or mental impairment" is sufficiently broad such that a transgender individual should easily meet that definition.[54] More specifically, Levi and Klein contend that a medical diagnosis is unnecessary for an individual to be covered by law, and they find any arguments as to whether being transgender is either a "physical" or "mental" condition irrelevant since the statute covers both "physical and mental impairments."[55] Also, being transgender "substantially limits a major life activity" because, among other things, the regulations provide that "caring for one's self" can be considered a "major life activity." Further, a transgender individual's need for quality health care falls into the category of "caring for one's self," and his or her inability to access the health care system "substantially limits" him or her from doing so.[56] In order to effectuate their transitions, many transgender individuals require access to hormones, psychotherapy and counseling sessions, long-term

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[52] *Id.* at 16.

[53] I will discuss this three-prong definition in greater detail in Part II.B.

[54] Levi & Klein, *supra* note 11, at 84–85.

[55] *Id.* at 81.

[56] *Id.* at 84–87.

electrolysis sessions, and periodic outpatient body-contouring procedures, along with medical support for the side effects from these procedures.[57] Additionally, if these individuals decide to have genital surgery to complete their transition, they might have difficulties being sexually intimate or engaging in reproduction, which can fairly be considered "major life activities."[58]

Second, Levi and Klein note that even if a transgender individual is not presently experiencing a substantial limitation on a major life activity, the second prong of the "disability" definition, having a record of an impairment, allows for the possibility of a future limitation. Lastly, Levi and Klein argue that transgender individuals are also "regarded as having an impairment"[59] by families, friends, communities, employers, coworkers, customers, and society as a whole, who regularly stigmatize them. Indeed, in many of the cases that use state disability anti-discrimination laws to challenge transgender discrimination, transgender individuals have been characterized as "undesirable," lacking the credibility to perform their jobs, "crazy," and a poor reflection of the employment organization.[60] Levi and Klein write that "being transgender is a quintessentially stigmatic condition that has engendered fear and discomfort in others wholly separate and apart from the effect that being transgender has on any one person's life. Transgender people are often substantially limited not as the result of anything inherent to the condition of being transgender, but as a result of the negative attitudes of others."[61] Thus, the "regarded as" prong of the disability definition is meant to "address discrimination

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[57] *Id.*

[58] *Id.*

[59] Levi & Klein, *supra* note 11, at 89.

[60] Sommers v. Iowa Civil Rights Comm'n., 337 N.W.2d 470 (Ia. 1983); Smith v. City of Jacksonville Corr. Inst., No. 88-5451, 1991 WL 833882, at *1 (Fla. Div. Admin. Hrgs. Oct. 15, 1991); Doe v. Electro-Craft Corp., No. 87-E-132, 1988 WL 1091932, at *1 (N.H.Super. Ct. Apr. 8, 1988); Enriquez v. West Jersey Health Sys., 777 A.2d 365 (N.J. Super. Ct. 2001).

[61] Levi & Klein, *supra* note 11, at 89.

arising from stereotypes and ignorance about physical and mental impairments."[62]

III. Disability Models as Applied by Courts and Administrative Agencies in Transgender Discrimination Cases

A. The National Landscape

Both the Americans with Disabilities Act (ADA) and the Federal Rehabilitation Act (Rehab Act) exclude transgender individuals from the definition of "disability."[63] This prohibition was not originally part of the statutes, but was added as an amendment largely in reaction to federal court interpretations allowing transgender individuals to be covered by federal disability law.[64] At least eleven states have also excluded transgender individuals, either through common law or statute, from the protected class of "disability": Indiana, Iowa, Louisiana, Nebraska, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Texas, and Virginia.[65] Conversely, eight states, either through state courts or administrative agencies, have granted standing to transgender individuals to claim protection under part or all of their disability anti-discrimination laws:

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[62] *Id.* at 80.

[63] Americans with Disabilities Act, 42 U.S.C. § 12211(b)(1) (1997); Federal Rehabilitation Act of 1973, 29 U.S.C. § 705(9) (1997).

[64] Blackwell v. U.S. Dept. of Treasury, 639 F.Supp 289, 290 (D.D.C. 1986); *see also* Doe v. U.S. Postal Service, 1985 WL 9446 (D.D.C. 1985).

[65] NAN D. HUNTER, COURTNEY G. JOSLIN, & SHARON M. MCGOWAN, THE RIGHTS OF LESBIANS, GAY MEN, BISEXUALS, AND TRANSGENDER PEOPLE 174 (2004); *see also Sommers*, 337 N.W.2d at 470; Dobre v. Nat'l R.R. Transp. Corp., 850 F.Supp. 284 (E.D. Pa. 1993); Holt v. Northwest Pa. Training P'ship Consortium, 694 A.2d 1134 (1997).

Connecticut, Florida, Illinois, Massachusetts, New Hampshire, New Jersey, New York, and Washington.[66]

B. Statutory Schemes

Most states have statutorily protected disabled individuals via state anti-discrimination laws, which, at their broadest levels, shelter employees or tenants from discrimination in public accommodations, employment, or housing based on the employee or tenant's "handicap" or "disability."[67] Additionally, if the plaintiff has established that she has a disability, the plaintiff may also have to show one or more of the following: (1) the disability was directly related to the employee's performance of the job, (2) the defendant knew of and did not attempt to reasonably accommodate the handicap, or (3) the defendant did not experience undue hardship in attempting a reasonable accommodation of the handicap.[68]

These state statutes define "disability," but the approaches vary. Mirroring federal law, many states require that in order to come within the protected class of disability, a plaintiff must show that he or she (1) has a physical or mental impairment that substantially limits a major life activity, (2) has a record of such

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[66] *Electro-Craft Corp.*, 1988 WL 1091932 at *1; *Smith*, 1991 WL 833882 at *1; Evans v. Hamburger Hamlet, No. 93-E-177,1996 WL 941676 (Chi. Com. Hum. Rel. May 8, 1996); Conway v. City of Hartford, No. CV 950553003,1997 WL 78585 (Conn. Super. Ct. Feb. 4, 1997); *Enriquez*, 777 A.2d at 365; Doe v. Yunits, No. 001060A, 2000 WL 33162199 (Mass. Super. Ct. Oct. 11, 2000); Jette v. Honey Farms Mini Market, No. 95 SEM 0421, 2001 WL 1602799 (M.C.A.D. Oct. 10, 2001); Lie v. Sky Publishing Corp., No. 013117J, 2002 WL 31492397 (Mass. Super. Ct. Oct. 7, 2002); *Bell*, 194 Misc.2d 774 (N.Y. Sup. Ct. 2003); Doe v. Boeing Co., 846 P.2d 531 (Wash. 1993).

[67] *Id.* One state, North Carolina, does not have such a law in place. While the transgender plaintiff tried to argue that since transgender individuals were disabled, they should not be discriminated against as a matter of public policy, the court determined that transgender individuals were not part of the protected class of "disability" by relying on the ADA and Rehab Act's exclusion of transgender individuals from the protected class of "disability." Arledge v. Peoples Services Inc & Carolina Transfer and Storage Co., No. 02 CVS 1569, 2002 WL 1591690 (N.C. Gen. Ct. Apr. 18, 2002).

[68] *Electro-Craft Corp.*, 1988 WL 1091932 at *2; *Smith*, 1991 WL 833882 at *12-13; *Evans*, 1996 WL 941676 at *6; *Jette*, 2001 WL 1602799; *Lie*, 2002 WL 31492397 at *7; *Bell*, 194 Misc.2d at 782-783; *Boeing*, 846 P.2d at 537.

impairment, or (3) is regarded as having such an impairment.[69] However, some states take a different approach, requiring a plaintiff to show that the impairment is "demonstrable by medically accepted clinical or laboratory diagnostic techniques," or is "medically cognizable or diagnosable."[70]

Eleven state courts or administrative agencies have adjudicated transgender discrimination claims under state disability anti-discrimination laws. Looking closely at the different statutory approaches of these eleven states will illuminate the following analysis of the models of disability courts use in evaluating these claims. This Article classifies the statutory approaches of these states into three categories: statutes that employ the three-prong definition of disability, which allows for a social model of disability to be applied to the plaintiff; those that employ a diagnosis-based definition, which arguably limits the court only to applying a medical model of disability; and those that evidence both a three-prong definition and a diagnosis-based definition, which would allow for either the medical or social model approach.[71] Briefly, this Article will describe each approach and identify which state statutory schemes exemplify each approach.

1. Three Prong Definition Allowing a Social Model Approach

Florida, Iowa, Massachusetts, New Hampshire, and Pennsylvania's statutes follow the ADA's three-prong approach

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[69] *Smith*, 1991 WL 833882 at *11; *Sommers*, 337 N.W.2d at 475; *Yunits*, 2000 WL 33162199 at *4; *Electro-Craft Corp.*, 1988 WL 1091932 at *3; *Dobre*, 850 F.Supp. at 288.

[70] *Enriquez*, 777 A.2d at 374; *Conway*, 1997 WL 78585 at *3-5, *Evans*, 1996 WL 941676 at *6-7; *Boeing*, 846 P.2d at 534-5; *Bell*, 194 Misc.2d at 779.

[71] While this Article has attempted to categorize these laws by whether they embody the social or medical model, I recognize the limitations in doing so, namely, that courts have used the three-prong definition of disability to introduce medical evidence pertaining to a plaintiff's disability, and that courts can use a diagnosis-based statute to incorporate a social model of disability. Nevertheless, I maintain these categorizations based on my reliance on the legislative intent behind the ADA's definition (and state versions).

to the definition of disability.[72] This Article will focus in particular on the first and third prongs, as many of the decisions in the cases analyzed turn on these two prongs specifically.

a. Physical or Mental Impairment that Substantially Limits a Major Life Activity

This prong has three elements: the plaintiff must (1) have an impairment (physical or mental) that (2) substantially limits (3) a major life activity. Federal regulations, which have largely been adopted into state statutes, interpret "impairment" to mean "any physiological disorder . . . affecting . . . body systems . . . or a mental or psychological disorder."[73] An impairment "substantially limits" a major life activity if "it is restricted or made more complex as compared with persons without the impairment."[74] A "major life activity" includes "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working."[75]

b. Regarded as Having a Disability

Congress added this clause to the ADA with the legislative purpose of removing societal stigma and misperception associated with disabled individuals.[76] The U.S. Supreme Court reinforced Congress' intent in *School Board v. Arline*.[77] Congress found that a person should be protected under the "regarded as" prong if he or she is "excluded from any basic life

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[72] *Smith*, 1991 WL 833882 at *11 (stating "Congress included the 'regarded as' provision...precisely to protect people disadvantaged because of society's accumulated myths and fears about disability and disease."); *Sommers*, 337 N.W.2d at 475; *Yunits*, 2000 WL 33162199 at *4; *Electro-Craft Corp.*, 1988 WL 1091932 at *3; *Dobre*, 850 F.Supp. at 288.

[73] *See* 240 IOWA ANN. CODE § 6.1(1) (2011).

[74] 24 C.F.R. Part 36 App. B § 36.104.

[75] 45 C.F.R. 84.3 j(2)(ii).

[76] S. REP. NO. 93-1297, at 37–8, 50 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 6373, 6388–91, 6413–14.

[77] Sch. Bd. Of Nassau Cnty. v. Arline, 480 U.S. 273 (1987).

activity . . . because of a covered entity's negative attitudes toward that person's impairment."[78] Additionally, federal regulations consider a person to be "regarded as" having a disability when he or she "has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment."[79]

2. Diagnosis-Based Definition

New Jersey and Connecticut have statutory schemes that are distinct from the three-prong definition of disability as described above. New Jersey's Law Against Discrimination defines a disabled individual as a person suffering from:

> [P]hysical disability, infirmity, malformation or disfigurement which is caused by bodily injury, birth defect or illness . . . or any mental, psychological or developmental disability . . . resulting from anatomical, psychological, physiological or neurological conditions which prevents the normal exercise of any bodily or mental functions *or is demonstrable, medically or psychologically, by accepted clinical or laboratory diagnostic techniques.*[80]

Connecticut's anti-discrimination law states that employers cannot discriminate against employees based on their "present or past history of mental disability, mental retardation, learning disability or physical disability."[81] Furthermore, "mental disability" is defined as "an individual who has a record of, or is regarded as having, one or more mental disorders, *as defined in*

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[78] H. REP. NO. 101-485 pt. 2, at 53 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 303.

[79] 45 C.F.R. § 84.3(j)(2)(iv); 240 IOWA ANN. CODE § 6.1(5) (2011).

[80] N.J. STAT. ANN. 10:5-5(q) (West 2006) (emphasis added).

[81] CONN. GEN. STAT. ANN. § 46a-60 (West 2009).

the most recent edition of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders."[82]

3. Hybrid Approach: Three-Prong Definition and Diagnosis-Based Definition

Illinois, New York, and Washington's disability anti-discrimination laws incorporate elements of both the three-prong definition of disability and the diagnosis definition. For example, in Illinois, state agency regulations defining disability adopt the three prong structure, where having a history of a disability or being perceived as having a disability are incorporated into the definition.[83] However, instead of defining disability first as "an impairment that limits one or more major life activities," Illinois' regulations define disability as "a *determinable physical or mental characteristic* which may result from *disease, injury, congenital condition of birth or functional disorder* including, but not limited to, a determinable physical characteristic which necessitates a person's use of a guide, hearing or support dog."[84] Moreover, agency regulations define "determinable" from a diagnostic perspective: "A condition must be 'determinable' *by recognized clinical or laboratory diagnostic techniques.*"[85]

Similarly, New York's disability anti-discrimination statute defines disability as:

> (a) a physical, mental or medical impairment resulting from anatomical, physiological, genetic, or neurological conditions which prevent the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques or (b) a record of such an

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[82] *Id.* at §46a-51(20) (emphasis added).

[83] CHICAGO, ILL. CODE § 2-160-020(c) (2011).

[84] *Id.* (emphasis added).

[85] *Evans*, 1996 WL 941676 at *6–7 (emphasis added).

> impairment or (c) a condition regarded by others as such an impairment."[86]

New York's definition also leaves out the "substantially limits one or more major life activities" requirement, and incorporates a diagnosis-based approach in its definition of impairment.

Washington's disability anti-discrimination law is uniquely structured: the statute prohibits employers from discriminating against employees based on "any sensory, mental, or physical handicap."[87] State regulations define "sensory, mental, or physical disability" in two parts: (1) the condition must be "abnormal", *and* (2) the plaintiff must have been discriminated against *because* of the condition.[88] Moreover, "the presence of a sensory, mental, or physical disability includes, but is not limited to, circumstances where a condition (i) *is medically cognizable or diagnosable*; (ii) exists as a record or history, or (iii) is perceived to exist whether or not it exists in fact."[89] Washington's statutory scheme incorporates elements of the three-prong approach, but it deviates from this approach in three ways: (1) it ties causation (i.e., that the condition caused the discrimination) into the definition of the disability itself, (2) it requires that the condition be "abnormal," and (3) it allows for the presence of a disability when the disability is "medically cognizable or diagnosable."

Illinois, New York, and Washington's statutes are compelling because they contemplate an application of either the medical and social model of disability to the litigant. They contain language about "diagnosing" a disability, but being "perceived" as having a disability may also count under these statutes, whether or not one actually has a disability. Whether courts in these jurisdictions have taken full advantage of the flexibility of their respective statutes will be explored later in the Article.

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[86] N.Y. EXEC. LAW § 292(21) (McKinney 2011).

[87] WASH. REV. CODE ANN. § 49.60.180 (West 2011).

[88] WASH. ADMIN. CODE § 162-22-020(1)(a)-(c) (2011).

[89] *Id.* (emphasis added).

C. Court's Application of Disability Models to Transgender Discrimination Cases

As of mid-2010, eleven state courts or administrative agencies have issued opinions in favor of or against a transgender plaintiff who claimed discrimination under disability anti-discrimination laws.[90] These eleven opinions fall into four categories: (1) opinions that employ a medical model of disability to transgender plaintiffs, (2) an administrative agency opinion that fully employs a social model of disability to its transgender plaintiff, (3) opinions from courts and administrative agencies in New Hampshire and Massachusetts that have unsuccessfully attempted to fully employ the social model of disability to transgender plaintiffs, and (4) opinions by courts in Washington and Iowa that have either neglected or manipulated the social model of disability in ways that ultimately worked against its transgender plaintiffs.

1. Medical Model

State courts or agencies in Connecticut, Illinois, New Jersey, New York, and Pennsylvania[91] best exemplify the application of a medical model of disability to the transgender plaintiff. In addition, Massachusetts courts and agencies have to some degree invoked the medical model of disability, although I will explore below the observations they have made about societal perceptions of transgender individuals.

To determine whether a court or administrative agency employed a medical model of disability to the transgender plaintiff, several factors were considered: (1) whether the court or agency relied heavily or entirely upon evidence of a medical professional's GID diagnosis, (2) whether the court or agency discussed the symptoms and effects of GID as defined in the DSM-IV, (3) whether plaintiff's allegation of GID, as defined in

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[90] Two of the eleven decisions do not add their own analysis but refer to the analysis set forth in greater detail in Sommers v. Iowa Civil Rights Comm'n, 337 N.W.2d 470 (Iowa 1983). *See* Dobre v. Nat'l R.R. Passenger Corp., 850 F.Supp. 284 (E.D. Pa. 1993); Holt v. Nw. Pa. Training P'ship Consortium, Inc., 694 A.2d 1134 (Pa. Commw. Ct. 1997).

[91] *Id.*

the DSM-IV, was sufficient for the court or agency to find that plaintiff was disabled, and (4) whether courts or agencies viewed transgender identity as a "condition" of some kind, be it physical, mental, or both.

First, many of these courts either explicitly required or relied substantially upon a medical professional's diagnosis of GID in order to find that plaintiff was disabled. For example, New Jersey's Superior Court, in *Enriquez v. W. Jersey Health Systems*, found that the plaintiff had not submitted enough evidence, i.e., a medical professional's diagnosis, that the plaintiff had GID, which the statute required, and thus that it could not definitively rule on whether Enriquez was disabled.[92] Additionally, in *Doe v. Boeing*, the Washington Supreme Court relied on medical opinion and medical treatment guidelines for transgender individuals to determine that defendant reasonably accommodated plaintiff to the extent legally necessary.[93] The Chicago Human Rights Commission deferred to medical opinion in *Evans v. Hamburger Hamlet & Forncrook* noting: "Mental disabilities are defined by patterns of behavior in which the line between normality and abnormality is not absolute. In such instances *a skilled diagnosis* is important to separate a genuine mental disorder from universal behaviors and symptoms."[94] And, in *LaFleur v. Bird-Johnson Co.*, decided in 1994, the Superior Court of Massachusetts wrote in dicta that since "transsexualism is not a recognized handicap," LeFleur's disability claim must fail. The court noted that, even if transsexualism were recognized as a disability, LaFleur would not be protected because "mental health professionals who treated LaFleur . . . describe her as a transvestite, not a transsexual."[95] A medical expert's diagnosis to determine that

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[92] *Enriquez*, 777 A.2d at 376–7.

[93] *Boeing*, 846 P.2d at 537.

[94] *Evans*, 1996 WL 941676 at *7 (emphasis added).

[95] LaFleur v. Bird-Johnson Co., No. 93-107, 1994 WL 878831, at *4 (Mass. Super. Ct. Nov. 3, 1994).

LaFleur was not a transsexual but a transvestite was thus very significant to the court.[96]

Likewise, the New York Supreme Court in *Doe v. Bell* relied virtually entirely on the plaintiff's GID diagnosis to determine the plaintiff had a disability: "Doe's disorder has been clinically diagnosed by Dr. Spritz, as well as by Dr. Levin . . . using the medically accepted standards set forth in the DSM-IV. No more is required for Doe to be protected from discrimination under the State Human Rights Law."[97] The court in *Doe v. Bell* also characterized New York's statute as drawing a distinction between "physical and mental impairment" and "*medical* impairment" in its definition of disability. This distinction seems to further underscore the importance of medical opinion in the court's determination of "impairment."[98] The court also relied on Doe's GID diagnosis to demonstrate the necessity of accommodating Doe: "because of her GID and the treatment she has been receiving for her condition, Jean Doe needs to be able to wear feminine clothing, including dresses and skirts now banned under the ACS-approved dress policy."[99] Without the weight of a medical diagnosis, the court may not have been as willing to unequivocally pronounce that Doe needed to wear feminine clothing to be reasonably accommodated.

Second, some judges also cited the DSM-IV definition of GID to discuss the symptoms and effects of GID or to find that the plaintiff's *own* allegation of GID, whether or not supported by a medical professional's diagnosis, alone demonstrates that the plaintiff has a disability. In *Enriquez*, the court quotes the DSM-IV— "[w]ith regard to gender dysphoria [the DSM-IV] notes that the 'disturbance causes clinically significant distress or impairment in social, occupational, or other important areas

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[96] *Compare id. with* Oiler v. Winn-Dixie, No. 00-3114, 2002 U.S. Dist. LEXIS 17417 (E.D. La. Sep. 16, 2002) (employing a highly medicalized understanding of cross-dressing used to argue against covering the discrimination under a gender discrimination theory).

[97] *Bell*, 194 Misc.2d at 779–780.

[98] *Id.* at 779 (emphasis added).

[99] *Id.* at 783.

of functioning'"—to explain that "transsexualism can be accompanied by a profound sense of loathing for an individual's primary and secondary sexual characteristics."[100] In *Doe v. Electro-Craft*, decided in 1988, the New Hampshire Supreme Court looked to the DSM to determine, pursuant to state statute, whether GID was a "chronic condition," and ultimately found 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."[101] The Court then refuted the defendant's argument that the plaintiff's sexual reassignment surgery had "cured" her of her disability by listing all the physical and mental problems a transgender individual may experience pre- and post-surgery.[102] In *Evans*, the Commission held, "[As] gender dysphoria is listed in the DSM-III as a psychological disorder . . . the Commission finds that the Complainant has alleged that she has a disability which she may prove to be determinable under the CHRO."[103] And, in *Lie v. Sky Publishing Corp.*, decided in 2002, the Massachusetts Superior Court discussed the DSM definition of GID in its "background" section and described the plaintiff's specific condition as alleged in her complaint: "The plaintiff avers that she is a biological male who has desired to live as a woman . . . that she has been diagnosed with GID, that she engages in psychotherapy, and that she takes hormones as part of her treatment."[104]

Lastly, two courts in particular expressly held that transsexuality was not a physical disability but could be a mental disability. Connecticut's Superior Court, in *Conway v. Hartford*, found that transsexuality did not fit into the definition of "physical disability" as defined by Connecticut statute, but that since "mental disability" is statutorily defined as any disorder recognized by the DSM-IV, and because GID is thus recognized,

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[100] *Enriquez*, 777 A.2d at 376 (quoting DSM-IV, *supra* note 47, at 537–38).

[101] *Electro-Craft*, 1988 WL 1091932, at *3, 4.

[102] *Id.*

[103] *Evans*, 1996 WL 941676, at *8.

[104] *Lie*, 2002 WL 31492397, at *2.

the transgender plaintiff had a mental disability.[105] Similarly, in *Enriquez*, the court noted that "we are not dealing with [a case of] any 'physical disability'" when discussing whether the transgender plaintiff's condition was a "physical or mental" condition.[106] Thus, in the vast majority of cases in which transgender plaintiffs have sought protection under state disability laws, courts have applied the medical model of disability to these individuals.

2. Social Model

To determine whether a court or agency employed a social model of disability when considering a transgender discrimination claim, the author looked for courts or administrative agencies that favored evidence relying on the kinds of adverse societal attitudes, prejudices, stigma, bias or misconceptions that effectively disable the specific transgender plaintiff. Detailed evidence regarding how the plaintiff's coworkers or others in her community treated her, as well as a thoughtful discussion of how the adverse attitudes and stigma plaintiff experienced rendered her incapable of performing her job duties, signaled a court's application of the social model of disability. Florida's Division of Administrative Hearings (FDAH) is the only adjudicative body that has clearly relied on a social model of disability to grant state disability anti-discrimination protection to transgender individuals.

In *Smith v. City of Jacksonville Correctional Institution*, the FDAH describes how adverse attitudes among Smith's coworkers and supervisors about transsexuality contributed to the loss of Smith's job:

> Smith was handicapped because of the attitudes with which she was confronted by her employer . . . . The City offered no witness . . . who testified on personal knowledge to any actual loss of respect for Smith or to any actual erosion of working relationships . . . [t]he City

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[105] *Id.*

[106] *Enriquez*, 777 A.2d at 374.

> instead made a snap decision based on the personal predilections and perspectives of the Directors who met with Smith, without any effort then or later to assess the validity of their assumptions.[107]

The FDAH notes that the defendant correctional facility's deepest fear was that "as a known transsexual [Smith] would not be able to command the respect of co-employees and inmates and would generally discredit the City," although, as the Director of Police Services testified, no one was concerned that Smith's transition would affect *her* ability to carry out her job requirements.[108]

The FDAH seems to understand that both the first and third prongs of the disability definition—that is, "an impairment that substantially limits one or more major life activities" and "regarded as having a disability"—can encompass a social model of disability.[109] Throughout the opinion, the agency emphasizes how Smith's employer's adverse attitudes disabled her through the use of both the first- and third-prong language:

> A handicap can result *from the perception* of others . . . . A person's inability to continue working in that person's chosen field *is an impairment of a major life function* regardless of whether it is caused by a *physical or mental handicap*, including a handicap *caused by the perceptions* of the employer.[110]

3. General Observations About Stigma: Not Enough

Courts in New Hampshire and Massachusetts have also brought in evidence pertaining to how transgender individuals

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[107] *Smith*, 1991 WL 833882, at *12-13.

[108] *Id.* at *8.

[109] Id. at *11.

[110] *Id* (emphasis added).

are stigmatized on a general scale. However, courts in both states stop short of demonstrating how the overarching stigma associated with transgender individuals effectively disabled the transgender plaintiff, thus failing to employ fully the social model of disability.

For example, the New Hampshire Supreme Court in *Electro-Craft* included in its opinion part of the testimony of two medical professionals who discussed how society perceives transgender individuals generally. The court summarized their testimony as follows: "According to both [experts], many people, including employers, the general public, and even some well-educated physicians, consider transsexuals to be mentally handicapped, unstable, incompetent, 'crazy,' and less capable in employment than non-transsexual persons."[111] While the court acknowledged the misconceptions and stereotypes that contributed to a negative perception of transgender individuals, this evidence failed to decide the case. Moreover, the court also failed to seek out evidence of the impact that adverse societal attitudes about transgender people and/or the attitudes held by specific people within the transgender plaintiff's community had had on the specific transgender plaintiff.

Similarly, courts and administrative agencies in Massachusetts have made broad observations about the link between the "regarded as" prong of the definition of disability and the stigma transgender individuals experience in society, but have not linked such stigma to the plaintiff involved in the case. For example, the court in *Lie* noted that

> [The 'regarded as' third prong is] designed to protect otherwise qualified individuals whose only impairment in major life activities stems from deprivations based on prejudices, stereotypes, or unfounded fear . . . It cannot be gainsaid that transsexuals have a classically stigmatizing condition that sometimes elicits

[111] *Electro-Craft*, 1988 WL 1091932, at *1.

> reactions based solely on prejudices, stereotypes, or unfounded fear.[112]

However, as to how the prejudices experienced by transgender individuals in general disabled the specific plaintiff in particular, the court only observes, "the plaintiff . . . alleges the defendant regarded her as having a handicap rendering her incapable of performing her job, despite her abilities and capability."[113]

As to how adverse societal attitudes about transgender people might have disabled the plaintiff, the court in *Yunits* only notes that "plaintiff alleges that [she], as a result of the clothing she wears and the manner she carries herself, is regarded as having such an impairment," yet spends a great deal of time discussing the general policy reasons behind the legislature's decision to refrain from statutorily excluding transgender individuals generally from the protected class of "disability":

> [Massachusetts' approach] recognizes that, as our knowledge of genetics, biology, psychiatry, and neurology develops, individuals who were not previously believed to be physically and mentally impaired may indeed turn out to be so, and may warrant protection from handicap discrimination. It also recognizes that this may mean that persons who were previously thought to be eccentric or iconoclastic (or worse) and who were vilified by many people in our society may turn out to have physical or mental impairments that grant them protection from discrimination. Stated differently, the traits that made them misunderstood and despised may make them persons enjoying special protection under our law.[114]

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[112] *Lie*, 2002 WL 31492397, at *7.

[113] *Id.* at * 7.

[114] *Yunits*, 2001 WL 664947, at *5.

Moreover, the MCAD in *Jette* only mentions the general policy reasons behind the state's disability anti-discrimination law: the law is designed to protect "otherwise qualified" individuals who are substantially impaired in a major life activity "from deprivations based on prejudices, stereotypes, or unfounded fear."[115]

Thus, unlike the FDAH's thorough examination in *Smith*[116] of how the misconceptions and prejudices of Smith's supervisors effectively disabled her, the courts and administrative agencies in these cases, although seemingly well-intentioned, perform an incomplete social model analysis by not demonstrating how the general stigma worked to disable the specific plaintiff.

4. Washington and Iowa: Problematic Understandings of the Social Model of Disability

Two state courts in particular have implicitly applied the social model of disability, alongside the medical model, in their application of disability anti-discrimination laws to transgender plaintiffs. However, they have managed to either disregard the social model where it might be relevant (Washington), or manipulate the social model of disability such that the courts' interpretation of its framework resulted in the plaintiff losing under these laws (Iowa).

In *Doe v. Boeing*, decided by Washington's Supreme Court in 1993, the plaintiff had to prove both that her transgender condition was abnormal *and* that her transgender condition caused the employment discrimination, in order to satisfy the statutory definition of "disability." And, in order to determine whether Doe's employer had discriminated against her because of her condition, the court considered whether the employer reasonably accommodated the employee's disability.

First, in holding that the plaintiff's gender expression was "abnormal," the court in *Doe v. Boeing* recognized that "gender dysphoria is a medically cognizable and diagnosable condition.

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[115] *Jette*, 2001 WL 1602799, at *3.

[116] *Enriquez*, 777 A.2d at 374.

Those who suffer from the condition surely endure great mental and emotional agony." Moreover, whether the plaintiff's condition can be considered abnormal "depend[s] upon expert medical testimony, relevant medical documentation, and state of mind."[117] This language mirrors the language in cases where courts or agencies have employed a medical model of disability to transgender individuals: the court relied on medical opinion to determine whether the plaintiff is disabled and noted the psychological "agony" associated with gender dysphoria. Additionally, the concept of abnormality individualized the problem to the victim, since "surely" the victim experienced "agony" from being gender dysphoric. Thus, the environment within which the plaintiff was discriminated against appears natural and neutral.

Next, the court considered whether Doe's employer discriminated against her because of her transgender condition. The court held that Boeing discharged Doe not because she was *transgender,* but because *she violated the employer's dress policy,* which changed after Doe announced her decision to transition on the job. Now, all transgender individuals employed at Boeing were instructed not to wear "obviously feminine clothing."[118] Within the causation inquiry, the court also asked whether the defendant reasonably accommodated Doe's condition. By relying heavily on the testimony of Doe's psychologist and physician, as well as the Harry Benjamin Standards of pre-surgical treatment of transgender individuals, the court held that, since Doe had no "medical need" to wear feminine clothing on the job, and since Boeing's restrictive dress policy did not affect her job performance, Boeing had "reasonably accommodated" her condition.[119]

The question of whether Doe's transgender condition caused Boeing to discriminate against her, at first blush, seems

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[117] *Boeing*, 836 P.2d at 535.

[118] *Id.* at 533. The court is unclear as to whether this unwritten dress policy was applied and enforced equally with regard to women as it was to the transgender women working at Boeing at the time; the court only notes that the policy was applied to all Boeing employees.

[119] *Id.* at 537–538.

to invite a social-model-of-disability analysis: in order to determine whether Doe was discriminated against *because* of her gender expression, the court might ask how her supervisors and colleagues at her place of employment treated her before and after she began to transition and whether any negative stereotypes that her employers held toward transgender people influenced the company's decision to restrict the company's dress policy and ultimately terminate Doe's employment. Yet the court did not take this opportunity, relying instead on medical evidence and technical legal arguments to find that Doe's employer had not discriminated against her because of her condition.

The Iowa Supreme Court in *Sommers v. Iowa Civil Rights Commission* incorporated both a medical and social model of disability when reaching its decision, but with disturbing results. In applying a medical model, the court in *Sommers* did not specifically invoke the DSM definition of GID, but it made its own psychological and physical observations about "transsexualism": "It is generally agreed that transsexualism is irreversible and can only be treated with surgery to remove some of the transsexual feelings of psychological distress; psychotherapy is ineffective."[120] Indeed, the court's assumption that transgender individuals have to be "cured," and only through surgery, sounds strongly in the medical model of disability.

The Iowa Supreme Court held that since the state legislature had not intended to include transsexualism in the definition of "physical or mental impairment," the anti-discrimination statute did not apply to transgender individuals.[121] To reach its conclusion, it first observed that "No claim is made that a transsexual has an abnormal or unhealthy body," thus transsexualism was not a physical impairment.[122] The court then looked to how mental impairment was defined under agency regulations: a mental impairment includes any mental or psychological disorder, "such as mental retardation, organic

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[120] *Sommers*, 337 N.W.2d at 473.

[121] *Id.* at 476.

[122] *Id.*

brain syndrome, emotional or mental illness, and specific learning disabilities."[123] The court decided that, while these mental conditions *inherently* limit an individual's ability to engage in a major life activity, "[t]ranssexualism ordinarily should not affect a person's capacity to engage in those activities. Instead, transsexualism is more likely to have an adverse effect because of attitudes of others toward the condition."[124] Moreover, although the plaintiff argued that her condition fits under the "regarded as" prong, the court held that a finding of physical or mental impairment is necessary before "attitudes of others can be said to make the condition a substantial handicap."[125] That is, the plaintiff must prove that she actually has a "physical or mental impairment that substantially affects one or more major life activities" *before* she can claim relief because she is "regarded as having a disability." The court's interpretation seems to directly contradict Iowa's regulatory definition of "is regarded as having such an impairment," which would include an individual who "has none of the impairments defined to be 'physical or mental impairments,' but is perceived as having such an impairment."[126]

Additionally, the court makes the point that "[a]lthough a transsexual may have difficulty in obtaining and retaining employment, the commission could reasonably believe that difficulty is the result of discrimination based on societal beliefs that the transsexual is *undesirable*, rather than from beliefs that the transsexual is impaired physically or mentally [emphasis added]."[127] While it might be plausible to distinguish between discrimination because of a "physical and mental impairment" and discrimination because of "undesirability," the court does not acknowledge that "undesirability" may well emanate from societal perceptions of transgender individuals as impaired.

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[123] *Id.*

[124] *Id.*

[125] *Id.*

[126] *Sommers*, 337 N.W.2d at 475.

[127] *Id.* at 477.

D. Conclusion

The various state definitions of "disability" break down into three categories: first, a three-prong statute that incorporates a social model of disability; second, a diagnosis-based statute that limits the definition of disability to a medical model; third, a hybrid that is structurally similar to the three-prong statutes but utilizes a diagnosis-based definition of disability. Secondly, in practice, when applying disability anti-discrimination laws to transgender individuals, Connecticut, Illinois, New Hampshire, New Jersey, New York, and Washington rely most heavily on a medical model of disability. Florida comes closest to exhibiting a true social model of disability, while courts in New Hampshire and Massachusetts make general observations about transgender stigma but stop short of demonstrating how they disable the plaintiff specifically. Lastly, the missed opportunity to apply the social model of disability (Washington), or the misapplication of the social model of disability (Iowa), ultimately worked against the transgender plaintiff's success on these claims. These cases illustrate that courts have largely relied on the medical model of disability, and have not fully applied a social model of disability to individuals by showing how stigma against transgender individuals effectively disabled the specific plaintiffs bringing their claims.

IV. The Impact of Using Disability Anti-Discrimination Laws, As Applied Currently, to Fight Transgender Discrimination

Disability laws, as applied to transgender plaintiffs, have a number of beneficial effects. First, as Levi and Klein have noted, using disability law has helped "humanize[] the plaintiff, [convince] . . . courts of the seriousness of the underlying claims, and . . . [gives judges] a basis for removing him or herself as the evaluator of the harm of a sex-differentiated rule."[128] Moreover, disability anti-discrimination laws provide an opportunity to debunk myths and misconceptions about "disability." Both transgender and disabled individuals have historically challenged mainstream society's notions of what is

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[128] Jennifer Levi, *Clothes Don't Make the Man, but Gender Identity Might*, 15 COLUM. J. GENDER & L. 90, 104 (2006).

"normal" and "abnormal" with regards to a person's body and mind.[129] If courts can be encouraged to apply the social model of disability when evaluating transgender plaintiff's discrimination claims under disability law, they may, at the least, raise awareness of the adverse societal attitudes associated with transgender individuals.

From a legislative perspective, applying disability laws to individuals not "traditionally" thought of as disabled also advances a more dynamic interpretation of disability anti-discrimination statutes. Levi and Klein argue that, since the ADA was passed with an explicit exclusion of transgender individuals from its protections, despite the fact that many state disability anti-discrimination laws in place at the time as well as the Federal Rehabilitation Act (FRA), contained no transgender exclusion provision, Congress must have originally believed that transgender individuals could be included under the definition of disability.[130] However, an equally plausible theory is that Congress never intended for transgender individuals to use federal disability anti-discrimination law for protection from discrimination. Once lower federal courts began to interpret the FRA in such a way, Congress reacted by inserting the exclusion into the ADA, pursuant to its original intent. Thus, as the Massachusetts Superior Court in *Yunits* noted, a more dynamic interpretation of disability anti-discrimination statutes would acknowledge that our understanding of "disability" may shift as advances in "genetics, biology, psychiatry and neurology" reshape that definition.[131] For proponents of a dynamic theory of statutory interpretation, courts should allow these laws the flexibility they need in order to accommodate the progression of societal interpretations of "disability" throughout time.

In addition, these laws allow advocates to refute the argument that, given the political and social history of the disability rights movement, transgender individuals should not associate themselves within the stigmatized community of

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[129] Spade, *supra* note 6, at 11.

[130] Levi & Klein, *supra* note 11, at 84.

[131] *Yunits*, 2001 WL 664947, at *5.

"disability."[132] Levi and Klein have observed that some believe that no one would want to be labeled as "disabled," even if societal bias surrounding disabled individuals did not exist.[133] Levi and Klein, as well as Gehi and Arkles, agree that this argument cannot be tolerated because it reflects the same stigmatization of disability that disability rights advocates have explicitly rejected by embracing a social model of disability.[134] Indeed, not only has the disability rights movement rejected the medical model of disability, from which this stigma derives, but Congress has, at least in theory, embraced a social model of disability in its disability laws via the "regarded as" prong of the "disability" definition. Some might argue that a social model of disability can be read into the first prong as well.

Nonetheless, there are still some valid concerns about applying these laws to transgender individuals that cannot necessarily be cured via the social model of disability. Most fundamentally, the vast majority of state courts and administrative agencies still apply a medical model of disability under state disability anti-discrimination laws, despite attempts by advocates to encourage courts to apply a social model of disability. Thus, it is highly likely that using disability laws will perpetuate the medicalization of transgender individuals, that is, transgender individuals' continued reliance on the medical profession to obtain legal entitlements and protections on the basis of their transgender status.[135] Further, this medicalization of transgender individuals, perpetrated through a medical model of disability, has and will necessarily exclude transgender individuals of lower socioeconomic status. Without the means to access the health care system, they will be unable to be diagnosed with GID or receive hormone treatment or transition-related surgeries, some or all of which are needed to change one's gender on one's birth certificate or driver's license, or to

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[132] Levi & Klein, *supra* note 11, at 75.

[133] *Id.* at 82.

[134] Levi & Klein, *supra* note 11, at 75; Gehi & Arkles, *supra* note 15, at 15.

[135] Spade, *supra* note 6, at 34; *see also* Gehi & Arkles, *supra* note 15, at 15.

obtain other legal benefits.[136] For this reason, disability anti-discrimination laws, with their current emphasis on the medical model of disability, may do more harm than good for transgender individuals.

The cases largely support these concerns because nearly all of them reference or explicitly require a medical professional's GID diagnosis, as well as other types of medical expert testimony, in order to find that a transgender individual has a "disability." Moreover, at least some courts emphasize the negative, psychological effects of GID in their opinions, and in so doing remove the physical and mental freedom to define one's own mental health from the transgender individual.

Levi and Klein have responded to this argument by stating that "there need not be an associated DSM-IV diagnosis in order for an individual to be covered by law . . . it is enough the impairment simply be acknowledged to be a health condition in order for an individual to come within the definition."[137] Unfortunately, however, this is generally not what the existing case law suggests, especially in jurisdictions that ask for proof that the GID diagnosis was obtained "through clinically accepted diagnostic techniques" (New Jersey) or that expressly define "mental disorder" as "any illness referenced in the DSM-IV" (Connecticut). Even in New York, where the statutory scheme encompasses both a medical and social model of disability, the court had relied entirely on a medical professional's diagnosis of GID, as defined in the DSM-IV, to find plaintiff had a "disability". According to the court, no other evidence was needed to satisfy the claim.[138]

Furthermore, if a medical model of disability is applied to disability anti-discrimination laws, it may further the pathologization of transgender individuals, since the DSM-IV defines GID as a mental illness.[139] Levi and Klein argue in

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[136] Gehi & Arkles, *supra* note 15, at 15.

[137] Levi & Klein, *supra* note 11, at 81.

[138] *Bell*, 192 Misc.2d at 778–80.

[139] Gehi & Arkles, *supra* note 15, at 15.

response that since state disability laws, in theory and to some extent in practice, would allow for *both* physical and mental disabilities to be covered, advocates should not fixate on whether transgender individuals have a "physical" or "mental" impairment.[140] However, at least three state courts—Iowa, New Jersey, and Connecticut—have expressly held that GID is *not* a physical disorder, but could be a mental disorder. Moreover, Massachusetts is the only state that expressly held that GID could be considered *either* a physical or mental impairment. This is relevant not only because some states, such as Connecticut, may only define "disability" as a physical impairment, but also because the characterization of GID as purely a "mental" illness may make it difficult for transgender individuals to separate their physical desire to transition into a fuller expression of their gender from a sense that they are "crippled emotionally and socially."[141]

Adding to the problem that courts have generally failed to apply the social model of disability in practice to transgender individuals is the fact that the application of the social model of disability to transgender individuals may, in itself, be problematic. Given the current understanding of transsexuality as a mental illness, diagnosable in the DSM-IV, applying the social model of disability to transgender individuals may advance misunderstandings about the transition-related health care a transgender individual may desire in reaching a fuller gender expression, at least until GID is no longer pathologized. This is a concern among at least some disability rights advocates: for example, Susan Wendell writes:

> Many people with disabilities, even those with the strongest social-constructionist perspective, admit that there are often heavy personal burdens associated with the physical and mental consequences of disabling physical conditions – such as pain, illness, frustration, and unwanted limitation – that no amount of

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[140] Levi & Klein, *supra* note 11, at 81.

[141] Spade, *supra* note 6, at 19–21, (quoting CLAUDINE GRIGGS, S/HE: CHANGING SEX AND CHANGING CLOTHES 32 (1998)).

> accessibility and social justice could eliminate.[142]

Given the fact that the GID diagnosis is a loaded, often heavily stigmatized diagnosis, applying the social model of disability may make it more difficult, at least at this point in time, for disabled and transgender individuals to acknowledge and accept their individual needs while simultaneously acknowledging that society renders them disabled.

Additionally, framing the nature of transsexuality as a disability, whether using the medical or social model, encourages the notion that being transgender is a "condition." In fact, scholars refer to the "transgender condition" when discussing applications of state disability anti-discrimination laws to transgender discrimination claims.[143] The structure of state disability anti-discrimination laws, with their emphasis on defining "disability"—unlike other identity-based anti-discrimination laws based on race or religion, which do not ask the plaintiff to satisfy a statutory definition of the identity to come within the protections of the statute—lends itself to a correlating emphasis on disability as a "condition," since plaintiffs must prove either that their impairments are medically cognizable, or that society has disabled them by stigmatizing their impairments. Yet, for those who think of their gender expression as an "identity," or a "status," distinct from a "condition," or for those who wish to refrain from labeling their gender expression at all, how does disability law honor their notions of themselves?

Lastly, encouraging courts to apply a social model of disability to transgender discrimination claims may be difficult in practice because courts struggle with the application of a social-constructionist perspective to individual characteristics and generally prefer a more essentialist approach. Suzanne Goldberg has considered the difficulties in making social constructionist arguments in the sexual orientation

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[142] SUSAN WENDELL, THE REJECTED BODY: FEMINIST PHILOSOPHICAL REFLECTIONS OF DISABILITY 45 (1996).

[143] Levi & Klein, *supra* note 11, at 86 ("To treat or respond to one's transgender condition").

discrimination context, where courts have tended to favor biological and psychological arguments about the origins and causes of sexual orientation in order to grant lesbian and gay plaintiffs legal protections from discrimination in public accommodations, housing, or employment.[144] Similarly, the social model of disability encourages advocates to argue that "disability" is a social construct, and not inherent in or essential to the individual.[145]

However, existing case law demonstrates that most courts adhere to an essentialist approach. For example, in many of these cases, state court judges and administrative agencies have focused specifically on the "inherent" and "involuntary" nature of transsexuality as support for their conclusions. Even in *Smith*, the best example of a full application of the social model of disability, the FDAH states that "Smith's condition was wholly involuntary" to show that she did not deserve the treatment she received from her superiors, treatment that emanated from their misconceptions and prejudices of transsexuality.[146] The courts in *Sommers* and *Dobre* decided their respective cases by concluding that being transgender did not "inherently" limit major life activities in a substantial way, as the statutorily enumerated physical and mental disorders apparently did.[147]

Additionally, the requirement of a medical professional's GID diagnosis can be considered an essentialist argument: a transgender plaintiff must prove that his or her condition is biologically- and/or psychologically-based in order to be deemed as "having a disability." Levi has noted that:

> A disability claim gives a court a construct for understanding why someone cannot conform to a gender stereotype and does so in language

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[144] Suzanne Goldberg, *On Making Anti-Essentialist and Social Constructionist Arguments in Court*, 81 OR. L. REV. 629 (2002).

[145] I acknowledge that some people who recognize the social construction of certain identities may still consider those identities involuntary.

[146] *Smith*, 1991 WL 833882, at *14.

[147] *Sommers*, 337 N.W.2d at 476; *Dobre*, 850 F.Supp. at 289.

> a judge can understand . . . . By incorporating a medical claim associated with one's gender identity or gender expression, courts can distance themselves from the particular facts and circumstances of a case and take seriously the dysphoria experienced by a plaintiff's forced conformity to a gender norm.[148]

However, the "construct" may be the opportunity for judges to make essentialist arguments about disability and/or transgender individuals. It seems clear that at least in this context, judges are generally much more comfortable making essentialist arguments that emphasize the GID diagnosis as inherent to the condition than turning to a social-constructionist perspective that would ask how people's perceptions of the plaintiff's gender transition rendered her disabled.

V. Potential Approaches for Advocates Considering the Application of State Disability Laws to Transgender Plaintiffs

After having considered the current landscape of state disability law as applied to transgender individuals, as well as the concerns inherent in employing either a medical or social model approach, this Article will next discuss the various options advocates might consider before bringing a transgender discrimination claim under state disability law. As lawyers have an ethical obligation to zealously pursue all potential claims for their clients, the question is not merely whether a disability claim on behalf of a transgender client should be brought at all, especially in conjunction with a gender and sex discrimination claim. A more delicate question is how this claim should be framed and how the advocate can encourage the court to address the claim in such a way that does not negatively impact transgender individuals. The advocate should consider the advantages and difficulties of succeeding on this claim, what evidence may be needed to succeed on this claim, and the impact of litigating under this claim on both the transgender rights and disability rights movements, when crafting the client's factual and legal allegations. Given the way that applications of state

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[148] Levi & Klein, *supra* note 11.

disability anti-discrimination laws to transgender plaintiffs have played out in the cases, advocates could take the following approaches to bringing these types of claims.

A. Policy Based Approach

Advocates could advance a policy-based approach by convincing legislatures to remove all language in disability anti-discrimination statutes that require a medical GID diagnosis. Many of these laws need to be further amended to include the three-prong definition of disability that does not require a GID diagnosis and that would allow a court to find that either the plaintiff has an impairment that substantially limits a major life activity or that the plaintiff is regarded as having such an impairment. Of course, this alone will not be sufficient to prevent courts from using the medical model of disability or from applying a less-than-complete version of the social model of disability to transgender plaintiffs bringing these claims.

B. Use Only the Medical Model

Advocates could give into what courts by and large demand of them currently and employ only a medical model of disability to transgender plaintiffs. Doing so would heavily emphasize the need for medical experts to testify that a plaintiff is diagnosed with a tangible physical or mental condition. In addition, "good facts" such as evidence of sexual reassignment surgery, hormone intake, feminizing or masculinizing procedures, and/or psychotherapy would be highly valuable to the lawyer advancing the claim. Furthermore, being transgender would likely be seen as a disorder of some kind, and lawyers would have to back up their claim that a transgender person has a mental disorder by giving weight to the latest DSM version of GID, and arguing that the plaintiff fits into this category. This approach is tangible for both advocates and judges, and relies on familiar methods of case preparation—finding medical experts, combing through medical documentation to find "proof" of diagnosis, and looking to an authoritative source (the DSM) to show plaintiff's impairment.

Employing this approach, however, would do a number of harms: plaintiffs who are gender non-conforming but who have not undertaken medical, transition-related treatment may be

disadvantaged because they cannot as effectively "prove" that they have gender identity disorder. Additionally, this approach will likely continue to perpetuate the understanding of gender nonconformity as an "illness" and "mental disorder," which does nothing to reverse problematic societal assumptions about transgender people as abnormal, unusual, "sick," or "crazy." Thus, an advocate considering this approach must weigh the increased likelihood of winning the case, at least in most jurisdictions, with creating more case law that characterizes transgender individuals using the medical model of disability. Most importantly, this option is not available for the vast majority of transgender individuals who, for reasons of race and class, do not have access to sexual reassignment surgery or other transition-related procedures or surgeries. Thus, if advocates frame disability law claims using the medical model, they will only be able to advance the goals of a very small, privileged subset of the transgender population.

C. Discourage the Medical Model and Encourage a Social Model of Disability with Specificity

Advocates could discourage a requirement of or fixation on a medical GID diagnosis while simultaneously encouraging a specific application of transgender stigma to the plaintiff in order to find that she has a disability. First, advocates should guide courts away from focusing on essentialist arguments about the "inherent" nature of the transgender condition, which sounds uncomfortably in the medical model of disability. More broadly, the legal establishment needs to disentangle the procurement of legal rights for transgender people from a particularized showing of medical necessity based on the "mental disorder" of GID. Encouraging courts to stop relying on a GID diagnosis, and even to place less emphasis on the DSM-IV definition or taking its application out of the plaintiff's hands and into its own, is of integral importance in achieving this goal. Then, advocates should nudge courts towards not only acknowledging that stigma against transgender individuals exists in society, but also detailing how, if at all, such stigma rendered the plaintiff disabled.

In my view, this approach does the most justice to transgender individuals who resent the medicalization and

pathologization of their gender identity, as well as to transgender advocates who are proponents of the social model of disability. However, advocates must recognize that this strategy may come with a price: litigators should ask their clients whether they wish to characterize their gender identity as a "condition" rather than an "identity" and to downplay their very real health care needs by focusing predominantly on the stigma they experienced and how it created a disabling environment for them. Additionally, litigators should make their clients aware of the fact that most courts are unwilling to accept a social model of disability.

D. Refrain from Using Disability Law

To cover the full spectrum, the last option that advocates might consider is not to use disability law at all for transgender claims. To be sure, professional responsibility suggests that advocates should plead as many non-frivolous, viable legal claims for their clients as possible in order to provide zealous representation. Moreover, if disability arguments are omitted from these cases, courts might be more likely to experiment with gender discrimination arguments, with the potential to create bad, or at the least confusing, jurisprudence. However, if advocates give courts the less radical claim, that is, that transgender individuals are ill, diseased, sick, and juxtapose the claim with the gender discrimination claim that demands that individuals' gender expression, no matter how non-normative, be recognized, then courts will likely choose the less radical claim.[149]

CONCLUSION

Advocates have expressed a range of opinions on the legal and social impact of using state disability anti-discrimination laws in transgender discrimination claims. This Article aims to ground those opinions by examining the nature of courts' and administrative agencies' application of these laws to transgender plaintiffs. Most courts, enabled by diagnosis-based statutory definitions of disability, apply a medical model of disability to transgender plaintiffs by relying on a medical professional's GID diagnosis, DSM definitions of GID, and debate on whether GID

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[149] *See e.g.*, *Doe*, 194 Misc.2d 774.

constitutes a mental or physical disorder. However, one state administrative agency in Florida employed a full social model of disability by demonstrating that societal stigma of transgender individuals played a specific role in disabling the plaintiff from effectively exercising her capabilities in her job. Other states, New Hampshire and Massachusetts in particular, acknowledge the stigmatization of transgender individuals generally but do not fully demonstrate how those attitudes specifically disabled their plaintiffs. Moreover, in some cases, courts missed an opportunity to employ the social model of disability or "understood" the social model in such a way as to deny the transgender plaintiff protection under these laws.

These laws, as applied currently to transgender individuals, invoke concerns about the medicalization and pathologization of transgender identity. The application of these laws has largely perpetuated a judicial reliance upon the medical professional, and thus the medical model of disability, to prove that the transgender plaintiff has a disability. Yet, beyond the practical problems, theoretical problems still exist with the application of the social model of disability to transgender individuals. For example, it is difficult to balance the transgender individual's health care needs with the social model of disability, which focuses almost exclusively on how society disables the individual. Moreover, characterizing transgender identity as a "condition" may not fully honor transgender individuals' understandings of their experiences. Furthermore, courts are reluctant to accept social constructionist arguments, and feel most comfortable with an essentialist approach that emphasizes the medical model of disability and thus furthers the medicalization of transgender individuals.

Litigators may wish to choose between various strategies when bringing state disability law claims on behalf of transgender individuals. Alongside a policy-based approach that would ensure that, at a minimum, statutory language invoking the social model of disability is available to the plaintiff in any state, litigators could use only the medical model of disability, which is at least currently the most judicially reliable method but also may well perpetuate the view that transgender individuals have an "illness." Advocates could also plead facts that would actively discourage applying the medical model but encourage

the application of a fuller social model of disability. Ultimately, litigators should ensure that their clients understand the implications of applying the social model of disability to their gender expression, and that courts generally adhere to a medical model of disability and are unwilling to adopt a social model of disability when applying these laws to transgender plaintiffs.