Spelling "Relief" for Transsexuals: Employment Discrimination and the Criteria of Sex

I. Introduction

Although behavioral science has an established role in jurisprudence, the two disciplines have not always kept pace. A relatively recent behavioral science advance has been recognition of the sexual identity anomaly of transsexualism. At the time I co-edited the first interdisciplinary textbook on this variation in 1969, writers necessarily defined the term "transsexualism" whenever used, including in professional works. Now, school children know the meaning. The courts, however, have not fully appreciated the advances in science's understanding of the complexities of either sexual identity or transsexualism. This Comment describes that gap and the legal consequence.

Transsexualism is the enduring, pervasive, compelling desire to be a person of the opposite sex. Several hundred Americans undergo sex reassignment from male to female or female to male each year. This compulsion to change anatomic sex is not modifiable by psychiatric intervention. Psychiatry can benefit the transsexual, however, by facilitating a careful monitoring of a pre-operative trial period of cross-gender living. During this period the transsexual explores, in reversible fashion, what life will be like after irreversible surgery — the "real life test." Employment in the desired gender role is a necessary component of that test. Such employment is critical both because it demonstrates the person's ability to function socially in that role and prepares the person economically for the medical procedures. Post-operatively, many transsexuals continue to seek employment in their new gender role as they follow their new life course.

Major hurdles have been placed in the pre- and post-operative paths of transsexuals seeking employment, however. They are often refused or terminated from jobs upon disclosure or discovery of

1. TRANSSEXUALISM AND SEX REASSIGMENT (R. Green & J. Money eds. 1969), [hereinafter cited as GREEN & MONEY].
2. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, III 263 (1980) [hereinafter cited as DSM III].
their status. To seek legal relief, they have resorted to § 703 of the Civil Rights Act of 1964 (Title VII) which prohibits an employer from refusing to hire or from discharging any individual because of the individual's sex. Title VII, however, has yet to spell relief. An alternative source of relief sought by some transsexuals is the Rehabilitation Act of 1973, which forbids discrimination against handicapped persons who are otherwise qualified for employment. This Act, however, may pose more hardship than relief.

II. The Criteria of “Sex”

While Title VII prohibits employer discrimination based on a person's sex, the determination of a person's sex is not simple. An individual's sex can be determined by multiple criteria including the sex chromosomes (either the XX [female] or the XY [male] configuration), the gonads (ovaries or testes), hormonal levels (predominantly androgens [male hormones] or estrogens [female hormones]), genital appearance (penis or clitoris, scrotum or labia), and internal reproductive structures (uterus and vagina or prostate and seminal vesicals). These criteria may be inconsistent within a given individual such as with hermaphroditic or “intersexed” persons. However, the criterion of sex that is most salient to the hermaphroditic individual is not any of the above somatic criteria. The essential criterion is gender or sexual identity, namely whether the person considers himself or herself to be a male or a female. For the hermaphroditic person this overriding psychologic criterion must conflict with at least one of the somatic criteria.

Definitional problems of sex are compounded by the fact that gender or sexual identity is also a complex phenomenon; it is a composite of three different components: 1) the person's basic self-conception as male or female; 2) gender-role behavior (cultural features of masculinity and femininity); and 3) sexual orientation or sexual partner preference (sexual interactions with persons of the same or other sex). These three components permit delineation of three variants of gender or sexual identity among physically normal (non-

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5. For example, with the congenital virilizing adrenogenital syndrome, the person may have the XX female chromosome configuration plus ovaries and a uterus, but a male level of androgenic hormones as well as a penis and a scrotum. See J. Money & A. Ehrhardt, Man and Woman, Boy and Girl 42-48 (1972).
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hermaphroditic) persons. They are 1) transvestism, 2) homosexuality, and 3) transsexualism. The three variants are easily distinguished both behaviorally and psychologically.

Transvestites are anatomic males who have an episodic, compelling desire to wear women's clothes. Sexual arousal accompanies the fantasy or act of cross-dressing. Transvestites are not discontent being male. They are sexually attracted to persons of the other sex. They are atypical only on component 2 of sexual identity, i.e. gender-role behavior. Homosexuals are persons of either gender whose erotic attractions are primarily or exclusively to persons of the same anatomic sex. They usually dress in clothes associated with their own sex. They are content being the gender in which they were born. Thus, homosexuals are atypical only on component 3 of sexual identity. Transsexuals are discontent being of the sex to which they were born. They want to live as persons of the other sex. They want to dress as persons of the other sex. Their erotic attractions are usually to persons of the same anatomic sex. Thus, transsexuals are atypical on all three components of sexual identity. These distinctions are critical in an examination of the employment cases in which transsexuals have sought relief.

III. The Ulane Case

Ulane v. Eastern Airlines provides the most detailed account of a transsexual filing suit under Title VII of the Civil Rights Act of 1964. For a decade, Karen Ulane had been a male pilot with Eastern with an excellent employment record. An increasing desire to become a woman led Ulane to wear women's undergarments and to undergo female hormone treatment. Ulane continued to fly until finally taking a leave of absence to undergo reassignment surgery. After surgery she was given permission to resume flying by the Federal Aviation Administration. Eastern, however, refused to reemploy Ulane as a pilot. Ulane brought suit under Title VII for discrimination based on sex, claiming that the same employment granted a man was being denied a woman. Alternatively, Ulane asserted that Title VII should apply to an individual who is discriminated against solely because of transsexual status.

7. See DSM III at 269; R. STOLLER, SEX AND GENDER 177 (1968).
8. These attractions are not considered by the transsexual to be homosexual, in that the transsexual identifies him or herself with the opposite sex and so construes the relationship as heterosexual.
I was an expert witness in Karen Ulane's suit against Eastern. The subjects I addressed in my testimony included the nature of transsexualism and the various factors that influence sexual identity. This testimony is detailed here to show that the courts had available the most current behavioral science data describing both the phenomenon of transsexualism and the complexity involved in defining a person's sex.

[The phenomenon of transsexualism]

Q. Would you tell us what is a transsexual?
A. Transsexualism is a pervasive, severe, and long-standing discontent, discomfort, belonging to the sex to which one was born. It is accompanied by a long-standing wish for a variety of hormonal, surgical, and civil procedures which would allow one to live in the sex role opposite to that to which one was born. This long-term discontent, dysphoria, if you will, with being male or female, is not a product of some significant type of mental disorder. . . .

Q. Will you describe for me what you meant when you said that transsexualism was not a product of a significant mental disorder?
A. Sometimes in schizophrenia, which is a significant mental disorder, one sees in a patient delusions of changing sex, delusions which are somewhat transient, are a product of that psychotic state, of being schizophrenic. Quite often they fade as the person recovers from a schizophrenic episode. By contrast, this long standing, generally lifelong wish or discontent of being of the sex to which one was born (in transsexualism) is not a product of some significant illness or delusional thinking . . .

Q. Now Doctor, I have also heard from time to time a word raised in this context, and that is "transvestism" or "transvestites" . . . . Can you tell us what, if anything, is different between these two terms?
A. A transvestite is an individual who is content being the sex to which he was born, does not wish to undergo sex-change surgery. It is an individual whose primary gratification from cross-dressing or dressing in women's clothes is one of sexual arousal rather than a feeling of social comfort. 10

[The nature of sexual identity]

Q. To what extent, Doctor, are these people now females after the surgery as opposed to males as they were before the surgery?
A. That depends on one's definition of sex. If you are talking to a legal definition of sex, in certain states, as I understand it, post-operative transsexuals do have legal sex change. . . .

Q. Let's talk about just from a medical point of view, if we could.
A. If you are looking to the medical definitions of sex or gender, there are a number of criteria that are used to describe gender or sex.

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These include psychological sex. They include chromosomal sex. They include hormonal sex. They include the anatomical structure of the internal reproductive organs, and they include the appearance of the external genitalia.

Q. As far as post-surgically speaking, are these people anatomically male, or are they anatomically female?
A. It would depend on which criterion you use. If you look to chromosomes, they would still be male. If you would look to the appearance of the external genitalia, they would be female. If you look to the psychological sex, they would be women. If you look to the hormonal sex, if they were on replacement hormones, they would be women or females.

Q. What is Karen Ulane’s gender?
A. Karen Ulane is a woman.

Q. Would you explain that?
A. Karen Ulane psychologically has a sexual identity of female and behaves socially and feels psychologically as a woman. She is legally, as I understand it, a female and, additionally, psychologically a woman.\footnote{Id. at 252 (Sept. 27, 1983) (Dean Dickie, attorney for plaintiff).}

Psychiatric experts for Eastern asserted that Ulane was not a transsexual, but rather was a transvestite.\footnote{This diagnosis was based on the fact that Ulane had been married as a male and had functioned in a traditionally masculine social role, both in the military and as an airline pilot. The contention was that the capacity to function in this manner precluded the degree of feminine identification necessary for the diagnosis of transsexualism. However, this contention ignored Karen Ulane’s assertion that, while performing in these roles, she had identified herself as a woman.} They argued that since surgery is not an appropriate treatment for transvestism, a poor psychiatric outcome would follow. Thus, the pilot would be emotionally unstable and airline passengers would be endangered. Arguing in the alternative, Eastern’s experts maintained that, even if Ulane had been a transsexual, sex reassignment surgery is palliative at best, with the long-term psychiatric results uncertain.\footnote{The long-term results of transsexual surgery are currently being collated from several medical centers throughout the world. While there is no universal agreement, some believe that, in carefully selected patients who have passed the presurgical "real life test," favorable results far outnumber the unfavorable. Pauly, \textit{Outcome of Sex Reassignment Surgery for Transsexuals} 15 AUST. N.Z. J. PSYCHIATRY 45 (1981).} Therefore, they contended, Ulane, the transsexual, was too much of a psychiatric risk to vest with the responsibility for piloting a commercial aircraft.

The trial court wrestled both with the issues of Ulane’s gender status as a male or a female, and with Ulane’s status as a transsexual. Whether Ulane was now “legally” male or female was not clear to the court, even though Illinois, the state in which Ulane had been
born, issued a new birth certificate designating Ulane female. The court, while not finding the birth certificate change conclusive as to Ulane’s status as a female, did find the certificate “pertinent to the question of plaintiff’s sexual identity and the larger question of whether sex is a cut-and-dried matter of chromosomes.” The court’s recognition of the complexity of sexual identity was relevant to its finding on Title VII protection. Thus the term “sex” should be “reasonably interpreted to include among its denotations the question of a person’s sexual identity and . . . therefore, transsexuals are protected by Title VII.”

In its initial opinion, the court held that Ulane merited Title VII relief because the statute should be interpreted to include transsexuals as a protected class. Discrimination based on Ulane’s status as a transsexual was proven to the satisfaction of the court. “[B]ut for being a transsexual and but for having had the transsexual surgery, the sex reassignment surgery, and adopting the life style of a woman, the plaintiff would not have been discharged.” In its subsequent memorandum opinion and supplemental findings, the court reconsidered the merits of plaintiff’s argument regarding her status as a woman and held that Title VII should “apply with equal force whether plaintiff be regarded as a transsexual or as a female.”

While the trial court’s ruling may have been designed as double protection for Ulane, and as an “appeal proof” ruling, the court’s separation of the two classes in which Ulane was ruled protected disserves the fundamental nature of transsexualism. The employee’s status as a transsexual should not be separated from status as a man or a woman. Transsexualism is as much a statement as to a person’s gender as is the designation of that person as a man or a woman. For transsexuals (psychic hermaphrodites), as with anatomic hermaphrodites, the usual (somatic) criteria of sex are an incomplete description of gender. The psychologic criterion rules. Since transsexualism is a statement about gender, the requirement that the transsexual employee alternatively prove discrimination based on status as a woman or a man and as a transsexual both creates and enforces an artificial distinction. This requirement undermines the psychiatric significance of the transsexual phenomenon.

The trial court ruling was reversed by the Court of Appeals for

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15. Id. at 825.
16. Id. at 837.
17. Id.
18. Id. at 838-39.
the Seventh Circuit. After taking notice of the lower court’s recognition of Title VII as a “remedial statute” requiring broad interpretation and conceding that “some may define ‘sex’ in such a way as to mean an individual’s ‘sexual identity,’” the appellate court stated, “our responsibility is to interpret this congressional legislation and determine what Congress intended when it decided to outlaw discrimination based on sex.”

While the legitimacy of the legislative intent inquiry is well established in Title VII jurisprudence, ascertaining the legislative intent in this context is problematic. Title VII was initially designed to remedy race discrimination. Sex as a basis for discrimination was added as a floor amendment one day before the House approved the bill. Purportedly, the sex amendment was added only as a means of derailing the anti-race discrimination statute. However, the tactic backfired and a statute banning both race and sex discrimination in employment passed. After conducting its own legislative intent inquiry, the appellate court in Ulane concluded that “[t]he dearth of legislative history . . . strongly reinforces the view that the section means nothing more than the plain language implies.” The plain language of Title VII, according to the court, did not imply protection for transsexuals.

The legislative history of Title VII following its passage was also used in Ulane to justify a narrow interpretation of the meaning of sex or gender. In 1975, several (unsuccessful) bills were introduced in Congress aimed at prohibiting discrimination based on “sexual preference.” At least one other court has explicitly referred to the failure of these bills to amend the Civil Rights Act to support its holding that Title VII does not protect transsexuals. However, whether or not Title VII protects homosexuals should have nothing to do with the issue of transsexual coverage under the Act. Sexual orientation or sexual partner preference is not a reflection of one’s own gender. It addresses the gender of the person’s partner. Transsexualism, in contrast, addresses the gender of the individual coming under the discriminatory classification. Thus any legal

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20. Id. at 1084.
21. For a brief description of the legislative history, see id. at 1085.
22. Id. at 1085.
23. For a listing of unsuccessful congressional efforts in this regard, see id. at 1085 n.11.
25. This distinction is underscored by the fact that the transsexual may be either
doctrine equating sexual orientation with transsexualism is not built on any secure behavioral science foundation.

Although the circuit court in *Ulane* acknowledged my lower court testimony distinguishing transsexuals, homosexuals, and transvestites,\(^{26}\) it found that the differences were not of further relevance: "[w]hile we recognize [these] distinctions . . . we believe that the same reasons for holding that the first two groups do not enjoy Title VII coverage apply with equal force to deny protection for transsexuals."\(^{27}\) Again, the reasoning of the court ignores the behavioral science data. While transsexualism reflects the person's gender and homosexuality the gender of a person's sexual partner, both are distinguishable from transvestism. The latter is a disorder of adornment and attire.

**IV. Other Cases**

The courts' confusion over transsexualism is manifest from the hodgepodge of other cases involving transsexual employee dismissals. Focussing narrowly on the clothing worn by pre-operative transsexuals, courts have upheld dismissals on the ground that the employees in question violated dress-code regulations.\(^{28}\) In the case of one male-to-female transsexual who had dressed as a woman as part of the sex-reassignment process, the court ruled that since the employee was a male, no Title VII case could be made on the basis of gender.\(^{29}\) In a similar dress-code action the court held that the employee was "not being refused employment because he is a man or because he [sic] is a woman. . . . [Therefore] Title VII and the Constitution do not protect him. The law does not protect males dressed or acting as females and vice versa."\(^{30}\) (emphasis added). The phrase "acting as a female" has been "clarified" further by the Fifth Circuit to include "effeminacy" and is a sufficient basis for discrimination.

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heterosexual or homosexual. Yet whether the reassigned male-to-female transsexual seeks male or female partners, the person is still transsexual.

27. Id. at 1085.
28. Employee dress codes have been frequent sources of contention in litigation involving both Title VII and Fourteenth Amendment equal protection claims. Generally, "reasonable" dress and appearance codes have been upheld, even when hair length standards have been overruled. *Doyle* v. *Buffalo Sidewalk Cafe Inc.*, 333 N.Y.S.2d 534, 33 Misc. 2d 212 (1972). Equal protection arguments are problematic for transsexuals because they have not yet been declared a "suspect class" requiring the special protection of strict scrutiny. Nor have they been afforded the intermediate level of scrutiny permitted women, see, e.g., *Frontiero* v. *Richardson*, 411 U.S. 677 (1973).
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for denial of employment.\textsuperscript{31} “Misrepresentation” was the basis for another transsexual employee’s dismissal.\textsuperscript{32} The employee had specified sex as “female” on the job application. The employee, however, was anatomically male. After the employee was hired, “the company’s work routine” was disrupted when “a number of female employees indicated they would quit if [the transsexual] were permitted to use the restroom facilities assigned to female personnel.”\textsuperscript{33} The district court ordered the plaintiff to submit an amended complaint indicating whether discrimination was based on status as a male, a female, or a transsexual. In the amended complaint the plaintiff asserted that discrimination was based on status as a female, “that is, a female with the anatomical body of a male;” the transsexual’s claim, however, was dismissed by the court as a “manipulation of semantics.”\textsuperscript{34}

Courts have denied other transsexuals’ Title VII claims on the ground that discrimination had not been based on the person’s sex \textit{per se}, but rather on the individual’s change of sex. One court, citing “Congressional intent,” noted that Title VII “speaks of discrimination on the basis of one’s ‘sex.’ No mention is made of change of sex . . . .”\textsuperscript{35} This court found it unnecessary to reach the “persuasive” evidence that the transsexual medical employee would have had a “probable adverse impact . . . on the staff and patients in the defendant’s hemodialysis unit.”\textsuperscript{36} Protection of a person who has “changed sex” was similarly denied in \textit{Holloway v. Arthur Andersen and Co.} where the court found that the plaintiff was not being discriminated against as a male or a female, but as a “transsexual who chose

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\item \textsuperscript{31} Smith v. Liberty Mutual Insurance Co., 569 F.2d 325 (5th Cir. 1978).
\item \textsuperscript{32} Sommers v. Budget Marketing Inc., 667 F.2d 748 (8th Cir. 1982).
\item \textsuperscript{33} Id. at 748-49. Access to an appropriate restroom facility has been the subject of other employment discrimination cases. When only one type of facility has been available, employers have contended that the sex of the employee becomes a bona fide occupational qualification, permitting exemption from Title VII protection. However, the EEOC has indicated that the cost of maintaining separate facilities and accommodations for persons of one sex will not justify discrimination unless the cost is unreasonable. \textit{EMPL. PRAC. GUIDE} (CCH) \textsection 6137 (1970). Whether an employer would be required to provide a separate facility for an employee whose presence in either the female or the male employees’ restroom was objected to has not been resolved.
\item \textsuperscript{34} Sommers v. Budget Marketing Inc., 667 F.2d at 749.
\item \textsuperscript{35} Voyles v. Ralph K. Davies Medical Center, 405 F. Supp. 456, 457 (N.D. Cal. 1975), aff’d mem., 570 F.2d 354 (9th Cir. 1978).
\item \textsuperscript{36} Id. at 457 n.3. The fact that patients would object to the employee does not appear to be a sufficient basis for health care employee dismissal unless there is a major intrusion on patient privacy. For example, while a male nurse may be denied employment in an obstetrical delivery service, customer (or patient) preferences generally do not prevail. Backus v. Baptist Medical Center, 510 F. Supp. 1191, 1194 (E.D. Ark. 1981), \textit{vacated on other grounds}, 671 F.2d 1100 (8th Cir. 1982); Diaz v. Pan American World Airways, 442 F.2d 385, 389 (5th Cir. 1971), \textit{cert. denied}, 404 U.S. 950 (1971).
\end{itemize}
to change her sex.”

The language of the Holloway court both reveals and illustrates a prevalent tension in such rulings. The court appears to be saying that transsexuals do not have a gender, yet utilizes language which suggests that transsexuals do have a gender. After placing the transsexual in a court-conceived non-gender class — neither male nor female — it then necessarily relies on gender-typed language to describe the person. That our language does not accommodate "neuters" underscores the fact that society perceives human beings as belonging to only one of two gender categories. People are either male or female, no matter the type of surgery performed on them. A male with cancer of the penis or testis is not rendered neuter after organ removal. Nor is the transsexual rendered neuter after organ removal, with or without organ reconstruction.

The circuit court in Ulane stated that “the words of Title VII do not outlaw discrimination against a person who has a sexual identity disorder.” If this is true, then the post-operative transsexual plaintiff should be able to argue that he or she is being invidiously discriminated against, not on the basis of having a disorder, but on the basis of (the new) gender. Eastern could certainly not argue that it would not have employed Karen Ulane in the former gender. In this way, transsexuals are effectively caught in a legal “Catch 22.” If they allege discrimination on the basis of their status as male or female, the courts rule that they are not being discriminated against on the basis of their sex, but because they are transsexual. On the other hand, if they sue on the ground of discrimination because of their status as transsexuals, the courts rule that transsexuals, as a class, are not protected by Title VII.

The transsexual, qualified for employment in the original gender and qualified for employment in the new gender, is disqualified as a consequence of wanting to change from one protected gender class to another protected gender class. Thus, according to the current state of the law, it appears that transsexuals are inherently unqualified to hold employment. This premise of inherent handicap was underscored in In re Grossman, the celebrated case of a transsexual school-teacher who was dismissed following reassignment surgery. The Grossman court noted that the individual had not been fired because of the new status as a female but because of the consequences stem-

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37. 566 F.2d 659, 664 (9th Cir. 1977) (emphasis added).
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ming from a change in sex from male to female.\textsuperscript{39}

One possible basis for reaching a conclusion of inherent disqualification is that change of sex is evidence of mental instability. This argument was not advanced in \textit{Grossman} as it was in \textit{Ulane}. Alternatively, an employer might argue that a person’s decision to undergo sex reassignment compromised employment performance. The latter was the issue in \textit{Grossman}. The tenured music teacher was dismissed because the Board of Education maintained that she would have an adverse effect on students, thus “incapacitating” her as a teacher. The court suggested that the teacher might not be “incapacitated” in another locale where her former sex status was not known.\textsuperscript{40}

With pilot Ulane, Eastern Airlines was worried about distressing passengers. The Airline was concerned that potential passengers would refuse to fly in a plane piloted by Ulane because of their fears that an “unstable” person in the cockpit would pose a threat to safety.\textsuperscript{41} Eastern’s case might have been stronger if their experts had been able to provide credible testimony about Ulane’s psychiatric “incapacity” or disability post-sex-reassignment. This was not possible, however, because Ulane had flown flawlessly for a decade while experiencing substantial conflict over wanting to be a woman. Now, with Ulane living as a woman, this conflict was necessarily reduced.

The post-operative transsexual no longer has a mental disorder according to the literal meaning of the DSM III diagnosis.\textsuperscript{42} The disorder exists pre-operatively when the person is grossly discontent due to a sexual status dictated by anatomy. With sex reassignment, that feature of the disorder is resolved. Even if courts were to reject this pre- vs. post-operative distinction for the presence of mental disorder, or if DSM III is revised to eliminate the distinction,


\textsuperscript{40} However, other school districts might be curious as to which of them, with a new female music teacher, had won the New Jersey sex-change-teacher lottery.

\textsuperscript{41} No evidence was offered by the airline demonstrating that a potential passenger’s concern for winning (or losing) the sex-change-pilot lottery would deter the person rushing to the airport in an effort to catch the next shuttle to Washington. Furthermore, while some passengers believe that a woman is not as competent to pilot a plane as a man, no airline contends it has lost passengers upon hiring a female pilot. (A common erroneous belief about the inadvisability of employing female pilots is the potentially detrimental influence on piloting skills of premenstrual tension. It was quipped during the course of the \textit{Ulane} proceedings that Karen Ulane was the one woman pilot for whom this was not a concern.)

\textsuperscript{42} DSM III at 269.
it is the desperate quest for sex change that constitutes the psychiatric problem of all transsexuals. Because not all persons continue to experience difficulty after surgery, the post-operative person should be evaluated as an individual, not as a member of a class.

V. An Alternate Spelling of "Relief"?

While Title VII should spell relief for pre- and post-operative transsexuals, it may be necessary to resort to the Rehabilitation Act of 1973, 29 U.S.C. § 701 et seq. This Act prohibits discrimination against any "otherwise qualified handicapped individual." For purposes of subchapters IV and V, a "handicapped" individual is defined as "any person who (A) has a physical or mental impairment which substantially limits one or more such person's major life activities, (B) has a record of such impairment, or (C) is regarded as having such an impairment." 43

The American Psychiatric Association description of transsexualism provides support for the inclusion of transsexuals within this Act. The DSM III diagnosis includes the phrases "persistent sense of discomfort" . . . [and] "disturbance [that] has been continuous for at least two years . . . ." 45 Discussion of features associated with transsexualism continues: "[g]enerally there is moderate to severe coexisting personality disturbance. Frequently there is considerable anxiety and depression which the individual may attribute to inability to live in the role of the desired sex." 46 Under the section describing "[i]mpairment and complications," the DSM III states that

...social and occupational functioning are [frequently] markedly impaired partly because of associated psychopathology and partly because of problems encountered in attempting to live in the desired gender role. Depression is common and can lead to suicide attempts. In rare instances males may mutilate their genitals. 47

A broad range of psychiatric conditions has been denominated "handicapped" under the Rehabilitation Act. Included are alcoholism and personality disorders, 48 aggressive and self-destructive behavior, 49 and suicidal behavior. 50 "Impairment" as defined in

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45. DSM III at 261-62.
46. Id. at 262.
47. Id. at 263.
49. See, e.g., Doe v. New York University, 666 F.2d 761 (2d Cir. 1981).
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regulations of the Department of Health and Human Services includes "any mental or psychological disorder, such as . . . emotional or mental illness." Handicaps cognizable under the Act are not confined to "persons who have those severe, permanent or progressable conditions that are most commonly regarded as handicaps." Indeed, courts have been most flexible in defining "handicap":

The definitions contained in the [Rehabilitation] Act are personal and must be evaluated by looking at the particular individual. A handicapped individual is one who has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment. It is the impaired individual that must be examined and not just the impairment in the abstract.

A recent case involving a transsexual's suit against the United States Postal Service offers promise that the Rehabilitation Act might spell relief in some circumstances. There, an employment offer was rescinded after it was learned that the prospective employee was a pre-operative transsexual. The court ruled that the transsexual's complaint adequately alleged the necessary "physical or mental impairment" to state a claim under the Act. The court noted that while the burden rested with the job applicant to prove that transsexualism is "an impairment which substantially limits one or more major life activities," the definition of handicap extends to those who are merely "regarded" as handicapped by others.

A ruling that transsexuals are protected under the Rehabilitation Act could pose a hardship for some. While the Act might have provided relief in Sommers and Voyles, if pilot Ulane had been terminated by Eastern while still pre-operative (and, by definition, suffering conflict over wanting to change sex), an argument for protection by virtue of having a severe emotional handicap would hardly soothe the airline's concerns about passenger safety. Furthermore, if the condition of transsexualism per se were judged a significant handicap, then the handicap could continue post-operatively, in spite of the literal meaning of the diagnosis. This, too, would hardly benefit pilot Ulane, if schoolteacher Grossman's experience is any indica-

50. Doe v. Region 13 Mental Health - Mental Retardation Commission, 704 F.2d 1402 (5th Cir. 1983).
51. 45 C.F.R. § 84.3 (1985).
55. 45 C.F.R. § 84.3 (1985).
56. Id.
tion of how the judiciary is apt to interpret “handicap” in this context. Indeed, Grossman was fired because she was “incapacitated” by the transsexual surgery. In addition, if the handicap is in “the eyes of the beholder,” the nature of the person’s employment might still be such that the employee’s presence could be considered too disruptive to the work place to allow the worker to continue on the job as was posited in Grossman.

VI. *Ulane as a “Transracial”*

If there were a manner by which a person could “change race” rather than “sex,” could a “transracial” be denied protection under Title VII? Race, for some persons, may be no more immutable than is sex for others. Consider a person of mixed black and white racial heritage, tan skinned, with moderately curled hair and no facial features clearly identifiable as black. Assume this person has always “as far back as s(he) can remember” been self-identified as black, but, nevertheless, has been treated by society as white. In the past, this person has utilized grooming chemicals that straighten hair. Assume also that the person is legally classified as white, having the requisite number of white ancestors. Now the person stops utilizing hair straightening chemicals, and undergoes plastic surgery to broaden the contours of the nose. Then, in keeping with a racial identity as black, this person presents himself or herself to the world as black.

Should an employer consider this person as white or black? If the person were to be not hired or fired on the basis of membership in a racial class that has been the target of discrimination, would this be legally permissible? If the person were to be not hired or fired on the basis of having *changed race*, would this be legally permissible?

If membership in a race or gender class is protected by law from invidious discrimination, we need to discern the basis on which changing to that race or gender class might eliminate protection. Perhaps the basis is that “voluntary” membership in the class is not protected because protected class membership is generally the consequence of an “immutable characteristic.” The transsexual should prevail on this ground of argument, however, because behavioral science data demonstrate that there is nothing “voluntary”

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57. This metaphor is employed as a model in which the individual’s self-perception differs from social appearance. It is not used to argue the extent to which race is a biological or political construct.


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about sexual or gender identity. Only sexual anatomy is mutable. There is no psychiatric "cure" for eliminating the conviction of being of the opposite sex:

Over the years, psychiatrists have tried repeatedly to treat these people without surgery, and the conclusion is inescapable that psychotherapy has not so far solved the problem...the high incidence of suicide and self-mutilation among these people testifies to the magnitude of the problem. If the mind cannot be changed to fit the body, then perhaps we should consider changing the body to fit the mind.\[59\]

Deeming transsexual surgery "voluntary" denies the necessity of transsexual surgery. Suicide is often the tragic consequence when this procedure is denied.\[60\]

VII. Conclusion

The foregoing is more than a critique of the unduly narrow application of an employment law barring discrimination based on sex. It addresses the significance of behavioral science in the interpretation of the law.

The understanding of human sexual behavior has grown remarkably during recent decades. Science has demonstrated that the "simple" categorization of a person as a man or as a woman is, in fact, a highly complex task. Indeed, there is no consensus on what constitutes a male or a female. The most sensitive criterion, however, is that which is consistent with the person's identity. When courts do not appreciate the general psychological as well as somatic manifestations of gender and the practical application of these data to transsexualism, an already conflicted population is subjected to additional suffering. The transsexual's dilemma is especially ironic. Medical science requires that the pre-operative transsexual demonstrate suitability for life-saving surgery by successful employment in the new gender role. Yet this demonstration is frustrated by a rigidly narrow application of the law which protects against discrimination based on gender.

Under the common law it was not a crime to change name, even to one of the "opposite" sex, so long as the choice was not made to perpetrate fraud.\[61\] The subjective importance of a person's identity has long been recognized at law. It would therefore be legally just, psychologically humane, and scientifically valid to afford transsexu-
als protection under Title VII. Forcing transsexuals to seek relief under the Rehabilitation Act may provide only a partial respite. Full relief should be spelled "Title VII."

—Richard Green