LAW AS A REFLECTION OF HER/HIS-STORY:

CURRENT INSTITUTIONAL PERCEPTIONS OF, AND POSSIBILITIES FOR, PROTECTING TRANSSEXUALS' INTERESTS IN LEGAL DETERMINATIONS OF SEX

Jody Lyneé Madeira[*]

SEXUALITY: LEGAL FACT OR FUNGIBLE FICTION?

> This case involves the most basic of questions. When is a man a man, and when is a woman a woman? Every schoolchild, even of tender years, is confident he or she can tell the difference, especially if the person is wearing no clothes. These are observations that each of us makes early in life and, in most cases, continue to have more than a passing interest in for the rest of our lives. It is one of the more pleasant mysteries. The deeper philosophical (and now legal) question is: can a physician change the gender of a person with a scalpel, drugs and counseling, or is a person's gender immutably fixed by our Creator at birth?[1]

Does "sex" have an objective meaning? Is "gender" merely a social construction or is it objectively connected to "sex"? These practical questions remain queries the law is reluctant, or perhaps unable, to comfortably answer. Yet they are ones that law must wrestle and best. They are very real questions for Christie Lee Littleton, the male-to-female postoperative transsexual plaintiff in *Littleton v. Prange*.[2] Born Lee Cavazos, Jr., Littleton married Jonathon Mark Littleton in 1989 after undergoing sex-reassignment surgery, and lived with him until his death in 1996, when Littleton filed a malpractice suit under a wrongful death statute as the surviving spouse. The defendant doctor filed for summary judgment, claiming that Littleton was a man and could not be the surviving spouse of another man. The trial court granted the motion and the Texas Court of Appeals affirmed, stating:

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[*] J.D. Candidate, 2003, University of Pennsylvania Law School; Ph.D. Candidate, Annenberg School for Communication, University of Pennsylvania; M.S., 1999 Georgetown University; B.A., B.S., 1997, Millersville University of Pennsylvania. I would like to thank Professors Larry Catá Backer and Francis J. Mootz for their priceless advice and editorial assistance. I must also recognize Lawrence and Patricia Burkett, Ronald and Carolyn Madeira, and especially my husband Matthew for their endless love, support, and mentorship.

[1] Littleton v. Prange, 9 S.W.3d 223, 223-24 (Tex. App. 1999).

[2] *Id.*

> There are some things we cannot will into being. They just are .... We hold, as a matter of law, that Christie Littleton is a male. As a male, Christie cannot be married to another male. Her marriage to Jonathon was invalid, and she cannot bring a cause of action as his surviving spouse.[3]

When pronouncing judgment on transsexual litigants, the courts have not spoken from one firm perspective but instead have issued a collection of disparate statements, a conflicting body of opinions hydra-like in its complexity. These pronouncements can be grouped into two categories. One includes judgments based on notions that sex has a fixed, easily determined and objective meaning grounded in biology.[4] The other includes judgments based on the idea that sex is personal to its possessor and must be determined from the perspective of the individual affected.[5] Ironically, the only certainty today is uncertainty regarding what roles sex and sexual identity should play in the legal realm and what constitutional rights should accrue to individuals as a result of their sex and sexual identity.

By focusing on transsexualism to analyze the jurisprudential treatment of sex and sexual identity, we can gain insight into broader issues relating to how the law characterizes sex and sexual identity.[6] Of course, "sexuality in law is tied to the legal determination of sex, a determination that proves to be influenced by capacity and desire for heterosexual intercourse, and by the future considerations of the sub-

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[3] *Id.* at 231.

[4] *See* Ulane v. E. Airlines, 742 F.2d 1081 (7th Cir. 1984); Sommers v. Budget Mktg., 667 F.2d 748 (8th Cir. 1982); Holloway v. Arthur Andersen, 566 F.2d 659 (9th Cir. 1977); James v. Ranch Mart Hardware, 1994 WL 731517, at *1 (D. Kan. Dec. 23, 1994); Dobre v. Nat'l R.R. Passenger Corp., 850 F. Supp. 284 (E.D. Pa. 1993); B. v. B., 355 N.Y.S.2d 712 (N.Y. Spec. Term 1974); Anonymous v. Anonymous, 325 N.Y.S.2d 449 (N.Y. Spec. Term 1971); Anonymous v. Weiner, 270 N.Y.S.2d 319 (N.Y. Sup. Ct. 1966); *In re* Anonymous, 314 N.Y.S.2d 668 (N.Y. Civ. Ct. 1970); *In re* Ladrach, 513 N.E.2d 828 (Ohio Misc. 1987); K. v. Health Div., 560 P.2d 1070 (Or. 1977); Littleton v. Prange, 9 S.W.2d 223 (Tex. App. 1999); Corbett v. Corbett, 2 All E.R. 33 (P. 1970).

[5] *See* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989); Hernandez-Montiel v. INS, 225 F.3d 1084 (9th Cir. 2000); Schwenk v. Hartford, 204 F.3d 1182 (9th Cir. 2000); Doe v. McConn, 489 F. Supp. 76 (D. Tex. 1980); Darnell v. Lloyd, 395 F. Supp. 1210 (D. Conn. 1975); Chicago v. Wilson, 389 N.E.2d 522 (Ill. 1978); *In re* Estate of Gardiner, 22 P.3d 1086 (Kan. Ct. App. 2001); Doe *ex rel* Doe v. Yunits, No. 00-1060-A, 2000 WL 33162199, at *1 (Mass. Super. Ct. Oct. 11, 2000), *aff'd*, Doe v. Brockton School Comm., No. 2000-J-638, 2000 WL 33342399, at *1 (Mass. App. Ct. Nov. 30, 2000); M.T. v. J.T., 355 A.2d 204 (N.J. Super. Ct. App. Div. 1976); Maffei v. Kolaeton Indus., 626 N.Y.S.2d 391 (N.Y. Spec. Term 1995); Richards v. United States Tennis Ass'n, 400 N.Y.S.2d 267 (N.Y. Spec. Term 1977); Hartin v. Dir. of Bureau of Records and Statistics, 347 N.Y.S.2d 515 (N.Y. Spec. Term 1973); *In re* Anonymous, 293 N.Y.S.2d 834 (N.Y. Civ. Ct. 1968).

[6] *See* Andrew N. Sharpe, *Institutionalizing Heterosexuality: The Legal Exclusion of 'Impossible' (Trans)sexualities, in* LEGAL QUEERIES: LESBIAN, GAY, AND TRANSGENDER LEGAL STUDIES 31 (Leslie J. Moran et al. eds., 1998) ("Legal discourse is . . . an important site in its own right for the constitution, consolidation and regulation of sexuality, and in particular the hetero/homo dichotomy.").

ject matter of litigation and the law/fact distinction."[7] Generally, because of hormone technologies and sex reassignment surgery, determining the sex of transsexuals poses the most difficult question to the courts: how do you determine the sex of an individual born one sex, still chromosomally of that sex, but who now has the surgically constructed body and genitalia of the opposite sex?

Deconstructing the social and legal constructions of sex and sexual identity is crucial to explicating how transsexuals' sexuality has limited their constitutional rights. This paper will analyze sex and sexual identity in a critical manner to clarify the complex relationship between these social and legal constructions; only after explicating that relationship is it possible to uncover how that relationship should be articulated to best further equity and justice and simultaneously gain transsexuals basic constitutional freedoms, such as the right to marry, that stem from the liberty to identify their own sex. The realization of such constitutional rights is an important and essential step to ending animus against transsexuals, who are marginalized through discrimination and prejudice or victimized through violent acts or hate speech simply because their sexual status is perceived as "deviant."[8]

The first three sections of this Comment establish the social and legal context for analyzing the constitutional implications of trans-

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[7] *Id.*

[8] As Phyllis Randolph Frye, a male-to-female postoperative transsexual, attorney and activist who is the central spokesperson for transsexual rights, asserts, "the transgendered are almost always discriminated against by the same people and for the same reasons as homosexuals and bisexuals are discriminated against." *Employment Discrimination Against Gays and Lesbians: Federal "Sexual Orientation" Employment Protection Bill Must Include the Transgendered*, 1994 WL 392889 (July 29, 1994 F.D.C.H.) (testimony of Phyllis Randolf Frye before the Senate Labor Comm'n) [hereinafter Testimony of Phyllis Randolf Frye]. A shocking array of experiences were related by Frye in her testimony before the Senate regarding a federal "Sexual Orientation" Employment Protection Bill on July 29, 1994:

> In 1972 as a 1LT US Army, I was discharged against my will, honorably, based upon my cross-dressing off-post and off-duty. In 1973 I was fired on the 'rumor' that I cross-dressed in private. I was designing artificial limbs at the time, and was fired by a manager who was sleeping with his secretary while both of them were married to other people. In 1976 I was fired on the basis that I cross-dressed in private. At that time I was project engineer at a petrochemical plant. There was never any allegation about my work product being poor. Nor did I ever cross-dress at work. I came to terms with my transsexual nature and began my full-time transition shortly thereafter. I NEVER was hired again. NEVER. I existed on the small income of my spouse, on charity, on unemployment compensation, on infrequent engineering fees from a gay architect and from retailing Amway products, mostly to gay bars. It was not until I began to practice law in 1986 that the ten year nightmare came to an end. Being transgendered is a tough row to hoe. Just imagine for yourself, if your gender did not 'fit' to some degree. The transgendered catch it from employers, police, bashers, landlords, insurance companies, the military, the churches and the divorce courts. Our families are often nonsupportive: indeed, my parents and siblings have disowned me for all of these 18 years.

Id.

sexuality. While there is some degree of conflation between transsexuals and other non-heterosexual sexualities, this Comment will only address transgendered individuals and will not focus on gender or identity issues with respect to other subordinated sexualities.[9] Part I of this Comment will consider the natures of and relationships between sex and sexual identity, free of any discussion of "gender identity disorders" or transsexualism, to explicate what these concepts have come to mean in American culture by examining them in a subjective, symbolic manner. This is a particularly apt way to begin elucidating the nature of these concepts. Queer scholars and transsexuals themselves often urge that the law adopt a means by which individuals could self-identify their own sex for legal purposes.[10] Only after such an explication will it become apparent why self-identification is not a viable means to legally determine sex. In Part II, this Comment will define transsexualism, explaining why transsexualism provides the law with conundrums that transvestitism and alternative sexualities, such as homosexuality and bisexuality, do not. Part II of this Comment will also review the present legal treatment of transsexuality and its implications, detailing the various subjective and objective approaches courts have adopted.

The final sections of this Comment will examine the constitutional implications of transsexuality in light of their unique social and legal context. Part III of this Comment will address the question of whether all, or indeed any, transsexuals have a liberty interest in self-defining their legal sex. Part III will also explain alternative legal treatments of transsexualism, and reveal why a unique approach that blends subjective self-identification and objective genital identification is mandated when one weighs the interests of objective consistency and equity. An effective conclusion can only be reached by tempering the legal need for objectivity with equity concerns; most importantly, in the interests of equity and consistency, courts must adopt a uniform standard in resolving the troubling questions of sex and sexual identity that have arisen in the courtroom.

I. THE SOCIAL CONSTRUCTION OF SEX AND SEXUAL IDENTITY

In determining whether sex and sexual identity are biological principles, socio-cultural constructions, or both, we must consider the

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[9] For discussions of these subordinated sexualities, see, for example, Carl F. Stychin, *Identities, Sexualities, and the Postmodern Subject: An Analysis of Artistic Funding by the National Endowment for the Arts*, 12 CARDOZO ARTS & ENT. L.J. 79 (1994); Carl F. Stychin, *Inside and Out of the Military*, 3 LAW & SEXUALITY 27 (1993).

[10] *See generally* Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 ARIZ. L. REV. 265 (1999) (discussing the need for definitions of the terms "male" and "female" for legal purposes).

dominant social and legal perception that sex is a biological construct, while sexual identity, or gender, is the social counterpart to sex. By analyzing sex and sexual identity as bodily-texts, we can deconstruct these concepts, demystifying debates over sex and sexual identity by explicating the ideological properties inherent in our bodies-as-texts. Social deconstruction is a particularly valuable tool as it "is an exercise in exposing the unassailable truth as myth;"[11] it reveals how social constructs of sex and sexual identity are intertextually mapped onto the transsexual body. After applying such a subjective theory, we will see that it is unworkable in practice and we can at last fully understand why a different approach is needed within a legal context.

A. Existing Scholarly Perspectives on Sex and Sexual Identity

Katherine M. Franke[12] and Julie A. Greenberg[13] have both addressed the issues of sex and sexual identity from a social constructionist perspective.[14] Incorporating the social constructivist perspective into an analysis of sex and sexual identity within the perspective of sex discrimination, Franke notes that "[s]ex is regarded as a produce of nature, while gender is understood as a function of culture," and emphasizes that this "disaggregation of sex from gender represents a central mistake of equality jurisprudence."[15] She further argues that "almost every claim with regard to sexual identity or sex discrimination can be shown to be grounded in normative gender rules and roles."[16] Therefore, Franke asserts that we must consider the "social processes that construct and make coherent the categories male and female."[17] This is accomplished by understanding sexual identity "not in deterministic, biological terms, but according to a set of behavioral, performative norms that at once enable and constrain a degree of human agency and create the background conditions for a

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[11] SUSAN S. M. EDWARDS, SEX AND GENDER IN THE LEGAL PROCESS 3 (1996).

[12] *See* Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1 (1995).

[13] *See* Greenberg, *supra* note 10.

[14] This perspective entails the realization that "every day, in life's most trivial and momentous moments, we interpret our experiences in ways that create not only facts, but meaningful facts." Franke, *supra* note 12, at 70. As Franke notes, this is usually made possible through the "acquisition and internalization of publicly agreed upon points of view or reference." *Id.* Franke posits that we view bodies from an idealized point of view, and that we approach the question of whether an individual is male or female as a question of fact to get "right or wrong." *Id.* at 70-71. The sticking point is that "we have so thoroughly internalized the points of view that allow us to 'get factual questions right' that we no longer notice that right answers frequently contradict our direct observations of the world." *Id.* at 71.

[15] *Id.* at 1-2.

[16] *Id.* at 2.

[17] *Id.* at 3.

person to assert, *I am a woman* [or I am a man]."[18] A social constructivist perspective, then, appears to offer a unique vantage point for analyzing the constitutional implications of sex and sexual identity in the context of transsexualism, for "[t]his conception of sexual identity ultimately provides the basis for a fundamental right to determine gendered identity independent of biological sex."[19] Seen in the social constructivist light, then, a body is not an independent "biological given which emits its own meaning"[20] but a socially constructed organism to which meaning is assigned through interpretation.

Greenberg, too, posits that "[s]ex is commonly used to denote one's status as a man or woman based upon biological factors" and differentiates sex, "a reflection of one's biology," from gender, "which is generally considered to be socially constructed."[21] Within the specific context of transsexualism, she notes that "the biological aspect of one's body that determines one's sex has not been legally or medically resolved."[22] Greenberg also confronts the "either/or" sex categorization of male and female, asserting that it is unrealistic as "sex and gender range across a spectrum;" "[m]ale and female occupy the two ends of the poles, and a number of intersexed conditions exist between the two poles."[23]

There is a more useful way of examining sex and sexual identity that incorporates both Franke's emphasis on the social construction of sex and sexual identity and Greenberg's argument that social context determines the biological construction of sex and sexual identity. Similarly, sex and sexual identity are socialized bodily characteristics that people rationalize, interpret, and discuss. Most significantly for the purposes of this analysis, courts memorialize and normalize certain constructions of sex and sexual identities that are rationalized through judicial analysis and discussion. Therefore, sex and sexual identity are discursive constructs in their own right, but constructs that are subordinated to and mapped onto the human body that is the interpretive focus. Thus, it seems particularly apt to analyze sex and gender from a more discursive social constructivist perspective—that of the body-as-text. To the best of my knowledge, this particular

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[18] *Id.* at 3-4.

[19] Franke, *supra* note 12, at 4.

[20] *Id.* at 71 (quoting JEFFREY WEEKS, SEXUALITY AND ITS DISCONTENTS 122-23 (1985)).

[21] Greenberg, *supra* note 10, at 271.

[22] *Id.* Greenberg emphasizes that the social or legal context in which sex is determined dictates which biological aspect will be the key to identifying which bodily aspect determines one's sex. In other words, "the biological factor(s) that control sex determination may vary depending upon the purpose for which sex is being defined." *Id.* at 273. For example, in determining sex for purposes of birth certificate documentation "the appearance of the external genitalia typically determines the sex assigned;" in contrast, in other contexts such as athletic contests sex may be determined by "chromosomal structure." *Id.* at 273-74.

[23] *Id.*

detailing of the body-as-text is my own creation; I am the first to detail this concept within this context, although other authors have articulated the concept of a body-as-text.[24]

B. The Body-as-Text

1. *The Concept of Text*

The concept of text starts with the more abstract concept of discourse. A discourse is a way of organizing social thought, one comprised of myriad ideologies all focused around a common theme. The investiture of ideology into a discourse takes place within the context of social practice that precedes and influences the discourse. Thus, discourse must be analyzed as a rearticulation of ideology, not simply as a conglomeration of independent ideologies.[25]

The ideological investiture of discourse is manifested in text, the forum in which discourse, itself an abstraction, appears in more concrete form. A text is a tangible product that is inscribed with a discourse and so is the actual embodiment of an expression, discourse incarnate.[26] Only the readers of a text may assign it meaning, and they are aided in their sense-making by the textual form itself. Just as words, sentences, and paragraphs are constructed and organized into specific patterns to achieve some coherent meaning, so are texts designed and organized to yield certain "interpretative positions." These "interpretative positions" are the result of the infusion of discourse into concrete textual form. A text does not have meaning in and of itself; its readers assign it meaning.[27] This act of interpretation is a reconstruction of the interpretive clues, a piecing together of the ideological properties of discourse embedded in the text. Therefore, a text is not a closed system of meaning, but one that is open; not merely a system expressive of a narrow set of specific ideological properties, but one that is constructive, allowing for an interplay of

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[24] *See* KATE BORNSTEIN, GENDER OUTLAW: ON MEN, WOMEN, AND THE REST OF US 12 (1994); Sandy Stone, *The Empire Strikes Back: A Posttranssexual Manifesto, in* BODY GUARDS 292, 295 (Julia Epstein & Kristina Straub eds., 1991); Susan Stryker, *My Words to Victor Frankenstein Above the Village of Chamounix: Performing Transgender Rage*, 1 GLQ: J. LESBIAN & GAY STUD. 237, 238 (1994).

[25] As Norman Fairclough asserts, "[d]iscourses do not just reflect or represent social entities and relations, they construct or 'constitute' them; different discourses constitute key entities . . . in different ways, and position people in different ways as social subjects." NORMAN FAIRCLOUGH, DISCOURSE AND SOCIAL CHANGE 3-4 (1992).

[26] Futhermore, a text is only a presentation or re-presentation of structural and ideological properties of the discourse it is invested with, and contains no meaning in and of itself.

[27] Readers, those who interpret and assign meaning to texts, never approach any text from an unbiased perspective. The interpreter is embedded in a social matrix, just as a text is embedded in fields of social practice. The reader's interpretations of those forms are related to prior experience in the life world that she inhabits.

ideological and interpretive properties. Such a conception of "text" is above all a "communicative" conception.

2. *The Concept of Text Applied to the Body*

The concept of text is not limited to linguistic parameters. Physical objects, such as the human body, can also serve as texts. In handling the body as a text, we enter the realm of intertextuality. The signs that adorn the human body are every bit as eloquent as those uttered or appearing on the printed page. Signs such as clothing and mannerisms are but dust jackets that cover these walking, talking texts that are more complex than any novel (yet ones we read much more quickly). Just as the circumspect author chooses his words in light of style and context, so do we all dress and adorn ourselves, carry and express ourselves in light of tastes and habits that seem "personal" but are really re-created from other outside influences. I use the term "subtext" to denote bodily narratives, such as sex and sexual identity, that an author inscribes upon her own bodily text and that are in turn interpreted, reconstructed, and reassigned onto the author's body by Others.[28]

The body-as-text is more than just a collection of subtexts; through interpretation, it becomes a re-articulation of the body, an improvised, multi-dimensional way of interpreting, or reading, the body, a description of the body as seen by the social eye. Sex and sexual identity are at the epicenter of the body-as-text. These subtexts are unique from other bodily-texts in that the social and ideological constructions of each evolve from and respond to (either conform to or reject) a biological nexus, a sexual "starting point" provided by nature. Medical experts have identified eight recognized criteria of sex: chromosomal sex (XX for female, or XY for male), gonadal sex (evidently reproductive sex glands, consistent with chromosomal sex), sex hormone pattern (hormones secreted by testes/ovaries that produce gender characteristics), internal sex organs (ovaries/testes), genital sex (external sex organs), habitus (bodily form and appearance), assigned sex, and sex role (a psychological aspect of sexual identity).[29] It is upon these biological texts that the social elements of sex and sexual identity are inscribed by the author, or owner, of a bodily text and by those Others that see, reinterpret, and reassign meaning to these texts.

The process of inscription takes place in the following manner. Two inscriptions, or assignments of meaning, occur simultaneously.

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[28] I have elected to capitalize "Self" and "Other" in this Comment to conform with the usage of these terms in social constructivist scholarship.

[29] DAVID W. MEYERS, THE HUMAN BODY AND THE LAW 221-22 (2d ed. 1990).

At the same time as individuals elect to portray, or construct, their sex and sexual identity in certain ways, others, consciously or unconsciously, read these bodily-texts, deconstruct their sexual discourses, and assign other meanings to these texts. These processes of encoding and decoding necessarily involve a complex interplay of sex and sexual identity. An individual may cast herself as a feminine female or a masculine female, she may reject her sexual identity and seek to become "male" in dress or mannerism, or she may reject both her sex and her sexual identity and undergo sexual reassignment surgery to become a physical "male."[30]

The chief strength of the body-as-text is that it is a concept that will go anywhere, for anybody. In mainstream discourse that celebrates the male/female dichotomy, the body-as-text brings the outside inside, normalizing what is perceived as somehow "deviant,"[31] placing transsexuals on the same footing as "GG"s, or "genetic naturals,"[32] while at the same time preserving the differences between the heteronormative and the transsexual. In this image, difference is not subordinated difference; difference is diversity, valued, equally viable, and certainly not inferior. The body-as-text enables the transsexual body to be "normalized" for legal discourse, re-articulated as a construction that is intelligible to those who cannot escape the bipolar confines of male and female. Therefore, the body-as-text becomes a potential vehicle for constitutional rights, realizing rights for transsexuals that nontranssexuals accept as a matter of course. The body-as-text recaptures a personhood perspective, refocusing rights not on the sexual self, but on the body, or whole self.

Just as it helps to "normalize" the transsexual body, the body-as-text provides a site of resistance for transsexuals to defy the means by which such "normalizing" distorts transsexual identity.[33] Advocating

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[30] Before proceeding further with this analysis, I deem it necessary to acknowledge my own social position as a heterosexual, non-transsexual student and scholar of deconstruction and of sexuality. As any scholar does, "I become a part of the object of my study as I produce," and

> [i]n studying I politicise and theorise the culture of gender and irreversibly change it . . . . I, like you, cannot escape the hegemony of gendering but I also have a place in the power struggle that surrounds it, and I hope to use it responsibly, as I contribute, from my privileged positions to the culture of gender-blending.

Stephen Wittle, *Gender Fucking or Fucking Gender? Current Cultural Contributions to Theories of Gender Blending, in* BLENDING GENDERS: SOCIAL ASPECTS OF CROSS-DRESSING AND SEX-CHANGING 196-97 (Richard Ekins & Dave King eds., 1996).

[31] *See* Testimony of Phyllis Randolf Frye, *supra* note 8 (describing the discrimination Frye endured because she is a transsexual).

[32] Stone, *supra* note 24, at 295.

[33] Stone remarks that the "highest purpose of the transsexual is to erase him/herself, to fade into the 'normal population' as soon as possible." *Id.* Unfortunately, today's unreceptive social and legal climates almost always require the transsexual to "normalize" herself and hence to fade, at least to some degree, to gain legal rights; while we are working towards a society in

for and with transsexuals in their struggle to gain constitutional equality must not be confused with helping them to erase their transsexual selves. Indeed, we must encourage not only legal empowerment, but social empowerment, empowerment through the "ability to authentically represent the complexities of lived experience" as a transsexual.[34] Because the body-as-text captures the truth that bodies are sites of negotiation and contestation, the body-as-text can be reappropriated by transsexuals to render visible their own unique experiences. Transsexuals can take back the body-as-text by reclaiming it from the heteronormativity of the binary male/female and reconstructing it in their own images.[35] Stone describes her conceptualization of a "transsexual as text," in which "we may find the potential to map the configured body onto conventional gender discourse and thereby disrupt it, to take advantage of the dissonances created by such a juxtaposition to fragment and reconstitute the elements of gender in new and unexpected geometries."[36] This would not be constituting transsexuals as "a class or problematic 'third gender' but rather as a *genre*—a set of embodied texts whose potential for *productive* disruption of structured sexualities and spectra of desire has yet to be explored."[37]

3. *Sex and Sexual Identity and the Body-as-Text*

Using this understanding of the body-as-text as a starting point, we can begin to examine more closely the concepts of sex and sexual identity. Both emanate from and in response to biological characteristics. But each is not restricted to this narrow realm. "Objective" sex and "subjective" sexual identity are interdependent; both are important actors in the interplay of social construction whose roles are constrained only by the biological characteristics that tether them. Yet, they are distinct concepts. With biological characteristics as a starting point, sex is constructed from building blocks of anatomy and gender; "sex" is the meta-concept that an interpreter arrives at after reading and assigning meaning to another's sexual signs and strategies. After all, it is the "deployment of sexuality, with its different strate-

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which such fading will not be necessary, that point has not yet arrived, and meanwhile transsexuals still need to be recognized as the constitutional equals of nontranssexuals.

[34] *Id.*

[35] As Stone asserts, "in the case of the transsexual, the varieties of performative gender seen against a culturally intelligible gendered body *which is itself a medically constituted textual violence,* generate new and unpredictable dissonance which implicates entire spectra of desire." *Id.*

[36] *Id.* at 296.

[37] *Id.*

gies" that establishes the notion of one's sex.[38] Thus, "sex" is an umbrella term, the concept that represents gender and biological characteristics together in their entirety.[39]

It is important to emphasize, therefore, that from a social constructivist perspective, sex is not a real concept that one can proudly point to and pronounce as "sex;" it is but "an ideal construct which is forcibly materialized through time."[40] Not surprisingly, bodies are changing texts, and "sex" evolves along with its bodily bearer.[41] Most importantly, "sex" has socially significant meaning in a personal and communal sense, for ultimately "[s]ex! is a cultural command that all bodies understand and recognize themselves in a specific way, an identification of our bodies that we are forced to carry around and produce on demand."[42] As the need to legally define sex so clearly illustrates, "[t]o participate in society, we must be sexed."[43]

C. Delusions of Gender

As a component of the meta-concept of sex, we all possess what Stephen Wittle has termed "gender identity," a "total perception of an individual about his or her own gender," that includes "a basic personal identity as a boy or girl, man or woman, as well as personal judgments about the individual's level of conformity to the societal norms of masculinity and femininity."[44] Simultaneously, a second construction of gender exists, one with a different locus centered not in the Self but in the Other, but one that is of equal social importance. "Gender role," or gender as it is perceived by Others, is interdependent on gender identity, "since most people show their perceptions of themselves in their dress, manners, and activities."[45] When we assign gender roles to Others, we engage in "gender attribution,"

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[38] 1 MICHEL FOUCAULT, THE HISTORY OF SEXUALITY 154 (Robert Hurley trans., Pantheon Books 1978).

[39] As Foucault posits,

> The notion of "sex" ma[kes] it possible to group together, in an artificial unity, anatomical elements, biological functions, conducts, sensations, and pleasures, and it enable[s] one to make use of this fictitious unity as a causal principle, an omnipresent meaning . . . sex [i]s thus able to function as a unique signifier and a universal signified.

Id. at 154.

[40] Jillian Todd Weiss, *The Gender Caste System: Identity, Privacy, and Heteronormativity*, 10 LAW & SEXUALITY 123, 161 (2001).

[41] Sex is not a "'static condition of a body, but a process whereby regulatory norms materialize.'" *Id.* (quoting JUDITH BUTLER, BODIES THAT MATTER–ON THE DISCURSIVE LIMITS OF "SEX" 1 (1993)).

[42] *Id.* at 164.

[43] *Id.*

[44] STEPHEN WHITTLE, THE TRANSGENDER DEBATE: THE CRISIS SURROUNDING GENDER IDENTITY 5 (2000).

[45] *Id.* at 5-6.

based on an "intricate system of cues, varying from culture to culture," ranging from physical appearance and behavior to "context, and the use of power."[46]

The meta-concept of sex has traditionally been defined using the binary terms of male or female (leaving aside the question of the true sexual hermaphrodite) that are assumed to correspond at least roughly to biological characteristics. On the other hand, sexual identity or gender, (as it will now be termed to avoid confusion with "sex" as a meta-concept), is essentially a qualitative spectrum of social construction that spans from the completely "feminine" female at one extreme to the ultimately "masculine" male at the other. As Greenberg suggests, at no time is anyone at either of these extremes.[47] While the Self chooses to locate itself at some specific point on the spectrum and constructs bodily-texts to reflect this posturing, outside Others assign the Selves that they encounter to specific points on the spectrum after assigning meaning upon interpreting the textual interplay of sex and gender. Meaning is symmetrical when an individual's perceptions of sex and gender approximate those of Others that interpret it, and asymmetrical when an individual's perceived sex and gender are at odds with Others' interpretations. It is in this instance, when one's self-assigned sex and gender seem "authentic" to that individual while seeming false to others, that one wonders which is the "real" interpretation of sex and gender and which is the "illusion." This "illusion" most often occurs when one's "gender" does not equate with one's "genitalia."[48] This conundrum is the theoretical locus of legal confusion over determinations of sex and gender. It is essential to note that even though it is perceived as an "internal" socially constructed condition as opposed to "external" biologically constructed anatomy, gender is immutable and does not change.[49] And while the evolution and development of gender is an intensely personal and subjective experience, it is an experience that is shared by everyone, and is "culturally and objectively observed."[50]

The strength of the social constructivist approach is that it preserves gender as a "real" concept, preventing the analyst who does not understand or does not appreciate the personal and communal realities of its socially constructed nature from consigning it entirely to the realms of illusion. One "must not place sex on the side of reality, and sexuality on that of confused ideas and illusions; sexuality is a very real historical formation; it is what gives rise to the notion of sex,

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[46] *Id.* at 7.

[47] Greenberg, *supra* note 10, at 275.

[48] Weiss, *supra* note 40, at 158.

[49] *Id.*

[50] *Id.* at 159.

as a speculative element necessary to its operation."[51] A deconstruction of gender makes plain the distinction between the subjective and the illusionary; gender emerges in its concrete form upon the text of the body in its myriad social constructions and interpretations. Ironically, deconstruction of the body's sexual texts calls into question the traditional empirical imperialism of objectivity.[52]

Before the social constructivist perspective and the implications of the body-as-text platform forced us to become conscious of the constructed natures of biological (or "objective") sex and its sociocultural (or "subjective") counterpart, gender, we believed in the fiction of the objective, autonomous individual. This individual, who was believed to be unbiased and free of the social matrix and its accompanying myths and ideologies, strides forth boldly to confront life as a *tabula rasa* or blank slate, subject to no one's whim but his own. But this image is now easy to dispel. We have already seen that no individual is autonomous; by nature of our bodily-texts, we are all caught up in the social matrix, in a permanent marriage of ideological interplay. It appears that we need to reexamine the attainability of objectivity, perhaps recasting it into a less brilliant ideal, a more human "goal" that acknowledges our indivisibility from the social matrix. True objectivity is a fiction; every human has preexisting biases that work unconsciously and subconsciously, so that one never knows exactly when they are in play. Nonetheless, the human struggle to achieve such objectivity is the force that renders it "real." While objective impartiality as an ideal may be a myth, something akin to impartiality, an awareness of bias and its influence upon personal actions and reaction is not. Seen in this light, the human endeavor to achieve objectivity entails the recognition and appreciation of the power and the reality of the subjective. While this awareness does not allow one to remove the ideological tints that color the world she sees, it does allow her to realize that these tints exist and that they work upon her images of Self and Other. Knowing that such tints ex-

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[51] FOUCAULT, *supra* note 38, at 158.

[52] If so much of sex is socially constructed, and not determined by objectively verifiable tenets of anatomy and biology, then what constitutes an objective "sex," readily ascertainable through "impartial" observation? Now objective "sex" itself may appear to be the illusion. As Ronald Dworkin posits in the context of legal philosophy,

> Is there any objective truth? Or must we finally accept that at bottom, in the end . . . there is no 'real' or 'objective' or 'absolute' or 'foundational' or 'fact of the matter' or 'right answer' truth about anything, that even our most confident convictions about what happened in the past or what the universe is made of or who we are . . . are just our convictions, just conventions, just ideology.

Ronald Dworkin, *Objectivity and Truth: You'd Better Believe It*, PHIL. & PUB. AFF. No. 2, Spring 1996, at 87.

ist, she can now try to make her image of the world more authentic, and hence more reliable, than it was before.[53]

Law itself appears to provide a socially significant objective standard; convention codified is the rule of law. Of course, "[t]he nascent body in law is given supreme legal significance," and "[z]ones are accorded meaning and legal significance for sex and social status."[54] Ultimately, "persons are controlled through the physical body which is a gateway and corridor to rights."[55] Agents of the law would have us believe that they survey and classify bodies with an objective eye. However, objectivity is just as elusive in the courtroom and legislative hall as it is in the workaday world. Like most other governmental institutions, law "makes claims to neutrality, to objectivity, and to universality."[56] As Susan Edwards asserts, "[i]n law, as elsewhere, concepts are given a significance and authorised as a priori valid."[57] However, in the wake of deconstruction, we must now acknowledge that inherent "[i]n the application of [the] scientific method to law is the false premise that all subjectivity and partiality will be washed away."[58]

II. JUDICIAL IMAGES OF TRANSSEXUALS

The principles just covered have been exactly that—principles, from theory, that can easily be distinguished from those that emerge from practice. What happens when we apply these conceptions of subjectivity and objectivity to transsexualism? A detailed investigation into the nature of transsexualism immediately reveals its challenge to the legal community: "the examination of the limits of our ability to know what exists and does not exist."[59] This challenge is particularly complex in constitutional law, for judicial interpretations of sex and gender dictate the rights of transsexuals in several ways that will be addressed in the following section. Defining transsexualism, there-

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[53] Only now, after we have recast objectivity, have the scales dropped from our eyes; we now recognize that the pluralities of subjectivity do exist, that they are in fact "real." At the same time, we can appreciate the true nature of objectivity, an ongoing struggle to make one's images of Others and of the social environment more authentic and more reliable, a quest to see past the subjective tint to what lies beyond. We become unconventionally aware of the conventional, able to acknowledge universally accepted myths. And so at the end, like sex and gender, the subjective and the objective play like Yin the dark and Yang the light, confusion and peace, chasing each other about in a perpetual eddy, each trying to catch the other, but never quite succeeding.

[54] EDWARDS, *supra* note 11, at 51.

[55] *Id.*

[56] *Id.* at 1.

[57] *Id.* at 3.

[58] *Id.* at 1.

[59] Weiss, *supra* note 40, at 155.

fore, sets forth the context and contests of sex and gender that have profound constitutional implications for transsexuals.

A. *Transsexualism Defined*

As defined by the *Diagnostic and Statistical Manual of Mental Disorders*, or the DSM-IV, transsexualism, officially termed Gender Identity Disorder ("GID"), or gender dysphoria, includes both "evidence of a strong and persistent cross-gender identification" (defined as "the desire to be, or the insistence that one is, of the other sex"), and "a persistent discomfort about one's assigned sex."[60] While the DSM-IV is cited by many legal authorities[61] and seems to be the definitive psychiatric source on transsexualism, transsexuals themselves contest this psychiatric classification of transsexualism, urging instead the assumption of a medical categorization.[62] While it is essential to be mindful of this perspective while wading through legal and social scientific materials that overwhelmingly place transsexualism in a psychiatric context, this Comment discusses transsexualism within a psychiatric context because this is still the conventional perspective from which this condition is constructed.

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[60] AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 532, 533 (4th ed. 1994) [hereinafter DSM-IV].

[61] *See, e.g.*, Meriwether v. Faulkner, 821 F.2d 408, 412 (7th Cir. 1987) (referring to DSM-IV to support a description of transsexualism); Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1083 n.3 (7th Cir. 1984) (referring to DSM-IV to support a description of transsexualism); Smith v. Rasmussen, 57 F. Supp. 2d 736 (N.D. Iowa 1999) (referring to DSM-IV in a discussion of gender identity disorder); Dobre v. Nat'l R.R. Passenger Corp., 850 F. Supp. 284, 288 n.2 (E.D. Pa. 1993) (citing DSM-IV's definition of a transsexual).

[62] *A Joint Statement by the International Conference on Transgender Law and Employment Policy and The National Center for Lesbian Rights*, INT'L CONF. ON TRANSGENDER L. & EMP. POL'Y PROC. 5, A-1, A-2 (1996). This statement asserts that its adherents

> strongly believe that transsexualism should become a medical rather than a psychiatric status. The existing system of access to and reimbursement for transition-related health care is grossly inadequate, because it vests psychiatrics with far too much power over access to hormones and all corrective surgeries, because that power is far too often abused, and because the vast majority of transsexuals are excluded from any hope of reimbursement for transition-related care. We believe that shifting transsexualism from a psychiatric to a medical status will help to alleviate these problems .... We also believe that transgendered people need and deserve explicit civil rights protections. For a number of reasons, we do not believe that the disability rights model is either the only or the most effective way to win civil rights protections for transgendered people .... Legal protections based on GID as a psychiatric disability have some serious drawbacks, not the least of which is the perpetuation of a stereotype that transgendered people are inherently disturbed or unstable. Accepting the notion that we are mentally ill in order to gain some limited protections on the basis of disability will not protect transgendered parents who are denied custody or the right to adopt because they have a mental impairment which renders them unsuitable parents. Nor will it necessarily provide transgendered people with comprehensive protection against job discrimination. Even under ADA, the extent to which employers must accommodate people with mental illnesses is highly contested and unclear.

Id.

In general, Gender Identity Disorder is "manifested by symptoms such as preoccupation with getting rid of primary and secondary sex characteristics (e.g., request for hormones, surgery, or other procedures to physically alter sex characteristics to simulate the other sex) or belief that he or she was born the wrong sex."[63] Individuals with a concurrent physical intersex condition, such as hermaphrodites, should not be diagnosed with Gender Identity Disorder, for "individuals with Gender Identity Disorder have normal genitalia (in contrast to the ambiguous genitalia or hypogonadism found in physical intersex conditions)."[64] People of all ages, from young children to adults, can manifest symptoms of Gender Identity Disorder. The DSM-IV describes Gender Identity Disorder in children in broad terms.[65] Although statistics are not cited, the DSM-IV asserts that only a few children emerging into later adolescence or adulthood "will continue to have symptoms that meet criteria for Gender Identity Disorder."[66] Adults with Gender Identity Disorder are preoccupied with their desire to live as a member of the opposite sex, and "to varying degrees, they adopt the behavior, dress, and mannerisms of the other sex," engaging in cross-dressing and hormonal treatment.[67] When adults are diagnosed with Gender Identity Disorder, "it tends to have a chronic course, but spontaneous remission has been reported."[68] For all those with cross-gender identification, "[t]he disturbance can be so pervasive that the mental lives of some individuals revolve only around those activities that lessen gender distress."[69] The DSM-IV distinguishes Gender Identity Disorder from simple "nonconformity to stereotypical sex role behavior" by the extent of an individual's cross-gender identification; Gender Identity Disorder represents not mild discomfort but a "profound disturbance."[70] The disorder can also be distinguished from transvestitism; transvestic fet-

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[63] DSM-IV, *supra* note 60, at 538.

[64] *Id.* at 535.

[65] Boys with "cross-gender identification" may be preoccupied with traditionally feminine activities such as dressing in girls' clothing, playing house, identifying with female characters such as princesses or beautiful girls, and playing with "female-type dolls, such as Barbie." *Id.* at 533. In addition, they may sit to urinate and pretend not to have a penis. *Id.* Girls, in contrast, do not wish to wear feminine clothing and prefer boys' clothes and haircuts, and show little interest in traditionally female toys and games, preferring contact sports and "rough-and-tumble play." *Id.* In addition, they may refuse to urinate in a sitting position, may claim to have penises, and may not want to grow breasts or menstruate. *Id.*

[66] *Id.* at 536.

[67] *Id.* at 533.

[68] DSM-IV, *supra* note 60, at 536.

[69] *Id.* at 535.

[70] *Id.* at 536.

ishism occurs in heterosexual or bisexual men who cross-dress for sexual excitement.[71]

The psychiatric community currently hails sex reassignment surgery as the only "effective" treatment for transsexualism.[72] According to the standards of care presented by the Harry Benjamin International Gender Dysphoria Association, a clinical behavioral scientist recommending sex reassignment surgery should know a transsexual patient for at least six months.[73] Sex reassignment surgery should be preceded by a period of at least twelve months when the transsexual lives as a member of the self-identified sex on a full-time basis.[74]

We may now return to our subjective explications of sex and gender and recall that while sex is at once a physical fact, it is also an ideal, as we constantly "create artificial standards of normality to which we must continually strive to conform."[75] While most people deviate only marginally or temporarily from "the ideal set of behaviors which in our culture we associate with males and females" in seemingly random patterns that are easily "excused" by others, transsexuals "consistently and coherently deviate from society's ideal so far as to fall outside of the range traditionally associated with their sex."[76] And so while a transsexual's gender "is essentially congruent throughout his or her life," it is always at odds with his or her birth sex.[77] Largely due to the socially imposed dichotomy of man and woman, male and female, "the transsexual does not exist in social or even less in legal language. The modern transsexual remains an enigma, regarded by and large as a 'sexual' deviant bent on distorting and challenging a natural body form."[78]

B. Do Transsexuals Have a Liberty Interest in Defining Their Own Sex?

Before this query can be fully addressed, it is necessary to have a comprehensive understanding of the judicial treatment of transsexualism and its implications in various legal contexts. Only then can we fully analyze whether transsexuals have a constitutional right, or a liberty interest, in self-defining their own sex. If it is determined that

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[71] *Id.*

[72] *See* Smith v. Rasmussen, 57 F. Supp. 2d 736 (N.D. Iowa 1999) (recognizing the opinion of the psychiatric community and holding that sex reassignment in this case was "medically necessary").

[73] HARRY BENJAMIN INTERNATIONAL GENDER DYSPHORIA ASSOCIATION, STANDARDS OF CARE: THE HORMONAL AND SURGICAL SEX REASSIGNMENT OF GENDER DYSPHORIC PERSONS § 4.8.1 (1990) [hereinafter HARRY BENJAMIN, STANDARDS OF CARE].

[74] *Id.* at § 4.9.1.

[75] Weiss, *supra* note 40, at 161.

[76] *Id.*

[77] *Id.* at 162.

[78] EDWARDS, *supra* note 11, at 9.

transsexuals do indeed have such an interest, profound changes would have to be made in the current methods which courts use to define legal sex; no longer could a judge impose his or her idea of a proper sex assignment on a transsexual. Rather, transsexuals would be the ultimate authority in defining their own sex.

From the perspective of "any transsexual struggling to achieve recognition in the newly assigned postoperative sex, the right to privacy and to alter the birth certificate in order to ensure legal congruity with the new sexual status[] remains fundamentally necessary."[79] Transsexuals do not yet have a liberty interest in defining their own sex; no court in the cases discussed below has officially held that transsexuals have a universal right to self-identify their legal sex. Although courts have allowed postoperative transsexuals to self-identify their sex on a case-by-case basis, these case-by-case determinations do not translate into a universal right for transsexuals to self-identify their own sex. However, the law has granted transsexuals a few limited liberty interests, including a liberty interest in dressing in their self-identified sex for purposes of therapy[80] and a limited right to receive some form of continuing medical treatment while incarcerated, though no right to receive any specific treatment.[81] These limited liberty interests by no means translate into a broader liberty interest allowing transsexuals to self-define their legal sex. As will become readily apparent in later sections, however, just because a liberty interest in self-identification has not yet been articulated does not mean that such an interest cannot or will not be articulated. After discussing judicial perspectives on transsexualism in a variety of legal contexts, this Comment will explore how such a liberty interest could best be articulated under Equal Protection and Due Process arguments.

C. The Judicial Analysis of Transsexualism

Courts have addressed the legal implications of transsexualism in eight different contexts: requests by transsexuals to change their names and sexes on official documents such as birth certificates,[82] determining the legality of marriages between transsexuals and non-

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[79] *Id.* at 37.

[80] *See infra* Part II(c)(5) for discussion of anti-cross-dressing ordinances and transsexuals.

[81] *See* discussion of transsexual prisoners' right to receive medical treatment, *infra* Part II(c)(7).

[82] *See, e.g.*, Darnell v. Lloyd, 395 F. Supp. 1210 (D. Conn. 1975); *In re* Hartin v. Dir. of Bureau of Records and Statistics, 347 N.Y.S.2d 515 (N.Y. Sup. Ct. 1973); Anonymous v. Weiner, 270 N.Y.S.2d 319 (N.Y. Sup. Ct. 1966); *In re* Anonymous, 314 N.Y.S.2d 668 (N.Y. Civ. Ct. 1970); *In re* Ladrach, 513 N.E.2d 828 (Ohio Misc. 1987); K. v. Health Div., 560 P.2d 1070 (Or. 1977).

transsexuals,[83] testing transsexuals for athletic events,[84] determining whether transsexuals are covered by Title VII of the Civil Rights Act,[85] discussing whether city ordinances can prevent preoperative transsexuals from dressing in their self-identified sex,[86] considering whether sex reassignment surgery is medically necessary,[87] assessing whether transsexual prisoners have a right to seek treatment for transsexualism while they are incarcerated,[88] and granting asylum to foreign national transsexuals.[89] Of these issues, this Comment will emphasize transsexuals' ability to change their name and sex on official documents, to marry, to receive protection under Title VII, and to dress in the self-identified sex. One common question, however, echoes throughout all of these issues: is sex reassignment essentially a form of psychotherapy pertaining to subjective gender, or does it actually change a patient's sex? A brief review of the cases that have addressed these issues reveals a general progression towards recognizing increased rights and providing greater protection for postoperative transsexuals.

1. *Changing Name and Sex on Official Documents*

In the first American case to deal with transsexualism, *Anonymous v. Weiner*,[90] a postoperative male-to-female transsexual applied to the Bureau of Vital Statistics in New York City for a new birth certificate.

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[83] *See, e.g., In re* Estate of Gardiner, 22 P.3d 1086 (Kan. Ct. App. 2001); M.T. v. J.T., 355 A.2d 204 (N.J. Super. Ct. App. Div. 1976); Anonymous v. Anonymous, 325 N.Y.S.2d 499 (N.Y. Sup. Ct. 1971); Littleton v. Prange, 9 S.W.3d 223 (Tex. App. 1999); Corbett v. Corbett, 2 All E.R. 33 (P. 1970).

[84] *See* Richards v. United States Tennis Ass'n, 400 N.Y.S.2d 267 (N.Y. Sup. Ct. 1977).

[85] *See, e.g.*, Price Waterhouse v. Hopkins, 490 U.S. 228 (1989); Schwenk v. Hartford, 204 F.3d 1197 (9th Cir. 2000); Ulane v. Airlines, 742 F.2d 1081 (7th Cir. 1984); Sommers v. Budget Mktg., Inc., 667 F.2d 748 (8th Cir. 1982); Holloway v. Arthur Andersen, 566 F.2d 659 (9th Cir. 1977); Dobre v. Nat'l R.R. Passenger Corp., 850 F. Supp. 284 (E.D. Pa. 1993); Maffei v. Kalaeton Indus., Inc., 626 N.Y.S.2d 391 (N.Y. Sup. Ct. 1995).

[86] *See, e.g.*, Doe v. McConn, 489 F. Supp. 76 (D. Tex. 1980); City of Chicago v. Wilson, 398 N.E.2d 522 (Ill. 1978); Doe *ex rel* Doe v. Yunits, No. 00-1060-A, 2000 WL 33162199, at *1 (Mass. Super. Ct. Oct. 11, 2000), *aff'd*, Doe v. Brockton School Comm., No. 2000-J-638, 2000 WL 33342399, at*1 (Mass. App. Ct. Nov. 30, 2000).

[87] *See, e.g.*, Smith v. Rasmussen, 57 F. Supp. 2d 736 (N.D. Iowa 1999).

[88] *See, e.g.*, Farmer v. Brennan, 511 U.S. 825 (1994); Long v. Nix, 86 F.3d 761 (8th Cir. 1996); Meriwether v. Faulkner, 821 F.2d 408 (7th Cir. 1987); Wolfe v. Horn, 130 F. Supp. 2d 648 (E.D. Pa. 2001).

[89] *See, e.g.*, Hernandez-Montiel v. Immigration and Naturalization Serv., 225 F.3d 1084, 1093 (9th Cir. 2000) (electing to grant asylum to a Mexican male-to-female preoperative transsexual, remarking in dicta that the sexual identity of a male-to-female preoperative transsexual "is immutable because it is inherent in his identity, that "sexual orientation and sexual identity are . . . so fundamental to one's identity that a person should not be required to abandon them," and that "sexual identity goes beyond sexual conduct and manifests itself outwardly, often through dress and appearance").

[90] 270 N.Y.S.2d 319 (N.Y. Sup. Ct. 1966).

The Bureau sought advice from the Board of Health, which established a commission which, after detailed analysis, issued an opinion opposed to changing a transsexual's sex on her birth certificate.[91] On appeal following the denial of her application, the Supreme Court of New York, looking to the New York City Health Code provisions, held that an individual's sex could be changed on a birth certificate only when there was a recording error, not to reflect changes in sex brought about by sex-reassignment surgery.[92] Thus began the legal trend of holding that sex is determined by biological criteria, and that any changes in the criteria used for sex determination or changes in the sexual rights of transsexuals should issue from the state legislature, not the courts.[93] As a necessary corollary, courts have held, in accordance with so-called correctional statutes enacted by the legislature, that changes in legal documents such as birth records should be made only to correct errors.[94]

Apparently, changes of name were easier to come by, as indicated by a New York Civil Court granting a change of name to a postoperative transsexual in 1968 and again in 1970. In the 1968 case *In re Anonymous*,[95] a postoperative male-to-female transsexual petitioned the court for an order to change her name and to direct that the sex on her birth certificate either be changed or that a copy of the order be attached to the document. The court recognized that "any difficulty presented herein is not so much in the nature of the problem itself, but in trying to apply, perhaps inadequately, static rules of law to situations . . . which perhaps merit new rules and/or progressive legislation." The court took the road less traveled by speculating upon and forming a solution to the conundrum surrounding the fact that the transsexual's "social sex is determined by his anatomical [genital] sex."[96] The court overtly disagreed with the conclusions of

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[91] The Committee on Public Health of the New York Academy of Medicine approved a report entitled "Change of Sex on Birth Certificates for Transsexuals" on October 4, 1965. In this report, the Committee concluded that

> (1) Male-to-female transsexuals are still chromosomally males while ostensibly females; and (2) It is questionable whether laws or records such as the birth certificate should be changed and thereby used as a means to help psychologically ill persons in their social adaptation.

See also In re Hartin, 347 N.Y.S.2d 515, 517 (N.Y. Sup. Ct. 1973); Anonymous v. Weiner, 270 N.Y.S.2d 319, 322 (N.Y. Sup. Ct. 1966).

[92] *See In re Hartin*, 347 N.Y.S.2d at 515.

[93] Meyers, *supra* note 29, at 225.

[94] *See In re* Ladrach, 513 N.E.2d 828, 831-32 (Ohio Misc. 1987); K. v. Health Div., 560 P.2d 1070, 1072 (Or. 1977).

[95] 293 N.Y.S.2d 834 (N.Y. Civ. Ct. 1968).

[96] *Id.* at 837. As the court stated,

> [B]y definition, his [the transsexual's] psychological sex, as distinguished from his anatomical sex, is that of the opposite sex. Absent surgical intervention, there is no question that his social sex must conform with his anatomical sex, his mental attitude

the "learned committee" formed by the Board of Health in the initial 1966 case *Anonymous v. Weiner* and held that "a male transsexual who submits to a sex-reassignment is anatomically and psychologically a female in fact."[97] In 1970, a less loquacious court agreed to change a postoperative male-to-female transsexual's name from a male to female name, provided that the order itself not be used as evidence that the petitioner's sex had in fact been changed.[98] In 1973, the holding in *In re Hartin v. Dir. of Bureau of Records and Statistics*[99] upheld the decision in *Weiner*, and tangentially endorsed the conclusions reached by the Board of Health in that case.

A change was in the wings in 1975 in *Darnell v. Lloyd*,[100] when a postoperative male-to-female transsexual sued the Connecticut Commissioner of Health to change the sex on her birth certificate from male to female, and the Commissioner moved for summary judgment. The court denied the motion, finding that the Commissioner must show some state interest in his refusal to change the transsexual's birth sex to her current sex. The court also held that a higher level of scrutiny existed because the fundamental right to marry could be implicated by changing the transsexual's sex on her birth certificate.[101] Two years later in 1977, the Oregon Supreme Court in *K. v. Health Division*[102] held that no authority existed under state law to change the birth certificate to reflect changes in name or postoperative sex as the birth certificate was intended to be a historical record of the facts existing at the time of birth. Finally, in 1987,

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notwithstanding. But once surgical intervention has taken place, whereby his anatomical sex is made to conform with his psychological sex, is not his position identical to that of the pseudo-hermaphrodite who has been surgically repaired? Should not society afford some measure of recognition to the altered situation and afford this individual the same relief as it does the pseudo-hermaphrodite?

It has been suggested that there is some middle ground between the sexes, a "no man's land" for those individuals who are neither truly "male" nor truly "female." Yet the standard is much too fixed for such far-out theories. Rather the application of a simple formula could and should be the test of gender, and that formula is as follows: Where there is disharmony between the psychological sex and the anatomical sex, the social sex or gender of the individual will be determined by the anatomical sex. Where, however, with or without medical intervention, the psychological sex and the anatomical sex are harmonized, then the social sex or gender of the individual should be made to conform to the harmonized status of the individual and, if such conformity requires changes of a statistical nature, then such changes should be made.

Id.

[97] *Id.* at 838.

[98] *In re* Anonymous, 314 N.Y.S.2d 668, 670 (N.Y. Civ. Ct. 1970).

[99] 347 N.Y.S.2d 515 (N.Y. Sup. Ct. 1973) (holding that male-to-female postoperative transsexual whose name was changed to female name by court order could obtain new birth certificate bearing the female name but could not compel authorities to verify that her sex is female).

[100] 395 F. Supp. 1210 (D. Conn. 1975).

[101] *Id.* at 1214.

[102] 560 P.2d 1070 (Or. 1977).

an Ohio court heard *In re Ladrach*,[103] in which a postoperative male-to-female transsexual applied to have the sex changed on her birth certificate;[104] the court ruled that the birth certificate should not be changed because under state law, certificates could only be changed to correct errors, and that there was no error in designating the transsexual's sex at birth as male.

Now, statutory law permits postoperative transsexuals in nearly all of the fifty states to change their name and sex on their birth certificate and receive a new or amended birth certificate. Idaho, Ohio, and Tennessee will allow transsexuals to change their name but not their sex.[105] Most states will grant transsexuals a new birth certificate;[106] others grant an amended birth certificate, most often one marked "amended" but without the specifying the amended items.[107] A distinct minority grant an amended birth certificate with the transsexual's name, sex, or both struck out, and the new name or sex

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[103] 513 N.E.2d 828 (Ohio Misc. 1987).

[104] The transsexual, who had been married twice before to females, filed an application to have the sex corrected on her birth certificate after she and her fiancée were denied a marriage license because a judge concluded that the transsexual's birth certificate stated that the transsexual was male. After her initial application was dismissed, the transsexual sought declaratory judgment to compel authorities to change her birth certificate to reflect her postoperative sex. *See id.*

[105] *See* Becky Allison, M.D., *U.S. States and Canadian Provinces: Instructions for Changing Name and Sex On Birth Certificate, at* http://www.drbecky.com/birthcert.html (last visited Nov. 5, 2002) [hereinafter *Instructions for Changing Name and Sex On Birth Certificate*].

[106] Arizona (ARIZ. REV. STAT. ANN. § 36-326(a)(4) (1993)); Arkansas (ARK. CODE ANN. § 20-18-307(d) (Michie 2001)); California (CAL. HEALTH & SAFETY CODE § 103440 (West 1996)); Colorado (COLO. REV. STAT. ANN. § 25-2-115(4) (West 2001)); Georgia (GA. CODE ANN. §31-10-23(e) (2002)); Hawaii (HAW. REV. STAT. § 338-17.7(4)(b) (2001)); Illinois (410 ILL. COMP. STAT. ANN. § 535(d)17 (West 2001)); Iowa (IOWA CODE ANN. § 144.23.3 (West 2001)); Kentucky (KY. REV. STAT. ANN. § 213.121 (Michie 2002)); Louisiana (LA. REV. STAT. ANN. § 40.62 (West 2000)); Michigan (MICH. COMP. LAWS § 333.2891(9)(a) (2002)); Nebraska (NEB. REV. STAT. § 71-604.01 (2002)); Nevada (NEV. ADMIN. CODE ch. 440, § 130); New Jersey (N.J. STAT. ANN. § 26:8-40.12 (West 2002)); New Mexico (N.M. STAT. ANN. § 24-14-25(D) (Michie 2002)); North Carolina (N.C. GEN. STAT. § 130A-118(b)(4) (2002)); Texas (TEX. HEALTH & SAFETY CODE ANN. § 192.011 (Vernon 2001)) (though the state is refusing to issue such changes after *Littleton*); and Wisconsin (WIS. STAT. ANN. § 69.15(1)(a) (West 2002)). I was unable to locate specific statutory citations for Delaware, Indiana, Maine, New Hampshire, New York, Pennsylvania, South Dakota, and West Virginia; however, procedural details confirming state policies may be found at *Instructions for Changing Name and Sex On Birth Certificate, supra* note 105.

[107] Alabama (ALA. CODE 22-9A-19 (2002)); Connecticut (CONN. GEN. STAT. § 19a-42 (2002)); District of Columbia (D.C. CODE ANN. § 6-217(d) (2001)); Kansas (KAN. ADMIN. REGS. 28-17-(b)(1)(A)(i) (2000)); Maryland (M.D. CODE ANN. HEALTH-GEN. § 4-214 (2002)); Massachusetts (MASS. GEN. LAWS ANN. Ch. 46 § 13(e) (West 2002)); Minnesota (MINN. STAT. § 4601.1000 (2002)); Missouri (MO. ANN. STAT. § 193.215(9) (West 2002)); North Dakota (N.D. CENT. CODE § 23-02.1-25 (2002)) (Regulation 33-04-12-02 speaks to the amendment as a result of Gender Identity change); Oregon (OR. REV. STAT. § 432.235(4) (2001)); Utah (UTAH CODE ANN. § 26-2-11 (2002)); and Virginia (VA. CODE ANN. § 32.1-269 (Michie 1999)). I was unable to locate specific statutory citations for Alaska, Florida, Montana, Oklahoma, Rhode Island, Vermont, Washington, and Wyoming; however, procedural details confirming state policies may be found at *Instructions for Changing Name and Sex On Birth Certificate, supra* note 105.

typed above.[108] Nearly all states require a court order for a name change; for a change of sex a letter from the surgeon who performed the sex-reassignment surgery is most often required, though a court order may be needed as well.[109] New York is the only state to require more documentation than a letter from the sex-reassignment surgeon.[110] The easiest states in which to change name and sex are clearly those in which sex is not listed on the birth certificate, such as Indiana.

The standards for obtaining a change of sex and name on a passport are remarkably different. Preoperative transsexuals can obtain passports valid for one year, which may be extended if medical documentation certifying the completion of sex-reassignment surgery is submitted.

2. *Marriage Between Transsexuals and Nontranssexuals*

The first court to address the legal validity of a marriage between a transsexual and a nontranssexual did so in 1970 in the English case *Corbett v. Corbett*,[111] holding that a marriage between a postoperative male-to-female transsexual and a male was void as the transsexual's sex must be determined by biological criteria.[112] The *Corbett* court rationalized that the

> criteria must . . . be biological, for even the most extreme degree of transsexualism in a male or the most severe hormonal imbalance which can exist in a person with male chromosomes, male gonads and male genitalia cannot reproduce a person who is naturally capable of performing the essential role of a woman in marriage.[113]

In 1971 in *Anonymous v. Anonymous*,[114] the New York Supreme Court held invalid a marriage between a man and a male-to-female transsexual who was preoperative at the time of the ceremony. The

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[108] Mississippi (MISS. CODE ANN. § 41-57-21 (2002)); and Tennessee (TENN. CODE ANN. § 68-3-203 (2002)). South Carolina will not issue a new birth certificate, but will attach a card to the old certificate indicating a change of name and sex. *See Instructions for Changing Name and Sex On Birth Certificate, supra* note 105.

[109] The states requiring a court order for a change of sex include Alabama, Arkansas, Maryland, Mississippi, Utah, Vermont, and Virginia.

[110] New York requires a letter from surgeon, operative report, letter from therapist, and letter from primary physician with hormone information. *See Instructions for Changing Name and Sex On Birth Certificate, supra* note 105.

[111] 2 All E.R. 33 (P. 1970). In holding that April Ashley, a postoperative male-to-female transsexual, was not a female for the purposes of marriage, the court in *Corbett* stated that "sex is clearly an essential determinant of the relationship called marriage, because it is and always has been recognised as the union of man and woman. [T]he validity of the marriage in this case, [depends] in my judgment, on whether the respondent is or is not a woman." *Id.* at 48.

[112] *Id.*

[113] *Id.*

[114] 325 N.Y.S.2d 499 (N.Y. Sup. Ct. 1971).

court found that the defendant was not a female at the time of the marriage ceremony, and moreover stated that "it would appear from the medical articles and other information supplied by counsel, that mere removal of the male organs would not, in and of itself, change a person into a true female."[115] The same court adopted a similar anatomical approach to defining sex in 1974 in *B. v. B.*,[116] when it annulled the female plaintiff's marriage to a male-to-female transsexual, stating that "marriage is and always has been a contract between a man and a woman" and that "[w]hile it is possible that defendant may function as a male in other situations and in other relationships, defendant cannot function as a husband by assuming male duties and obligations inherent in the marriage relationship."[117] However, in 1976, in *M.T. v. J.T.*,[118] the New Jersey Superior Court recognized the right to marry where sex-reassignment surgery either created the ability for heterosexual relations or where physical appearance and psychological orientation were harmonized.[119] In this case, the court held that a male-to-female postoperative transsexual was a female for marital purposes.[120] Adopting the formula first articulated in *In re Anonymous*,[121] the court proposed that, where the psychological sex differs from the anatomical sex, "the social sex or gender of the individual will be determined by the anatomical sex," but where "with or without medical intervention the psychological sex and the anatomical sex" do not differ, "the social sex or gender of the individual should be made to conform to the harmonized status."[122]

In the recent case *Littleton v. Prange*,[123] the Texas Court of Appeals returned to the anatomical means of determining sex for purposes of marriage in holding that Christie Lee Littleton, a male-to-female transsexual who married Jonathon Littleton as a postoperative transsexual in 1989, lacked standing as Jonathon's spouse under a wrong-

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[115] *Id.* at 500.

[116] B. v. B., 355 N.Y.S.2d 712, 716-17 (N.Y. Sup. Ct. 1974).

[117] *Id.* at 716-17.

[118] M.T. v. J.T., 355 A.2d 204 (N.J. Super. Ct. App. Div. 1976).

[119] *See* Meyers, *supra* note 29, at 226.

[120] Explaining its reasoning, the court stated, "we must disagree . . . that for purposes of marriage sex is somehow irrevocably cast at the moment of birth, and that for adjudging the capacity to enter marriage, sex in its biological sense should be the exclusive standard." *Id.* at 209. Instead, the court explained that "[t]he evidence and authority which we have examined . . . show that a person's sex or sexuality embraces an individual's gender, that is, one's self image, the deep psychological or emotional sense of gender." *Id.* Utilizing this subjective approach, the court ultimately concluded that, "for marital purposes if the anatomical or genital features of a genuine transsexual are made to conform to that person's gender, psyche or psychological sex, then identity by sex must be governed by the congruence of these standards." *Id.*

[121] 293 N.Y.S.2d 834 (N.Y. Civ. Ct. 1968).

[122] *M.T.*, 355 A.2d at 210.

[123] 9 S.W.3d 223, 230-31 (Tex. Ct. App. 1999).

ful death statute because "[b]iologically, a post-operative female transsexual is still a male" and so could not marry another male.[124] The court also emphasized the seemingly artificial nature of Christie's femininity.[125] Most recently, in 2001, the opposite approach was taken by the Kansas Court of Appeals in *In re Estate of Gardiner*.[126] In *Gardiner*, a son claiming to be the sole heir to his father's estate alleged that his father's marriage to his wife, J'Noel, a male-to-female postoperative transsexual, was invalid. After summary judgment was granted to the son, J'Noel appealed, and the appellate court reversed, stating that genuine issues of material fact existed as to whether J'Noel was a female at the time of marriage.[127] The court concluded that "the trial court must consider and decide whether an individual was male or female at the time the individual's marriage license was issued and the individual was married, not simply what the individual's chromosomes were or were not at the moment of birth,"[128] thereby mandating that a "court may use chromosome makeup as one factor, but not the exclusive factor, in arriving at a decision."[129]

3. *Testing Transsexuals for Participation in Athletic Competition*

In 1977, a breakthrough came in regards to testing transsexuals for participation in athletic events in the landmark case *Richards v. United States Tennis Association*,[130] in which Dr. Renee Richards, a post-operative male-to-female transsexual and successful tennis player formerly known as Richard H. Raskind, sought a preliminary injunction against the United States Tennis Association so that she could

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[124] *Id.* at 230.

[125] The court remarked that Christie's "female anatomy . . . is all man-made" and that "[t]he body that Christie inhabits is a male body in all aspects other than what the physicians have supplied." *Id.* at 231. The court further stated that there was no room for "soft" arguments, for "courts are wise not to wander too far into the misty fields of sociological philosophy" and so ignored the "many fine metaphysical arguments lurking about here involving desire and being, the essence of life and the power of mind over physics." *Id.*

[126] 22 P.3d 1086 (Kan. Ct. App. 2001).

[127] *Id.* at 1110. The court noted that "the evidence in the appellate record to date points to a conclusion that Marshall [the father] knew of the transsexual nature of J'Noel, approved, married, and enjoyed a consummated marriage relationship with her." *Id.*

[128] *Id.*

[129] *Id.* Other factors that trial courts were directed to consider included "gonadal sex, internal morphologic sex, external morphologic sex, hormonal sex, phenotype sex, assigned sex and gender of rearing, and sexual identity." *Id.* Most importantly, the *Gardiner* opinion specified that the list of factors "should not preclude the consideration of other criteria as science advances." *Id.*

[130] 400 N.Y.S.2d 267 (N.Y. Sup. Ct. 1977).

qualify and participate in the U.S. Open as a woman.[131] The New York Supreme Court held that the Association's requirement that Richards pass a sex-chromatin test was "grossly unfair, discriminatory and inequitable, and violative of her rights under the Human Rights Law of this state."[132]

4. *Transsexuals and Title VII of the Civil Rights Act*

Courts have long disagreed over whether "sex" as defined in Title VII[133] denotes merely anatomical sex, or includes gender together with anatomical sex. The earliest cases held that "sex" was to be interpreted narrowly in an anatomical sense, without the implications of gender. In *Holloway v. Arthur Andersen & Co.*,[134] the Ninth Circuit held that a claim of sex discrimination made by a preoperative male-to-female transsexual employee who was dismissed shortly after her name was changed on employment records was not actionable under Title VII.[135] More importantly, the court determined that transsexuals are not a suspect class for Equal Protection purposes because they were not a "discrete and insular minority" and it had not been established that "transsexuality is an immutable characteristic determined solely by the accident of birth."[136]

The second case to address transsexualism and the meaning of sex under Title VII was *Sommers v. Budget Marketing, Inc.*,[137] in which the Eighth Circuit held that a Title VII suit brought by a preoperative male-to-female transsexual who was fired because her employment led to disruption of the work routine was not actionable[138] as the

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[131] Richards had been barred from competing as a woman because the Association made her take a sex-chromatin test known as the Barr body test to determine if she was female, which she could not pass as her chromosomes were male. The court further stated that "it seems clear that defendants knowingly instituted this test for the sole purpose of preventing plaintiff from participating in the tournament." *Id.* at 272. The court concluded that "[w]hen an individual such as plaintiff, a successful physician, a husband and father, finds it necessary for his own mental sanity to undergo a sex reassignment, the unfounded fears and misconceptions of defendants must give way to the overwhelming medical evidence that this person is now female." *Id.* at 273.

[132] *Id.*

[133] 42 U.S.C. § 2000e-2(a)(1)(2002) prohibits an employer from taking adverse employment actions because of an employee's "sex."

[134] 566 F.2d 659 (9th Cir. 1977). Her employer claimed that she was fired because of personnel problems caused by the her transitional appearance.

[135] *Id.* at 662. The statute was not actionable because "giving the statute its plain meaning, ... Congress had only the traditional notions of 'sex' in mind;" the court also noted that several bills introduced to amend the Civil Rights Act to prevent discrimination against "sexual preference" had not been enacted into law. *Id.*

[136] *Id.* at 663 (citing Graham v. Richardson, 403 U.S. 365, 372 (1971)).

[137] 667 F.2d 748 (8th Cir. 1982).

[138] This "disruption" occurred when other female employees threatened to quit if the transsexual was allowed to use the women's restroom. *Id.* at 748-49.

court did "not believe that Congress intended by its laws prohibiting sex discrimination to require the courts to ignore anatomical classifications and determine a person's sex according to the psychological makeup of that individual."[139] Similarly, in *Ulane v. Eastern Airlines*,[140] the Seventh Circuit reversed a federal district court's determination that Eastern Airlines had discriminated against a postoperative male-to-female transsexual pilot who was fired after she returned to work following sex-reassignment surgery, reiterating the now-familiar statement that "Title VII does not protect transsexuals."[141]

On the heels of *Ulane* came *Dobre v. National R.R. Passenger Corp.*,[142] in which a preoperative male-to-female transsexual employed by Amtrak informed supervisors that she was receiving hormone injections to begin the sex-reassignment process and consequently experienced undue employment hardships.[143] The District Court for the Eastern District of Pennsylvania stated that the "term 'sex' in Title VII refers to an individual's distinguishing biological or anatomical characteristics, whereas the term 'gender' refers to an individual's sexual identity."[144] The court also held that transsexualism was not a mental or psychological disorder under the Pennsylvania Human Relations Act because it was not a mental or psychological disorder "inherently prone to limit major life activities."[145]

Dobre was followed by *James v. Ranch Mart Hardware, Inc.*,[146] in which a transsexual alleged sex and disability discrimination under Title VII and the Americans with Disabilities Act of 1990;[147] the *James* court held that "[t]he Americans with Disabilities Act does not recognize transsexualism as a covered disability" as transsexualism "is a condition which is specifically exempted from coverage."[148]

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[139] *Id.* at 749.

[140] 742 F.2d 1081 (7th Cir. 1984).

[141] *Id.* at 1084. After stating that "Congress had a narrow view of sex in mind when it passed the Civil Rights Act, and it has rejected subsequent attempts to broaden the scope of its original interpretation," the Seventh Circuit crudely opined that "it may be that society, as the trial judge found, considers Ulane to be female . . . but even if one believes that a woman can be so easily created from what remains of a man, that does not decide the case." *Id.* at 1086. The court ultimately concluded that "[i]t is clear from the evidence that if Eastern did discriminate against Ulane, it was not because she is female, but because she is a transsexual." *Id.* at 1087.

[142] 850 F. Supp. 284, 285-86 (E.D. Pa. 1993).

[143] She was told that a doctor's note was needed for her to dress as a female, she was required to dress as a male, she was not allowed to use the women's restroom, her supervisor referred to her by her male name, and her desk was moved out of public view. *Id.* at 286.

[144] *Id.* at 286 (citing Holloway v. Arthur Andersen & Co., 566 F.2d 659, 662-63 (9th Cir. 1977)).

[145] *Id.* at 289.

[146] No. 94-2235-KHV, 1994 WL 731517, at *2 (D. Kan. Dec. 23, 1994).

[147] 42 U.S.C. § 12211(b)(1)(2002).

[148] *James*, 1994 WL 731517, at *2.

A different mood began to descend in 1989, when the Supreme Court considered *Price Waterhouse v. Hopkins*,[149] involving a sex discrimination claim brought by Hopkins, a female employee of Price Waterhouse who had been denied a partnership because she needed to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."[150] Justice Brennan announced the court's holding that when a plaintiff in a Title VII action proves that gender played a part in an employment decision, the defendant employer may avoid a finding of liability by proving by a preponderance of the evidence that it would have made the same decision regardless of the plaintiff's gender. Lest there be any confusion over whether gender was actionable under Title VII, Justice Brennan explicitly stated that "Congress' intent to forbid employers to take gender into account in making employment [decisions] appears on the face of the [Title VII] statute," and interpreted the statutory language forbidding employers from acting "in any way which would deprive or tend to deprive any individual of employment opportunities . . . because of such individual's . . . sex" to mean "that gender must be irrelevant to employment decisions."[151]

Likewise, in 1995 in *Maffei v. Kolaeton Industry, Inc.*,[152] the New York Supreme Court held that an employer violated a city anti-sex discrimination ordinance by harassing an employee who changes sex through surgery and hormone treatments. This mood was only strengthened by the Ninth Circuit's decision in *Schwenk v. Hartford*,[153] in which a preoperative male-to-female transsexual sued a state prison guard and other officials under 42 U.S.C. § 1983 and the Gender Motivated Violence Act ("GMVA").[154] The Ninth Circuit first summarized the earlier approach to defining "sex"[155] under Title VII before rejecting this approach, choosing instead to rely upon the Supreme Court's holding in *Price Waterhouse v. Hopkins*[156] that Title VII barred not just discrimination based on the fact that Hopkins was a woman, but also discrimination based on the fact that Hopkins failed "to act like a woman," "to conform to socially-constructed gender expecta-

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[149] 490 U.S. 228 (1989).

[150] *Id.* at 235.

[151] *Id.* at 240.

[152] 626 N.Y.S.2d 391 (N.Y. Sup. Ct. 1995).

[153] 204 F.3d 1187 (9th Cir. 2000).

[154] *See* 42 U.S.C. § 13981 (1994).

[155] *Schwenk*, 204 F.3d at 1201. The court stated that "federal courts (including this one) initially adopted the approach that sex is distinct from gender," and, as a result, "[m]ale-to-female transsexuals, as anatomical males whose outward behavior and inward identity did not meet the social definitions of masculinity, were denied the protection of Title VII by these courts because they were the victims of gender, rather than sex, discrimination." *Id.*

[156] 490 U.S. 228 (1989).

tions."[157] Ultimately, the Ninth Circuit held that, "under *Price Waterhouse*, 'sex' under Title VII encompasses both sex—that is, the biological differences between men and women—*and* gender."[158] As the GMVA paralleled Title VII, "for purposes of these two acts, the terms 'sex' and 'gender' have become interchangeable."[159]

5. *Anti-Cross-Dressing Ordinances and Transsexuals*

Courts have long recognized that preoperative transsexuals who must dress in the clothing of the opposite sex as part of the "real life test" requirement for sex-reassignment surgery[160] may not be prosecuted under city ordinances forbidding citizens to dress as members of the opposite sex. In *City of Chicago v. Wilson*,[161] the Illinois Supreme Court found that an anti-cross-dressing provision was "an unconstitutional infringement of [defendants'] liberty interest[s]" and held that the city's justifications for the provision did not apply to transsexuals such as the defendants.[162] This approach was followed in *Doe v. McConn*,[163] a Texas case with a similar fact pattern.[164] The court determined that the anti-cross-dressing provision was unconstitutional as applied to transsexuals because the "policies and procedures directly inhibit the treatment of the transsexual plaintiffs and their reassignment."[165] The most recent case to address the constitutionality of an anti-cross-dressing regulation came in the rather surprising context of a middle school.[166] In *Doe ex rel. Doe v. Yunits*,[167] the Superior

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[157] *Schwenk*, 204 F.3d at 1201-02.

[158] *Id.* at 1202.

[159] *Id.*

[160] *See* HARRY BENJAMIN, STANDARDS OF CARE, *supra* note 73, at § 4.9.1.

[161] 389 N.E.2d 522, 525 (Ill. 1978).

[162] *Id.* at 525. Two preoperative male-to-female transsexuals were arrested for wearing female clothing because they violated an anti-cross-dressing provision of the Chicago municipal code which prohibited a person from wearing clothing of the opposite sex with an intent to conceal his or her own sex. The court also stated that "we cannot assume that individuals who cross-dress for the purpose of therapy are prone to commit crimes," and reasoned that since "[t]here is no evidence . . . that cross-dressing, when done as part of a preoperative therapy program or otherwise, is in and of itself, harmful to society," "the aesthetic preference of society must be balanced against the individual's well being." *Id.* at 525.

[163] 489 F. Supp. 76 (S.D. Tex. 1980).

[164] Preoperative transsexuals and a treating physician sought declaratory and injunctive relief with regard to a Houston ordinance prohibiting a person from appearing in public dressed "with an intent to disguise his or her true sex as that of the opposite sex." *Id.* at 79.

[165] *Id.* The court further determined that, for a transsexual, wearing the clothing of the opposite sex was "medically and psychologically necessary for the true integration of the body and mind throughout the transition period of the developing gender." *Id.*

[166] A fifteen-year-old student male-to-female preoperative transsexual brought an action requesting that her school not exclude her because of her sex, disability, gender identity, and expression.

Court of Massachusetts not only found that "plaintiff's expression is not merely a personal preference but a necessary symbol of her very identity," but also held that the defendants were "enjoined from preventing plaintiff from wearing any clothing or accessories that any other male or female student could wear to school without being disciplined."[168]

6. *Determining Whether Sex Reassignment Surgery is "Medically Necessary"*

Courts' determinations of whether sex-reassignment surgery was "medically necessary" for transsexuals have serious repercussions not only, in suits seeking reimbursement from Medicaid but also, in actions in which courts must assess the nature of transsexualism as a disorder. In the landmark case *Smith v. Rasmussen*,[169] a female-to-male postoperative transsexual filed suit seeking reimbursement from the Iowa Medicaid program for sex-reassignment surgery after Medicaid initially denied reimbursement on the grounds that the surgery was experimental and not medically necessary. In denying a motion to dismiss filed by the director of the Department of Human Services, the court stated that sex-reassignment surgery was not experimental but was generally accepted in the medical community and concluded that "sex reassignment surgery cannot be excluded from Medicaid coverage on the ground that it is 'experimental.'"[170]

7. *The Rights of Transsexual Prisoners*

In *Meriwether v. Faulkner*,[171] the most frequently cited case dealing with a preoperative transsexual prisoner's right to receive medical

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[167] No. 00-1060-A, 2000 WL 33162199, at *1 (Mass. Super. Ct. Oct. 11, 2000), *aff'd*, Doe v. Brockton School Comm., No. 2000-J-638, 2000 WL 33342399, at *1 (Mass. App. Ct. Nov. 30, 2000).

[168] *Id.* at *3, *8. The language of the opinion seems to imply that the transsexual plaintiff has some sort of interest in her appearance; as the court stated, "[t]his court cannot allow the stifling of plaintiff's selfhood merely because it causes some members of the community discomfort." *Id.* at *7.

[169] 57 F. Supp. 2d 736 (N.D. Iowa 1999).

[170] *Id.* at 770.

[171] 821 F.2d 408 (7th Cir. 1987). The plaintiff in this case was a preoperative male-to-female transsexual who had received nine years of estrogen therapy, who had surgical augmentation of breasts, hips, and facial structure, and who had been living as a female since the age of fourteen was treated as an anatomical male during her incarceration. The transsexual received no hormone treatments and no medical treatment for problems relating to silicon breast implants, was confined to segregated protective custody, and while in the general male prison population was harassed and sexually assaulted. As a result of this treatment the transsexual filed suit, alleging that prison officials had violated her Eighth Amendment right to adequate medical care. *See*

treatment while incarcerated, the Seventh Circuit stated that to prevail the plaintiff must establish "deliberate indifference to serious medical needs."[172] The court also emphasized that "other courts have recognized transsexualism as a 'very complex medical and psychological problem,'" noting that courts have held that sex-reassignment surgery is not cosmetic but medically necessary.[173] The Seventh Circuit ultimately held that the transsexual's complaint stated a serious medical need and a valid claim under the Eighth Amendment which, if proven, would entitle her to some kind of medical treatment.[174] The court emphasized, however, that "she does not have a right to any particular type of treatment, such as estrogen therapy," noting that the only two federal courts to have considered the issue refused to recognize a constitutional right under the Eighth Amendment to estrogen therapy if some alternative treatment is made available.[175] A later Supreme Court case, *Farmer v. Brennan*,[176] articulated the standard that transsexuals must satisfy in order to establish that a deprivation or prison officials' egregious conduct constitutes an Eighth Amendment violation. The Supreme Court held that in order to violate the Eighth Amendment, prison officials' conduct must meet two requirements: the deprivation alleged must be sufficiently serious, and an official must have a state of mind that amounts to "'deliberate indifference' to inmate health or safety."[177]

At least one court has required that an inmate's failure to cooperate with prison officials in the treatment of her gender dysphoria does not give rise to an Eighth Amendment violation. The "deliberate indifference" standard articulated by the Supreme Court was applied in *Long v. Nix*,[178] where the Eighth Circuit held that Long could

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U.S. CONST. amend. VIII. After the district court dismissed her complaint, she appealed, and the Seventh Circuit reversed.

[172] *Id.* at 411 (citing Estelle v. Gamble, 429 U.S. 97, 104 (1976)).

[173] *Id.* at 412.

[174] *Id.* at 413.

[175] *Id.*, (discussing Supre v. Ricketts, 792 F.2d 958 (10th Cir. 1986); Lamb v. Maschner, 633 F. Supp. 351 (D. Kan. 1986)).

[176] 511 U.S. 825 (1994). In *Farmer*, a male-to-female preoperative transsexual who had underwent estrogen therapy, received breast implants, and underwent unsuccessful testicle removal surgery was incarcerated and diagnosed by prison medical personnel as a transsexual; while imprisoned, she wore clothes in a feminine manner and allegedly took hormones smuggled into the prison and was segregated from the male prison population because of misconduct and safety concerns. After being transferred to another penitentiary for disciplinary reasons, she was placed in the general male population and was beaten and raped by a fellow inmate in a cell. Farmer filed suit, alleging that officials had placed her in the general population knowing that she was a transsexual and was vulnerable to assault and so deliberately failed to protect her safety in violation of the Eighth Amendment.

[177] *Id.* at 834 (citing Wilson v. Seiter, 501 U.S. 294, 298, 302-03 (1991)).

[178] 86 F.3d 761 (8th Cir. 1996). A 61-year old male inmate with gender identity disorder who had cross-dressed since an early age requested to be housed in a women's prison, to wear women's clothes, and to receive therapy and a sex change; the inmate claimed that prison offi-

not establish that prison officials were "deliberately indifferent" to his needs as he had "long frustrated the attempts of prison doctors to treat that disorder by his consistent refusal of psychological evaluation over the past twenty years."[179]

Finally, at least one court has held that transsexual prisoners should receive continuing medical treatment while incarcerated. In *Wolfe v. Horn*, the District Court of the Eastern District of Pennsylvania held that "abrupt termination of prescribed hormonal treatments by a prison official with no understanding of Wolfe's condition, and failure to treat her severe withdrawal symptoms of after-effects, could constitute 'deliberate indifference.'"[180]

Prison officials often adopt a policy of "freezing" transsexual prisoners in the prescribed treatment which they were undergoing prior to incarceration; thus, individuals involved in a physician-prescribed hormone therapy regimen would be permitted to continue this treatment while those persons taking black market hormones would not.[181] An extremely recent case may raise the stakes for the provision of medical treatment to incarcerated transsexuals. In *Kosilek v. Maloney*, a transsexual serving a life sentence brought suit to compel Commissioner Maloney of the Massachusetts Department of Corrections to retain a doctor specializing in Gender Identity Disorder and provide prescribed treatments. While the court did not address the question of which treatment the Commissioner was obligated to provide, it did state that it "expects that Maloney will allow qualified medical professionals to recommend treatment. [A]t a minimum psychotherapy with . . . a professional with training and experience concerning an individual with severe GID."[182]

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cials had violated the Eighth Amendment by failing to provide appropriate living conditions and medical treatment and the Fourteenth Amendment by failing to accommodate his gender identity disorder.

[179] *Id.* at 766.

[180] 130 F. Supp. 2d 648, 653 (E.D. Pa. 2001). In *Wolfe*, a male-to-female preoperative transsexual who was receiving hormone therapy and antidepressants at the time of her arrest was incarcerated and continued to receive treatment; after she was transferred to a second and a third facility where her treatment was discontinued, she brought suit against prison officials alleging deliberate indifference to serious medical needs and malpractice. The court denied the defendants' motion for summary judgement, stating that "[w]hen a prisoner has received medical attention and merely questions its adequacy, courts hesitate to second-guess professional judgements under the guise of the Eighth Amendment" and so "have rejected demands for hormonal therapy by transsexuals who did not take hormones outside of the prison setting." *Id.* at 652.

[181] *See* Kosilek v. Maloney, No. CIV.A.92-12820-MLW, 2002 WL 1997932, at *2 (D. Mass. Aug. 28, 2002).

[182] *Id.* at *10. The court further stated that if hormone therapy or sex reassignment surgery were ultimately needed, the Commissioner would have to consider whether security issues would make it impossible "to provide medically adequate care in prison for Kosilek's serious medical need." *Id.* at *5.

III. ARTICULATING A LIBERTY INTEREST IN SELF-DEFINITION

With a comprehensive understanding of the judicial treatment of transsexualism and its implications in various legal contexts, it is now possible to understand how transsexuals possess only a few limited interests, including a liberty interest in dressing in the self-identified sex for therapeutic purposes and a limited right to receive some form of continuing medical treatment for transsexualism while incarcerated. These limited interests, while by no means insignificant, do not arise in an everyday context for the majority of transsexuals, especially for postoperative transsexuals who no longer need to dress in the self-identified sex for therapeutic reasons. Clearly, then, transsexuals still lack the most important liberty interests, and so it is necessary to articulate new liberty interests to ensure that legal determinations of sex are respected so that transsexuals are finally placed on equal constitutional footing with nontranssexuals.

As previously stated, a liberty interest in self-identification has not yet been articulated, but this does not mean that such an interest can not be articulated or that it will never be articulated. If such an interest were to be enumerated, it would most likely emanate from at least one of three possible sources: an equal protection argument that transsexuals are a suspect class, an equal protection argument that transsexuals have a fundamental right to self-identify their legal sex, or a due process decision birthed from the long line of privacy cases establishing the oft-quoted "right to be left alone" first articulated by Justice Brandeis in *Olmstead v. United States.*[183]

A. The Potential of Privacy

In the two major precursors to modern privacy jurisprudence, *Meyer v. Nebraska*[184] and *Pierce v. Society of Sisters,*[185] the Supreme Court used the Due Process Clause of the Fourteenth Amendment to strike down state statutes prohibiting the teaching of foreign languages in elementary schools and requiring that all children attend public schools, respectively. Neither case explicitly articulated a right to "privacy" as such. Further enumeration on a potential right to privacy came in the unlikely guise of Justice Harlan's dissent in *Poe v. Ullman.*[186] Harlan asserted that national tradition should be a guide

[183] 277 U.S. 438 (1928) (reviewing convictions of conspiracy based on tapped telephones that were tapped offsite of the defendant's property).

[184] 262 U.S. 390 (1923).

[185] 268 U.S. 510 (1925).

[186] 367 U.S. 497 (1961) (Harlan, J., dissenting) (challenging the constitutionality of a prohibition on contraceptive devices). Here, Harlan recognized that due process "has represented

for due process decisionmaking, emphasizing that tradition is not static but a fluid "living thing" that includes both "what history teaches are the traditions from which it developed as well as the traditions from which it broke."[187] The right to privacy was first explicitly enumerated by the Supreme Court in *Griswold v. Connecticut*.[188] In *Eisenstadt v. Baird*,[189] Justice Brennan continued what *Griswold* began, holding that under the Equal Protection Clause the privacy right was located in the individual and not in the marital union itself as *Griswold* seemed to suggest.[190] The majority opinion delivered by Justice Blackmun in *Roe v. Wade*[191] permanently located privacy in the Due Process Clause's protection of liberty, where Justice Harlan first placed it in his *Poe* dissent.[192] However, the borders of individual privacy were erected in *Bowers v. Hardwick*,[193] in which Justice White excluded the possibility of a right to privacy that extended to homosexual sodomy, limiting prior privacy cases to narrow classifications.[194] White also enumerated "the nature of the rights qualifying for heightened judicial protection," namely those "fundamental liberties that are 'implicit in the concept of ordered liberty'" and liberties "deeply rooted in this Nation's history and tradition."[195]

Nonetheless, considerable wiggle room exists to articulate a privacy right allowing for self-identification of legal sex. The same private "zone of interest" that prevents state infringement upon some forms of intimate decisionmaking could extend to protect transsexuals' ability to self-identify their own sex. *Bowers* does not speak to whether transsexuals have a privacy right to self-identify their legal sex as it addresses a specific sexual practice in the context of a homo-

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the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society." *Id.* at 542.

[187] *Id.*

[188] 381 U.S. 479 (1965) (reversing the conviction of medical professionals for dispensing birth control to married couples). Here, Justice Douglas stated that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance," and asserted that additional penumbras of the First, Third, Fourth, Fifth, and Ninth Amendments and their "[v]arious guarantees" created additional "zone[s] of privacy." *Id.* at 484.

[189] 405 U.S. 438 (1972). *See also id.* at 453 ("[I]t is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamental . . . as the decision to bear or beget a child.").

[190] *Id.*

[191] 410 U.S. 113 (1973).

[192] WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, SEXUALITY, GENDER, AND THE LAW 33 (1997).

[193] 478 U.S. 186 (1986).

[194] *Id.* at 190. White stated that *Pierce* and *Meyer* "were described as dealing with child rearing and education," *Griswold* and *Eisenstadt* "with contraception," and *Roe v. Wade* "with abortion." *Id.*

[195] *Id.* at 191-92, (citing Palko v. Connecticut, 302 U.S. 319, 325-26 (1937)); *see also* Moore v. East Cleveland, 431 U.S. 494, 503 (1977).

sexual sexual orientation, not sex or gender as fundamental characteristics of personhood. However, the dissenting opinions of Justices Blackmun and Stevens both speak to the universal importance of sexual identity,[196] and Justice Stevens' dissent provides much fertile ground for such a privacy right. If it is true that "[f]rom the standpoint of the individual, the homosexual and the heterosexual have the same interest in deciding how he will live his own life, and, more narrowly, how he will conduct himself in his personal and voluntary associations with his companions," then how much more so does a transsexual have the right to choose her own legal sex, an essential characteristic of personhood?[197] Rights must inhere in individuals simply because they are individual citizens, irrespective of their sexual identity. Rights must arise from personhood, not from sexuality.

Bowers sounded the death knell for claims to privacy in the form of individual autonomy to engage in all forms of sexual acts. In Supreme Court privacy jurisprudence, therefore, privacy has been narrowed to "an essentially conservative idea or value, used in the service of powerful interests to reinforce traditionally condoned relationships and forms of intimacy."[198] In order to articulate a privacy right to self-identification for transsexuals, then, privacy could be reconstructed as a "liberatory value," protecting the individual, not the individual's relations with others.[199] *Bowers*, however, implies that such a rearticulation would not be favorably received by the majority of Justices on the Supreme Court. Getting past this "relational" reading of privacy and recapturing the former emphasis on privacy as an individual right necessitates us to distinguish between *Bowers'* focus on sodomy as intimate behavior shared by two people and an individual's status as a transsexual trapped between sex and gender. *Bowers* focuses on sodomy reconstructed as a dyadic relational behavior. Transsexualism, on the other hand, is a status, not a behavior, that takes place in a unitary, or individual, context. The identity of transsexualism itself, therefore, may provide a way around the behavior/relational conundrum articulated in *Bowers*. Transsexualism is a condition of the self, primarily affecting an individual's self identity as it conflicts with that individual's anatomy. Therefore, the focus may properly be moved from a relational to an individual perspective, from the sexual intimacy shared by two or more people to the one's own unique sexual identity or gender. It is important to realize that courts could not avoid this issue by focusing on transsexual sex acts

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[196] *Id.* at 205 (citing Roberts v. United States Jaycees, 468 U.S. 609, 619 (1984)).

[197] *Id.* at 218-19. After all, as Stevens correctly asserts, "[s]tate intrusion into the private conduct of either is equally burdensome." *Id.* at 219.

[198] PATRICIA BOLING, PRIVACY AND THE POLITICS OF INTIMATE LIFE 103 (1996).

[199] *Id.*

because postoperative transsexuals engage in heterosexual sex; sodomy is not a "transsexual" sex act any more than it is a "heterosexual" sex act.

To further this individualized focus, emphasis should be placed on medicalization of transsexualism. Medical problems experienced by an individual become dilemmas of the autonomous body, of one's Self, not of the Other. A strong analogy could be made between the unique, medicalized situation of transsexuals and the highly medicalized situation of a pregnant Jane Roe in *Roe v. Wade.* Though cases from *Griswold* forward legitimated the medicalization of contraception distribution and availability, this medicalization of intimate decisionmaking culminated in *Roe,* where the Supreme Court defined the state's interest in potential life "physiologically, without reference to the sorts of constitutional considerations that normally attend the use of state power against a citizen," and thus analyzed "an exercise of state power from a medical, rather than a social, point of view."[200] Just as the "facts concerning the physiological development of the unborn provide 'logical and biological justifications' both limiting and legitimating state action," so can the physiological dimensions of transsexualism as a medical disorder legitimate a state's decision to allow transsexuals to control their own autonomous bodies by self-identifying their legal sex within certain articulated limits.[201]

All in all, under current jurisprudence privacy is not conceptually the most effective means of articulating a right for transsexuals to self-identify their legal sex. Drawing attention to transsexualism as a conflict between an individual's internal gender and external sexual organs emphasizes the individual nature of the disorder and so portrays transsexualism as a condition disembodied from society, an affliction of the few that in no way affects the many. Casting transsexualism as a "personal dilemma or matter of one's privacy rights rather than as a systemic dilemma which can be addressed through collective action is disempowering to the individual coping with the dilemma, and depoliticizing and dangerous to the polity that closes off important problems from consideration by declaring them 'private.'"[202] In addition, it is doubtful that articulating a privacy interest to self-identification would address the significant political and cultural obstacles encountered by pre- and postoperative transsexuals.[203]

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[200] Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection,* 44 STAN. L. REV. 261, 276 (1992).

[201] *Id.*

[202] BOLING, *supra* note 198, at 104.

[203] *See id.* at 105. Here, Boling emphasizes that "[a]cceptance, and self-acceptance" of transsexualism requires "the uncovering and confronting of prejudices and forms of social power, the acknowledgement and appreciation of differences in public as well as private, not the pretense of assimilation and passing that privacy promotes." *Id.* at 104-05.

As Boling advocates with respect to articulating a privacy interest regarding homosexuality,

> [p]rotecting privacy would not help us recognize that the "'"freedom to have impact on others—to make the 'statement' implicit in a public identity—is central to any adequate conception of the self"'" or help to allay "'pervasive discrimination . . . ' in public society; it would not itself contribute, nor would it directly empower its beneficiaries to contribute, to 'heightening public awareness of [transsexuality] and thus broaden public acceptance of [these] lifestyles.'"[204]

The overall effect of articulating such a privacy interest would likely "burden" transsexuality with the "'stigma of quarantine.'"[205] This is not to say that transsexuals would be better off without an articulated privacy interest, but that such an interest would have to be carefully articulated so as not to further marginalize those it is supposed to benefit.

If we are to continue our quest for recognition of a privacy right to sexual self-identification, we must recast the current conception of privacy in a different mold. The present notion of privacy is a negative bar against certain intrusions into an individual's zone of privacy. Under a positive conception of privacy centered on the concept of personhood, emphasizing individual autonomy and dignity, one could argue that the right of transsexuals to self-define their legal sex should receive constitutional protection because it is so essential to an individual's concept of self.[206] Such a rearticulation of privacy in-

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[204] *Id.* at 105 (citations omitted).

[205] *Id.*

[206] For an example of how privacy promotes personhood, see Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right to Privacy*, 104 HARV. L. REV. 1419, 1468-69 (1991):

> These privacy concepts have two benefits for advocating the reproductive rights of women of color in particular: the right of privacy stresses the value of personhood, and it protects against the totalitarian abuse of government power. First, affirming Black women's constitutional claim to personhood is particularly important because these women historically have been denied the dignity of their full humanity and identity. The principle of self-definition has special significance for Black women. Angela Harris recognizes in the writings of Zora Neale Hurston an insistence on a "conception of identity as a construction, not an essence . . . . [B]lack women have had to learn to construct themselves in a society that denied them full selves." Black women's willful self-definition is an adaptation to a history of social denigration. Rejected from the dominant society's norm of womanhood, Black women have been forced to resort to their own internal resources. Harris contrasts this process of affirmative self-definition with the feminist paradigm of women as passive victims. Black women willfully create their own identities out of "fragments of experience, not discovered in one's body or unveiled after male domination is eliminated." The concept of personhood embodied in the right of privacy can be used to affirm the role of will and creativity in Black women's construction of their own identities. Relying on the concept of self-definition celebrates the legacy of Black women who have survived and transcended conditions of oppression.
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> While fundamentally different in their history of oppression and the ways in which they have been marginalized, transsexuals clearly have a status analogous to that of Black women; transsexuals too have been denied dignity, full humanity, and indeed a coherent

volves correctly emphasizing transsexuality as an issue concerning sexual identity. As Jed Rubenfield rationalizes, "differences of sexuality, gender, and race exist among us. These are not, however, differences in *identity* until we make them so."[207] Sex and gender are core components of everyone's conception of self, not only that of transsexuals. Therefore, it is imperative that we forego a blind and uninformed biologically-motivated focus on the transsexual as a sexual deviant in favor of a more body-oriented focus centered on the importance of sexual identity to every citizen.

The danger in this perspective is again that the very focus on individualism limits the degree to which such a person-oriented approach could take root. By focusing on individuals, we focus on individual characteristics, and transsexualism, not sex or gender identity per se, is once again elevated as a foremost concern. Using transsexualism as a rallying point is "problematic" in that it exposes "the individual to normalizing pressures on her intimate expression," treating her transsexuality as her "defining political trait."[208] Paradoxically, in focusing on transsexualism we reach injustice in a quest to achieve justice because such a focus portrays sexual identity as the only identity; it is "as if one's sexual identity *were* one's identity as a citizen and as a person."[209]

Clearly, then, making personal traits political has some pitfalls. Because "sexual identity is one aspect, and not always the most important one, of a person's whole self,"[210] what is needed is a "way to recognize and articulate problems first experienced in private or in isolation from others . . . not as a problem of personal biography . . . but as *systemic* problems that affect many or most people in the same situation."[211] Broadening the classification of transsexualism as an issue of sexual identity by framing it as an issue of gender negates the focus on individual identity and does not reduce identity to its sexual aspect. Gender as a series of personal strategies can give rise to a series of political strategies as well. A gendered focus redirects our attention to a universal human characteristic; we all experience gender in different ways, and the socialization of our gender

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(or perhaps any normalized) sexual identity. Transsexuals have adapted by passing while creating their own identities. Affirming the personhood of transsexuals recognizes the community's active resistance of marginalization and the "will and creativity" with which they have persevered in the fight for constitutional rights.

[207] Jed Rubenfield, *The Right of Privacy*, 102 HARV. L. REV. 737, 781 (1989).

[208] BOLING, *supra* note 198, at 142.

[209] *Id.* Ultimately, "[b]y conceiving of the conduct that it purports to protect as 'essential to the individual's identity,' personhood inadvertently reintroduces into privacy analysis the very premise of the invidious uses of state power it seeks to overcome." Rubenfield, *supra* note 207, at 782.

[210] BOLING, *supra* note 198, at 143.

[211] *Id.* at 153.

experiences groups us into subgroups. Those of us whose gender situational subgroup is the socialized "norm" are heterosexual individuals whose gender comports with anatomical sex. Others of us are homosexual individuals whose gender comports with anatomical sex, bisexual individuals whose gender comports with anatomical sex, or transsexual individuals whose gender does not comport with anatomical sex. Seen in this light, transsexualism becomes merely a situational subgroup of people who experience gender in the same way, not a factor that differentiates the holistic notion of "me" from the holistic notion of "you." From this perspective, then, there is not "one" gender experience elevated above "other" deviant gender experiences; many diverse gender experiences share the floor, some normalized through socialization, some normalized in certain contexts, and some not normalized at all. There is no bar, however, on normalization; other gender experiences are being and can continue to be normalized through exposure, education, and the like.

B. The Potential of Equal Protection

The law does not recognize a fundamental right to identify one's legal sex, perhaps because only a small minority ever have the occasion to assert such a right. A fundamental right extends to all persons, not just to a certain subsection of the population. Nontranssexuals have their legal sex identified for them at birth, and, because their gender comports with their anatomical sex, never question this identification. Therefore, without transsexualism as a motivating factor, no legitimate impetus giving rise to a fundamental right of self-identification would exist.

Setting aside the question of a fundamental right, we may now turn to the issue of suspect class. Thus far, transsexuals have not been held to be a suspect class for equal protection purposes.[212] However, this determination was made upon an analysis of transsexuals as a class, not upon an analysis of gender as a suspect classification. In holding that transsexuals were not a suspect class and thus undeserving of heightened scrutiny under an equal protection analysis, the Ninth Circuit in *Holloway* stated that "we find that transsexuals are not . . . a 'discrete and insular minority,'" that "[it has not] been established that transsexuality is an 'immutable characteristic determined solely by the accident of birth.'"[213] This approach to the issue of self-identification, however, is misguided. The issue should be phrased not as whether transsexuals as a class should be treated as

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[212] Holloway v. Arthur Andersen & Co., 566 F.2d 659, 663 (9th Cir. 1977).

[213] *Id.* at 663. The Ninth Circuit further stated that "the complexities involved merely in defining the term 'transsexual' would prohibit a determination of suspect classification." *Id.*

suspect under an equal protection analysis, but whether *gender* as a classification should be elevated to suspect status. Instead of debating whether transsexuals are a discrete and insular minority, or whether transsexualism is an immutable characteristic, the argument should focus on gender as a classification inscribed on the bodies of all citizens, not just transsexuals, a classification that many courts have already decreed is deserving of special protection. Of course, in this sense, gender is disaggregated from biological sex.

Possible models for articulating gender as a classification deserving of heightened scrutiny may be found in Title VII cases in which courts have held that "sex" in the meaning of Title VII includes "gender" as well.[214] In *Price Waterhouse*,[215] Justice Brennan emphasized that including gender as part of "sex" for purposes of Title VII is not a new interpretation: "our assumption always has been that if an employer allows gender to affect its decision-making process, then it must carry the burden of justifying its ultimate decision."[216] Such protection against gender discrimination has already been extended to preoperative transsexuals in the context of Title VII. The Ninth Circuit held in *Schwenk v. Hartford*[217] that discrimination against a male-to-female preoperative transsexual falls within "gender" discrimination under the Gender Motivated Violence Act, which paralleled Title VII. According to this interpretation of "sex," "male-to-female transsexuals, as anatomical males whose outward behavior and inward identity did not meet social definitions of masculinity," are thus as deserving of protection against gender discrimination through sex-stereotyping as Hopkins was in *Price Waterhouse*.

The fact that courts have held that "sex" under Title VII includes one's gender prompts us to realize the possibility of arguing that, like sex, gender should receive heightened scrutiny under an equal protection analysis. In *Frontiero v. Richardson*,[218] the distinction between classes and classifications became blurred when Justice Brennan enunciated why sex should receive heightened scrutiny using the factors[219] articulated under the traditional indicia of suspectness first al-

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[214] *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 258 (1989) (plurality opinion); Schwenk v. Hartford, 204 F.3d 1187, 1202 (9th Cir. 2000).

[215] 490 U.S. 228 (1989).

[216] *Id.* at 248. *Price Waterhouse* is also particularly relevant as it deals not only with issues of gender discrimination, but more specifically with sex stereotyping, or making determinations on how an individual should act on the basis of her gender. For example, "an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender" in a sex-stereotyping context. *Id.* at 250.

[217] 204 F.3d 1187, 1200 (9th Cir. 2000).

[218] 411 U.S. 677, 683-87 (1973).

[219] These factors include whether a class is "saddled with disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerless-

luded to in *United States v. Carolene Products Co.*[220] Brennan stated that "sex, like race and national origin, is an immutable characteristic, determined solely by the accident of birth" and that "the sex characteristic frequently bears no relation to ability to perform or contribute to society."[221] Brennan further noted that "over the past decade, Congress has itself manifested an increasing sensitivity to sex-based classifications."[222]

In *Watkins v. United States Army*,[223] the Ninth Circuit applied these same factors in finding that homosexuals constituted a suspect class. Even though this initial decision was reversed *en banc* in the following year,[224] the Ninth's Circuit's reasoning and application of suspect class criteria remains noteworthy. The *Watkins* court considered factors routinely utilized in Supreme Court jurisprudence, including considerations of purposeful discrimination involving gross unfairness,[225] which is determined by considering factors such as the trait's impact upon performance and immutability.[226] Perhaps Watkins' most significant jurisprudential contribution is defining what traits are immutable. In discussing the immutability of homosexuality, the Ninth Circuit first stated that immutability was not in and of itself a defining criterion.[227] *Watkins* also distinguished among three different types of immutability: "'strict' immutability, in which the bearer must be unable to change the trait; 'effective' immutability, in which changing the trait is possible but difficult; and 'personhood' immutability, in which the bearer's ability to change the trait is irrelevant, as long as it is central to her identity."[228] According to *Watkins*, strict immutability

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ness as to command extraordinary protection from the majoritarian political process." San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 28 (1973).

[220] 304 U.S. 144, 152 n.4 (1938) (suggesting that judicial intervention to protect discrete and insular minorities is more appropriate the less power they have in the political process).

[221] *Frontiero*, 411 U.S. at 686.

[222] *Id.* at 687.

[223] 847 F.2d 1329 (9th Cir. 1979), *rev'd en banc*, 875 F.2d 699 (9th Cir. 1989).

[224] 875 F.2d 699 (9th Cir. 1989).

[225] 847 F.2d at 1345-46. Explicitly, these factors include "whether the group at issue has suffered a history of purposeful discrimination" and "whether the discrimination embodies a gross unfairness that is sufficiently inconsistent with the ideals of equal protection to term it invidious." *Id.*

[226] *Id.* at 1346. Factors for determining gross unfairness are listed as "whether the disadvantaged class is defined by a trait that 'frequently bears no relation to ability to perform or contribute to society,'" "whether the class has been saddled with unique disabilities because of prejudice or inaccurate stereotypes," and "whether the trait defining the class is immutable." *Id.*

[227] *Id.* at 1347 ("The Supreme Court has never held that only classes with immutable traits can be deemed suspect.").

[228] Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell,"* 108 YALE L.J. 485, 494 (1998).

has only a limited usefulness.[229] Ultimately, the Ninth Circuit opted for a less strict formulation of personhood immutability.[230]

Extending the aforementioned indicia of suspect classes to gender as a suspect classification is not in the least problematic. Gender characteristics are highly visible for transsexuals just as sex characteristics are for women, and indeed, are even more so, for the inconsistencies between internal gender and external sex organs that characterize transsexuals heightens the visibility of transsexuals' sex and gender characteristics and transforms matters of everyday life such as which restroom to use into unique and crucial issues. In addition, gender is an immutable characteristic, as the Supreme Court stated in *Parham v. Hughes*,[231] its immutability is simply not often considered by those whose gender is harmonized with anatomical sex. Such individuals do not confront the fact that gender cannot be changed because they do not seek to change it. Transsexuals have learned, however, that while gender cannot be changed, sex can. Thus, in addition to seemingly constituting a strictly immutable characteristic, the immutability of gender is also ensured under the *Watkins* standard of "personhood" immutability; gender is certainly a trait that is so fundamental to one's identity that it cannot be changed, only denied, and it would be "abhorrent" to suggest that one deny one's gender. Refusing to permit any transsexual to self-identify her legal sex is tantamount to penalizing that transsexual for refusing to change her gender. Gender is also not related to one's ability to perform or contribute to society. Finally, courts have shown increasing

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[229] *Watkins*, 847 F.2d at 1347. ("[T]he Court has never meant strict immutability in the sense that members of the class must be physically unable to change or mask the trait defining their class," using transsexualism as an example in that "people can have operations to change their sex.").

[230] *Id.* Personhood immutability "may describe those traits that are so central to a person's identity that it would be abhorrent for government to penalize a person for refusing to change them." *Id.*

[231] 441 U.S. 347 (1979) (holding that (1) a Georgia statute—which precluded a father who did not legitimate his child from suing for that child's wrongful death—did not violate the Equal Protection Clause when it imposed differing burdens or awarded differing benefits to legitimate and illegitimate children; (2) the statute was not invidiously discriminatory against males; (3) the statutory classification was a rational means of dealing with problem of proving paternity; and (4) the statute did not violate the Due Process Clause). *Parham* described race, national origin, age, illegitimacy, and gender as immutable:

> And the presumption of statutory validity may also be undermined when a State has enacted legislation creating classes based upon certain other immutable human attributes. *See, e.g.*, Oyama v. California, 332 U.S. 633 (1948) (national origin); Graham v. Richardson, 403 U.S. 365 (1971) (alienage); Gomez v. Perez, 409 U.S. 535 (1973) (illegitimacy); Reed v. Reed, 404 U.S. 71 (1971) (gender).

Id. at 351.

sensitivity to gender-based classifications, and have even expanded "sex" to include "gender" in Title VII litigation.[232]

Using gender as a suspect classification may seem like a back-door approach to establishing that transsexuals are a suspect class. However, this is not so, as transsexuals are a unique group whose gender is inconsistent with anatomical sex. Clearly, transsexuals' need to articulate their legal sex and gender must not only be recognized as being distinct from that of nontranssexuals, but also must be addressed separately from the concerns of the nontranssexual population whose gender is not incongruent with anatomical sex.

C. Articulating a Potential Liberty Interest

The previous section detailed many constitutional strategies by which a liberty interest in legal sex self-definition could be articulated. It is now necessary to identify the more concrete legal vehicles though which any such liberty interest should be recognized and articulated. This requires a careful balancing of two equally competing considerations: the transsexuals' interest in equity and privacy and the legal need for consistency, objectivity, and an articulated standard for decisionmaking. Three possible paths to articulating a potential liberty interest readily suggest themselves. First, courts could adopt a uniform policy of self-definition, allowing all preoperative and postoperative transsexuals to self-define their legal sex. Second, courts could reject the idea of a transsexual liberty interest in self-identification, and consider numerous factors as in *In re Estate of Gardiner* when making a decision as to an individual's sex, including but not limited to "gonadal sex, internal morphologic sex, external morphologic sex, hormonal sex, phenotype sex, assigned sex and gender of rearing, and sexual identity," in addition to chromosomal makeup.[233] Finally, as they have in the past,[234] courts could adopt an entirely objective approach to defining legal sex, where a transsexual's sex would be defined as the anatomical sex of that individual at birth.

In order to realize the strengths and shortcomings of each of these approaches, it is necessary to consider each in the context of sex and gender. The concept of "sex" is never merely an issue of anatomy and biology, but is comprised of and subject to a host of other cultural and sociological factors. The dominant paradigm of

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[232] *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 258 (1989) (holding that gender may not be a motivating factor in an employment decision in a Title VII case); Schwenk v. Hartford, 204 F.3d 1187, 1202 (9th Cir. 2000).

[233] 22 P.3d 1086, 1110 (Kan. Ct. App. 2001).

[234] *See, e.g.*, Corbett v. Corbett., 2 All E.R. 33 (P. 1970) (finding respondent to be male because he was a biological male from birth for purposes of declaring a marriage void).

sex determination, however, still provides that "anatomy is destiny without possibility of change or transcendence."[235] As we have already seen that sex as a meta-concept is based on socio-cultural factors just as much as it is based on biology, it follows that "it is the social construction of the body and its meaning that is the primary source of enslavement," not merely a body's anatomical characteristics.[236] Thus, though it absolutely should not, the "biological body dictates the social ascription of gender from birth to the grave from which the transsexual psyche struggles to be free."[237] The very nature of transsexualism proves that that mysterious and somewhat enigmatic component of sex known as "gender" is separate from anatomical sex, and indeed has the potential to directly oppose anatomical sex. If gender was merely a function of sex, then transsexualism could never exist, for gender could never be divergent from anatomical sex. Most significantly, it is impossible to deny that the transsexual's plight is unfortunately eloquent testimony to the heartbreaking and life-rending consequences that arise because an individual's gender is not dictated by anatomical sex alone. These factors compel us to recognize not only that sex and gender are separate constructs, but also that it is perfectly plausible for anatomical sex and gender to diverge, and therefore that equity demands that the law go far beyond mere anatomical characteristics in determining the legal sex of a transsexual by considering sex *and* gender together. However, we must also recognize that the law has a very real interest in consistency, objectivity, and accuracy in determining an individual's permanent legal sex for purposes such as official recordkeeping and determining eligibility for a marriage license.

Currently, transsexual legal advocates "insist that they have the need and right to determine their own gender."[238] However, adopting an entirely subjective approach of allowing both preoperative and postoperative transsexuals to self-identify their own sex is a highly problematic solution to the conundrum of defining legal sex. While this certainly is a very equitable approach for transsexuals, this is an unsteady locus for the law as it undermines consistency, objectivity, and accuracy. If courts allowed all transsexuals to self-define their legal sex, then at what point would a transsexual become for all intents and purposes a member of her self-identified sex? Would it be at the moment of diagnosis? Would it be after the transsexual has begun hormonal therapy? Or would it be after sex-reassignment surgery has been completed, and a transsexual has the genitalia and secondary

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[235] EDWARDS, *supra* note 11, at 10.

[236] *Id.*

[237] *Id.*

[238] Weiss, *supra* note 40, at 168.

sex characteristics of his or her self-identified sex? The difficulty in pinpointing an exact moment when one "is" legally a member of one's self-identified sex is indeed daunting.

In addition, allowing preoperative transsexuals to self-define their legal sex would ironically overemphasize the importance of gender in relation to anatomical sex. It is readily apparent that sex and gender are two separate concepts that *together* determine an individual's sexual identity. A preoperative female-to-male transsexual's external female genitalia certainly affect her sexual identity simply because they conflict with her internal male gender. Allowing her to self-identify as a male would legally harmonize a severe physical and psychological conflict between sex and gender, a conflict which perhaps should first be resolved by sex-reassignment surgery.

Recalling the discussion of social constructivist perspectives on sex and sexual identity and the body-as-text in Part I,[239] powerful grounds for rejecting an entirely subjective self-identification policy exist that emerge out of the relationship between subjectivity and objectivity itself. We have seen that a subjective theoretical explication of sex and gender is a powerful tool for elucidating the natures of and relationship between the subjective and the objective. Although such an approach clearly applies in the realm of the theoretical, in practice its productivity and utility wither away. Currently, the practices of constructivist scholars (likened to the subjective) and those of judges (likened to the objective) are at cross purposes; the need for consistency and order in the law limits the applicability of the subjective approach in contemporary jurisprudence. Constructivist scholars who are at home in the realm of the subjective are familiar with the very same social theory of sign, discourse, and text that we explicated earlier. Because they are aware of the inner workings of the same social theory, they know that they are reading, interpreting, and reconstructing sign, text, and discourse. Scholarship requires its members to consciously manipulate sign, text, and discourse in a manner that only those familiar with the existence and principles of theoretical tools can do. Constructivist scholars are aware of these workings on a theoretical level, on an abstract plane divorced from the tangible physical plane. The theoretical nature of the "reality" of subjectivity is not that "reality" in which we live; it is an ideational reality of Platonic forms.

Judges, however, must embrace and solve disputes that arise in the practical physical world and must take signs, text, and discourses for what they are—dress, mannerisms, people, ideologies—and interpret them in almost all instances without the theoretical awareness of the

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[239] *See supra* Part I.

nature of that interpretation. Judges confront sign, text, and discourse *with* the interpretive baggage that comes from social experiences in the life-world, but *without* the theoretical semiotic baggage that scholars lug around as sense-making tools of the trade. Judges assign sex and gender to transsexual parties much as we assign sex and gender to persons we meet, albeit in a more articulated and reasoned manner. As Susan Etta Keller emphasizes, "when making determinations regarding the gender claims of litigants, judges are involved in a process similar to everyday gender attribution—the method by which we continuously decide whether someone is male or female."[240] Surely it would be impractical for all judges to be trained in such theoretical manners before they assumed the bench. Therefore, judges' capacity for conscious manipulation of sign, text, and discourse is much smaller than that of the scholar adept at such semiotic sculpture. Moreover, when judges determine an individual's sex for purposes of marriage or a change of sex on a birth certificate, they are not making a determination of what sex that individual is *socially constructed* as, but a factual determination of anatomical sex. Therefore, the inquiry is reduced to biological sex and does not involve the theoretical metaconcept of sex that entails a biological nexus and the interplay of the biological and the social. As such, judges need not and most do not even enter the theoretical realm of the subjective to make determinations of sex that are usually based on objective, independently verifiable criteria such as chromosomes and external genitalia.

Additionally, if judges make determinations of legal sex in much the same manner as each of us interprets and attributes gender to strangers we encounter each day,[241] they are just as vulnerable to ignorance and the stereotypes and stigmatizations that surround the transsexual as other laymen. Transsexualism is not an issue that confronts the average legal practitioner, and is most often relegated to the outskirts of social awareness as a deviant or freakish form of sexuality. Instances of discrimination against transsexuals, if people have heard of them at all, are not as familiar as claims of discrimination based on race or sex. Most people never stop to consider the everyday struggles that transsexuals overcome and the pervasive discrimination and bias they must endure; those who do confront them in a context that is at the very least fraught with heteronormativity and perhaps moral baggage as well. Thus far, judges have been able to utilize their discretion in determining legal sex, and there exists very little consensus of opinion on exactly how to make such determina-

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[240] Susan Etta Keller, *Operations of Legal Rhetoric: Examining Transsexual and Judicial Identity*, 34 HARV. C.R.-C.L. L. REV. 329, 341 (1999).

[241] *Id.*

tions. Therefore, at this socio-cultural point in time it is ill-advised to adopt a subjective approach to determining legal sex because the pervasive perception that one's birth sex always dictates one's gender is simply too appealing an argument to ignore, to the peril of transsexuals whose constitutional rights are largely riding on judicial empathy.

For similar reasons, it should be obvious that a judicial approach that considers only birth sex or chromosomal makeup is far worse than a liberal policy of self-identification for all transsexuals. Defining both preoperative and postoperative transsexuals' sex by birth sex alone is not only grossly unfair to transsexuals, but also ignores the basic tenet that "sex" is not merely a function of anatomy and biology.[242] More importantly, this distinction exiles gender to a nether realm of inconsequentiality, thus condemning even postoperative transsexuals to imprisonment in a strange sexual body that is absolutely incompatible with their gender. Ultimately, defining legal sex by birth sex or chromosomal makeup alone does not facilitate the legal goals of objectivity, consistency, and accuracy, but instead undermines these objectives. For instance, this policy would mandate that a postoperative male-to-female transsexual who now has the external genitalia and secondary sex characteristics of a female would still be classified as an anatomical male despite the absence of a penis. This would clearly be an egregious inconsistency, one that would turn a blind eye to the transsexual's objectively ascertainable female genitalia and secondary sex characteristics, and be unforgivably disrespectful of the transsexual's sexual autonomy and her laudable resolve and courage.

Now that we have cast aside the two most extreme approaches favoring liberal self-identification of sex and determination based solely on chromosomal makeup or birth sex, we are left with one policy: a method whereby courts would consider a wide variety of factors, including chromosomal makeup, in determining legal sex. There are obvious advantages and drawbacks to this method. If courts adopt the multi-factor approach to sex definition, it would ostensibly apply to preoperative transsexuals as well as postoperative transsexuals, and would thus be more equitable. However, courts now have little guidance on how much weight to accord each factor in making a determination of legal sex, and it is very probable that many courts would allot external factors such as anatomical sex or chromosomal makeup more weight than internal factors, bringing the approach uncomfortably close to the inequitably narrow birth sex/chromosomal makeup method rejected earlier. This method would also allow

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[242] *See, e.g.*, Franke, *supra* note 12; Greenberg, *supra* note 10.

courts much discretion in making legal determinations of sex, which would be an uncomfortable and invasive process for transsexuals at best, and unjustifiable as a state police power to protect health, welfare, safety, and morals at the worst. Therefore, because this approach is so unsatisfactory as well, we must dig deeper to uncover a more appropriate approach.

D. Toward a More Objective Approach to Legal Determination of Sex

We can begin to conceive of another, more objective approach by examining cases in which judges have sought to apply objective approaches, albeit in differing contexts. Ironically, Justice Scalia has articulated unique approaches towards sexual issues in two cases that have come before the Court in recent years. In the same-sex harassment case *Oncale v. Sundowner Offshore Services*, Justice Scalia, writing for the majority, advocates the adoption of an objective approach to determining what constitutes sexual harassment through the adoption of the reasonable person standard.[243] In his dissent in *Romer v. Evans*, Scalia stated that it was constitutionally within the ability of the state-wide community to pass legislation preventing homosexuals from obtaining special treatment.[244]

If we combine Scalia's emphasis on objective criteria in *Oncale* with his emphasis on the free will of local communities to legislatively determine the dominant mores of that community set by usage and custom, we can begin to articulate the foundations of a solid objective approach to jurisprudential determinations of sex and sexual identity. In developing our approach, we must first broaden Scalia's use of the word "community" so that our objective determinations are not based upon usage and custom in a given community; such an approach would undermine the consistency of standard we are striving for and would burden considerations of equity and fairness as well. Instead, we must base the objective determination of sex and sexual identity upon the customs as well as the dynamic and evolutive con-

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[243] Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 81 (1998) ("[W]e have emphasized, moreover, that the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering 'all the circumstances.'").

[244] Romer v. Evans, 517 U.S. 620 (1996). As the dissenting opinion states: "the constitutional amendment here before us is . . . rather a modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores against the effects of a politically powerful minority to revise those mores through use of the laws." *Id.* at 636. Scalia further explains that

> the people of Colorado have adopted an entirely reasonable provision which does not even disfavor homosexuals in any substantive sense, but merely denies them preferential treatment. Amendment 2 is designed to prevent piecemeal deterioration of the sexual morality favored by a majority of Coloradans, and is not only an appropriate means to that legitimate end, but a means that Americans have employed before.

Id. at 653.

cepts of a larger community of discourse; common law precedent and statutory indicia of legislative will.[245] The nature of the legal institution itself underscores the appropriateness of this approach.[246] Thus far, the majority of jurisdictions have memorialized the traditional conception of heterosexual marriage by refusing to allow preoperative transsexuals to self-identify their own sexes. This harmonizes the chronicle of law with statutory indicia of legislative will, for as previously discussed, most states allow only postoperative transsexuals to change their legal sex on their birth certificate and other official documents. At this point in time, it would be improper to allow preoperative transsexuals to self-identify their own legal sex, for "the ju-

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[245] Science is no stranger to the law, either; the scientific community has been sanctioned as an authority on matters of sex determination since the issue first came before the courts, which have consistently deferred to psychology and other mental health professions in understanding transsexualism, and have also deferred to medical science in determining when sex reassignment surgery was "medically necessary" instead of merely "experimenta." *See* Miller v. Whitburn, 10 F.3d 1315, 1320 (7th Cir. 1993) (defining an "experimental" procedure in the medical profession as "whether the service has come to be generally accepted by the professional medical community as an effective and proven treatment for the condition for which it is being used."); Smith v. Rasmussen, 57 F. Supp. 2d 736 (N.D. Iowa 1999) (where evidence supports sex-reassignment surgery as "medically necessary" for treatment of transsexuals). However, the same debate between the subjective and objective at issue here is raging in the scientific and medical communities in a different context that should be the subject of another paper.

[246] Law is but a museum of texts; its body of discourses reflects and mirrors the practices and ideologies of the cultures that eddy about and through its pronouncements. Most times law travels with the slow-paced caravan, not as an express courier of change; "[l]aw may confirm, it does not initiate." Larry Catá Backer, *Chroniclers in the Field of Cultural Production: Courts, Law, and the Interpretive Process*, 20 B.C. THIRD WORLD L.J. 291, 292 (Spring 2000). This is because "law exists within and reflects the culture from which it operates;" precedent and statutory provisions have not evolved independently of ideology, society, and culture but instead have developed hand in hand with such forces. *Id.* Modern justices, then, are "chroniclers of the norms through which people sharing a common culture understand themselves," and "the primary function of courts is to identify cultural practice and then to memorialize that practice as law." *Id.* at 292, 294. Once altered, pronouncements of law limit and define their subjects, eliciting determinations of what something is or is not. As cultural practice changes, the law becomes a forum for controversy and confrontation as diverse voices strive to preserve the insights of the present for posterity, to transform the "what is" into the "what will be." Backer posits that in a "culturally prophetic sense . . . courts exist as the place for the struggles and contestations which may produce cultural movement." *Id.* at 294. "To the victor of these struggles belongs a greater authority to pronounce convincingly those standards/patterns/models of the normal which may be enforced by the countless disciplines marshaled by society for that purpose." *Id.* at 295. Not all confrontation elicits change; often courts act as a kiln that subjects newly molded principles to heated debate, producing a hardened theory of law that holds water. Modern law is essentially the product of the negotiations of a few. This process of memorialization "stabilizes the court's message and makes it appear immutable." *Id.* at 301. However, the solidity of these legal edifices is misleading; "the fact of memorializing does *not* make more solid or enduring that which was memorialized . . . . [It] cannot slow the process of the production and reproduction of culture . . . . preserves a record of shared norms at the time of their making." *Id.* at 301-02.

diciary cannot successfully compel radical change" as the legislature can.[247] "Change must come first; law follows."[248]

Therein lies the best solution to articulating a liberty interest in self-identification, one that has already been adopted by the representatives of the vast majority of states and therefore, because of the democratic process, conceivably woven into the cultural cloth of those jurisdictions. If the current statutory policy of postoperative transsexual self-definition that is currently in place in a majority of states is extended to *all* legal determinations of sex, the result would be a modified policy of self-definition for every legal context in which only postoperative transsexuals would be permitted to self-define their legal sex. In other words, only those transsexuals whose gender was harmonized with anatomical sex and secondary sex characteristics would be legally recognized as members of their self-identified sex. As will be seen, this approach simultaneously protects the equity that is owed to transsexuals and safeguards the interests of the law in consistency, objectivity, and accuracy.

It may at first appear inequitable to allow postoperative transsexuals and not preoperative transsexuals to exercise this legal privilege. However, as sex reassignment surgery is quite obviously the "medically necessary"[249] treatment for transsexualism, and is not simply experimental, one could state that sex reassignment surgery is the final therapeutic goal for every transsexual. Therefore, like other legal "disabilities" such as infancy, preoperative transsexualism would be legally curable, remedied upon the successful completion of sex-reassignment surgery. Medical personnel and psychologists, not courts, are best able to tell when a transsexual is ready to live as a member of the self-identified sex. Currently, medical requirements already exist which require preoperative transsexuals to complete several procedures before proceeding with sex reassignment surgery, including hormone therapy and the completion of a "real-life test," in which the transsexual lives as a member of the self-identified sex for a long period of time, usually at least a year.[250] If a transsexual has not yet fulfilled the requirements for sex-reassignment surgery, then it is very likely that those medical authorities most "in the know" would opine that she is not yet ready to live permanently in her self-identified sex and therefore should not yet be legally recognized as a member of that sex.

Of course, this policy is not perfect, and indeed a perfect policy cannot yet be articulated or implemented, for such a policy would

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[247] *Id.* at 298.

[248] *Id.* at 306.

[249] *See* Smith v. Rasmussen, 57 F. Supp. 2d 736 (N.D. Iowa 1999).

[250] *See* HARRY BENJAMIN, STANDARDS OF CARE, *supra* note 73, at § 4.9.1.

somehow allow all transsexuals, whether preoperative or postoperative, to self-identify their own legal sex, something which is not possible in today's social and legal climates. For better or worse, the law is a product of a majoritarian socio-cultural context in which sex is defined in binary terms of male and female, and even the most liberal sex expectations decree that those with internal male gender should have a penis and testes, and those with internal female sex should have a vagina. In other words, law, like society, defines sex not by one's internal gender alone but by a combination of anatomical sex characteristics and internal gender. Biological and anatomical characteristics by their very nature play a pronounced role in such determinations.

Society can only evolve to the point where the focus is on individuals, and not their anatomy, after the prerequisites for social roles and statuses such as marriage evolve beyond sex. It will take much time for such a position to become accepted, and still more for it to become the law of the land. Until then, it is more productive to utilize the system against itself and seek to expand it so that at least postoperative transsexuals may obtain legal recognition of their new sex; it would be counter-productive to the interests of transsexuals to deny all transsexuals the right to live in their self-identified sex. Working within the system entails, of course, the acceptance of a definition of sex that considers biological characteristics as well as gender. After all, the law's "central concern has been to order rights, duties, remedies around the gender of citizens rather than around citizens *per se*."[251] Currently "[i]t is precisely the organisation [sic] of sex differences on biological essentialist criteria, and the rigidity of the legal construction of sex determination and indeed sex designation itself, which functions to exclude transsexuals."[252] However, if we elbow biological determinations and anatomical characteristics aside to make ample room for gender at the card table of constitutional rights, then gender may put its own cards on the table and finally play a role that is increasingly equal with–and hopefully eventually superior to–that of anatomical sex. Thus, adopting a policy allowing postoperative transsexuals to self-define their own legal sex will give us a position on the cliff-face from which we may agitate for other social and legal transitions.

In addition, if we accept that gender is a socio-cultural construction, we must necessarily accept that it is performative, like any other type of social behavior. If we apply gender as a performative concept to postoperative transsexuals, we see that these individuals have already "performed" a full transition from one gender to another, in-

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[251] EDWARDS, *supra* note 11, at 12.

[252] *Id.*

cluding forsaking their birth anatomy in favor of surgically constructed external organs. No legal authority should have the power to deny transsexuals who have undergone this difficult and arduous process the ability to live in their new sex.

It is extremely significant that this approach is already ostensibly in place in the many states that allow postoperative transsexuals to change their legal sex on their birth certificate and other official documents. The statutory adoption of this policy in one context of legal sex determination greatly supports its adoption in *all* contexts of legal sex determination. Moreover, the current application of this modified self-definition policy demonstrates that it is acceptable to the representatives who are elected to speak for the communities in which it is applied, and therefore by democratic proxy to those citizens who live in those communities. Therefore, by extending this approach to *all* legal determinations of sex, a court would not be usurping legislative power or acting against communal mores as the will of the people, theoretically represented by state legislatures, has already adopted the policy in one context. After all, this policy is already a cultural practice, and is already memorialized in law.

Some may argue that this approach medicalizes instead of legalizes definitions of sex, assigning to the medical community determinations that should be within the discretion of the courts. It is easy to recognize, however, that the medicalization of legal sex determination is an asset, not a liability. In *Griswold, Eisenstadt,* and *Roe,* the Supreme Court itself has defined the special role that physicians play in intimate matters and deferred to physicians and members of the medical community concerning issues of contraception and abortion. This entails a legal recognition that medical professionals are experts in areas where most judges are not. By determining that sex-reassignment surgery is the key to legal recognition of self-identified sex, "legal recognition serves to endorse and retrospectively legitimate a medical model with inbuilt notions of gender and sexuality."[253] Courts have continued to define transsexualism through medical constructions and have resorted to medicine in holding that transsexualism was a serious medical need and that sex-reassignment surgery was a medically necessary procedure. Even the law cannot remove transsexualism from its medical context and re-embed it in a social nest in which it would be perceived by the majority of uninformed Americans as merely another social ill undeserving of legal protection.

Others may question the efficacy of sex-reassignment surgery itself as a viable means of treatment. Deferring to the medical community,

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[253] Sharpe, *supra* note 6, at 32.

numerous courts have recognized that sex-reassignment surgery is medically necessary and indeed is the only successful treatment for transsexualism.[254] While there is no question that sex-reassignment surgery is at best painful and distressing, it currently is the preferred treatment for transsexualism, and so it cannot be properly termed mutilation.

This reliance upon a medical model also comports with the nature of transsexualism as primarily affecting sexual identity, not sexual orientation. As Sharpe suggests, "[i]n the context of sexuality, law presupposes that medicine has already established the heterosexuality (in the psychological sense) of the post-operative transsexual who stands before the court and asks for legal recognition of her sex claims."[255] This correctly implies that it is not a heterosexual orientation that defines legal recognition of sex but gender as it is permanently and publicly harmonized through sex-reassignment surgery. This emphasis upon gender as the determining factor illustrates that "heterosexual desire by itself has proved insufficient for legal recognition."[256] In reality, legal determinations of sex that rely upon the fulfillment of medically imposed requirements and the successful completion of medically endorsed surgical procedures inherently involve both determinations of heterosexual desire and the actual capacity to satisfy this heterosexual desire. By using sex-reassignment surgery as the point upon which a transsexual's self-identified sex is legally recognized, a court is automatically relying upon the medical determination that a heterosexual orientation is in place, for that determination is made by the medical community before sex-reassignment surgery is performed. While "legal recognition of transsexual sex claims has proved conditional upon the establishment of heterosexual desire (presumed to be established within the medical arena) and heterosexual capacity (demonstrated by specific surgical procedures),"[257] the establishment of heterosexual desire and capacity has been properly subordinated to questions of gender that trigger the transsexual diagnosis and are the catalyst of therapy, from hormones to sex reassignment.

Finally, relying on a medical model also protects the privacy interests of transsexuals. A transsexual's physician is, by nature of the pa-

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[254] *See* Doe v. State Dept. Public Welfare, 257 N.W.2d 816 (Minn. 1977) (holding that the total exclusion of transsexual surgery from eligibility for medical assistance payments was void, that standard of medical necessity requiring applicant for benefits to prove by conclusive evidence that requested medical treatment will eliminate disability and render applicant self-supporting was invalid, and that Welfare Department's determination to deny medical assistance benefits to adult male transsexual was arbitrary and unreasonable).

[255] Sharpe, *supra* note 6, at 32.

[256] *Id.*

[257] *Id.* at 33.

tient-client relationship, intimately acquainted with the individual's anatomy and medical record. It is easier, less embarrassing, and certainly less personally invasive for a doctor to certify that sex reassignment surgery has been completed and that the transsexual is now anatomically a member of the opposite sex than for the courts themselves to make this determination. A judge could hardly order a transsexual to disrobe in the middle of a court proceeding to prove to every curious and unbelieving eye the objective fact of her new sex.

The largest criticism of this policy would most likely be that it endorses same sex marriage, which is forbidden in all states. The historical argument against sex self-identification lies in the secular definition of marriage itself. Marriage is frequently viewed as "the keystone in the arch of civilization,"[258] and the Supreme Court itself has stated that marriage "is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress."[259] Critics of sex self-identification claim that permitting transsexuals to self-identify their own sex would allow a male-to-female postoperative transsexual to marry another male, someone of his own birth sex. This would directly violate the many legislative statutes that decree marriage to be between male and female, often for the purposes of procreation. Critics such as Bennett[260] note that it would also be a direct strike at the ancient institution of marriage itself which lies at the root of our society; if we blight this root by allowing sexual self-identification, critics claim, the root will wither and die.

Marriage has long been the legal province of the legislature.[261] In order to understand the criticism that such a self-identification policy would endorse same-sex marriage, it is necessary to examine *Baehr v. Lewin*[262] and the Defense of Marriage Act.[263] When *Baehr v. Lewin*, the Hawaii same-sex marriage case, was still pending before the Hawaii Supreme Court, Congress clearly articulated its position on same-sex marriage in the Defense of Marriage Act passed to "defend the insti-

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[258] William Bennett, . . . *But Not a Very Good Idea, Either*, WASH. POST, May 21, 1996, at A19.

[259] Maynard v. Hill, 125 U.S. 190, 211 (1888).

[260] *See* Bennett, *supra* note 258.

[261] As Bennett states:

> Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature. That body prescribes the age at which parties may contract to marry, the procedure or form essential to constitute marriage, the duties and obligations it creates, its effects upon the property rights of both, present and prospective, and the acts which may constitute grounds for its dissolution.

Id. at 205.

[262] 852 P.2d 44 (Haw. 1993).

[263] Defense of Marriage Act, H.R. REP. NO. 104-664 (1996).

tution of traditional heterosexual marriage."[264] The third section of the Act defines "marriage" as "only a legal union between one man and one woman as husband and wife," and "spouse" as "only a person of the opposite sex who is a husband or wife."[265] The Act was motivated in part by the *Baehr* conundrum; if same-sex couples were permitted to legally obtain a marriage license in Hawaii, Congress feared that other states would be forced to recognize same-sex unions under the Full Faith and Credit Clause in the Constitution.[266] Despite the shadow of Full Faith and Credit, the Judiciary Committee stated its belief "that a court conscientiously applying the relevant legal principles would be amply justified in refusing to give effect to the same-sex 'marriage' license from another State."[267]

It is immediately apparent that adoption of a modified self-identification policy that would allow postoperative transsexuals to self-identify their legal sex does not violate the terms of the Defense of Marriage Act as the DMA applies only to marriages between homosexuals and not to marriages in which one party is a postoperative transsexual. In legally recognizing postoperative transsexuals as members of their self-identified sex for the purposes of official documents, the majority of states have shown that postoperative transsexuals are legally recognized as members of the self-identified sex, and by allowing postoperative transsexuals to obtain a new birth certificate issued with their self-identified sex have given those transsexuals the tools they need to obtain a marriage license. For instance, the issuance of a birth certificate bearing a male-to-female

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[264] *Id.* at 2. The Judiciary Committee stated that that it did not believe that "passivity is an appropriate or responsible reaction to the orchestrated legal campaign by homosexual groups to redefine the institution of marriage through the judicial process." *Id.* at 12.

[265] *Id.* at 30.

[266] The Full Faith and Credit Clause states that "Full Faith and Credit shall be given to each State to the Public Acts, Records, and judicial Proceedings of every other State." U.S. CONST. art. IV, § 1.

[267] *Id.* at 9. The report further stated: "the effort to redefine 'marriage' to extend to homosexual couples is a truly radical proposal that would fundamentally alter the institution of marriage," as "from this nexus between marriage and children springs the true source of society's interest in safeguarding the institution of marriage." *Id.* at 12-14. Acting to protect heterosexual marriage was of special significance; "[w]ere it not for the possibility of begetting children inherent in heterosexual unions, society would have no particular interest in encouraging citizens to come together in a committed relationship. But because America, like nearly every known human society, is concerned about its children, our government has a special obligation to ensure that we preserve and protect the institution of marriage." *Id.* at 14. The report concludes by stating that:

> [c]ivil laws that permit only heterosexual marriage reflect and honor a collective moral judgment about human sexuality. This judgment entails both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality . . . . It is both inevitable and entirely appropriate that the law should reflect such moral judgments.

Id. at 15-16.

postoperative transsexual's self-identified sex publicly announces that a marriage between such an individual and another male is not a same-sex marriage because the transsexual is legally female.

E. The Need for Uniformity

A step that is equally as significant as selecting the means by which legal sex is determined is ensuring that this policy is adopted uniformly in all jurisdictions. There currently exists little judicial consensus over how transsexual sex should be determined or what rights should be awarded on the basis of that determination.[268] As a person's legal sex is fundamental to her very identity, this is both illogical and inequitable, and potentially inhumane. Only one uniform conclusion is currently possible: that "law as a locus of struggle over sexuality can be dynamic, unstable, and unpredictable."[269]

Uniformly adopting one equitable approach to legal determinations of sex is not enough; a uniform set of provisions defining surgical requirements and application procedures must be adopted as well. If legislatures and courts ultimately agree to allow postoperative transsexuals to define their own sex on new official documents and recognize the "new" sex in granting marriage licenses, then criteria specifying exactly what surgeries a transsexual must successfully complete in order to be "postoperative" is also needed. Currently, in those states that require sex reassignment surgery before new or amended official documents can be issued, it is sometimes unclear what surgical procedures are needed to satisfy the requirement of "sex-reassignment surgery."[270] For instance, in addition to cosmetic procedures, male-to-female transsexuals may undergo "orchiectomy, penectomy, vaginoplasty, clitoroplasty, and labiaplasty, each of which may be considered "sex-reassignment" surgeries."[271]

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[268] As the above cases and statutory standings make clear, some jurisdictions allow postoperative transsexuals to define their own sex in order to attain a new or amended birth certificate or a obtain a marriage license, and others do not. Some states refuse to recognize a postoperative transsexual's new anatomical sex altogether, making of the transsexual's body a mockery, condemning her to live the rest of her days in a body that should be a source of pride and personal honor but is instead downgraded to a humiliating prison, a constant reminder of her sexual deviance.

[269] Sharpe, *supra* note 6, at 38.

[270] Weiss, *supra* note 40, at 177.

[271] *Id.* at 177.

CONCLUSION: INTERPRETING SEXUALITY AS A QUESTION OF LAW

This Comment has amply documented the need to "free sexuality from the constraints of biological and anatomical destiny."[272] Science has long been able to release a transsexual's internal gender from the confines of a body bearing the secondary sex characteristics and genitalia of a sex that is strange to its unwilling bearer. However, courts still lag behind, reluctantly refusing to uniformly recognize postoperative transsexuals as members of their self-identified sex. Yet, in recent cases, "[t]he legal recognition of transsexual sex claims has involved the loosening of 'legal sex' from a specific temporal moment—birth—and from a strict grounding in biological determination."[273] The medicalization of transsexualism has directly influenced this loosening, as "[t]he emergence of psychology as an integral component in the 'legal sex' determinations has created a legal space for the constitution and consolidation of sex and sexuality around the subjective feelings and experiences of individuals."[274]

Perhaps in future years this loosening will continue to the point where the stigmas surrounding transsexuality will disappear; perhaps not. But it must be our goal as legal scholars and advocates to work towards this point. The current social perceptions of transsexualism as a condition and transsexuals as a population underpin the rather pessimistic conclusion of this Comment that only an objective statutory approach will set transsexuals on the road to constitutional equality through modified self-determinations of legal sex. However, this approach does enable the creation of an ever-widening legal space, a means by which transsexuals can squeeze a foot into the door to constitutional rights before it denies them access on sexual identity grounds. Perhaps the existence of this ever-widening legal space itself will thaw social reception of transsexuals so that transsexualism, like homosexuality, will eventually be received on its own terms within mainstream discourse. When transsexuals are seen as people identical to non-transsexuals whose different experiences of sexual identity has had a profound and unique effect on their lives which nontranssexuals cannot fully understand but must respect, and when sex-reassignment surgery is recognized as a procedure that does change a person's anatomical sex for all purposes—physiological, social, and legal—then we will have reached an inclusion that seems rather miraculous now.

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[272] Sharpe, *supra* note 6, at 38.

[273] *Id.* at 39.

[274] *Id.*

Thus, the seemingly pessimistic cloud that hangs over this Comment's concluding words has a very noteworthy silver lining. Conflict itself is something to celebrate, for ironically the presence of social and legal contestation enriches society by calling into question the categories of sex and sexual identity and the processes by which these categories are imposed on individuals.[275] Conflict forces us to plumb the depths of these concepts instead of continuing to enact and impose certain roles on individuals again and again in endless cycles of hegemony. Through conflict, we have consciousness, and perhaps eventually consensus as well.

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[275] Robert E. Lane, *Patterns of Political Belief, in* HANDBOOK OF POLITICAL PSYCHOLOGY 86 (J.N. Knutson ed., 1973). As Lane states, "without social conflicts, there is no change, no tension in the system, no consciousness of the beliefs in question. The beliefs are just 'there.' The important concepts of rationale, diffusion, persuasion, and other means of learning—even ideology itself—lose their meaning without the presence of conflict." *Id.*