2003

My Father is a Woman, Oh No!: The Failure of the Courts to Uphold Individual Substantive Due Process Rights For Transgender Parents Under the Guise of the Best Interests of the Child

Helen Chang
Golden Gate University School of Law, hchang@ggu.edu

MY FATHER IS A WOMAN, OH NO!: THE FAILURE OF THE COURTS TO UPHOLD INDIVIDUAL SUBSTANTIVE DUE PROCESS RIGHTS FOR TRANSGENDER PARENTS UNDER THE GUISE OF THE BEST INTEREST OF THE CHILD

Helen Y. Chang*

I. INTRODUCTION

My father wants me to call him "Aunt Sharon"[1] because he plans to become a woman.[2] Is he still my "father?" Or do I now

---

* Visiting Professor of Law and Interim Director LL.M Tax Program, Golden Gate University School of Law; J.D. Southern Methodist University 1985, B.A. University of Texas 1982. My thanks to Bernice Felicia Loui for being the inspiration behind this article and supporting me throughout this effort. My gratitude and appreciation to Michael Zamperini whose opinions, edits, and insight were always on target. I owe much to two exceptional colleages: Michele Anglade and Janice Kosel, whose friendship and support are greatly valued. Many thanks are owed to three wonderful research assistants: Riley Morgan, Nick Urick, and Johanna Atienza who sacrificed much time to complete this project. I also thank Dean Peter Keane and Sompong Sucharitkul for providing me with so many opportunities. To Sonya Hollenbeck and Cheryl Barnes: thank you for your friendship and for being exactly who you are. To my children Katie and Jackson: you are the greatest joys in my life. Finally, I thank my husband David for listening to my random thoughts at two in the morning, for responding with coherent replies, for his time in reviewing this article, and for his love and support.

1. In *J.L.S. v. D.K.S.*, 943 S.W.2d 766, 769 (Mo. Ct. App. 1997), the parents were married on March 19, 1983, and had two sons. Throughout the marriage, the father (referred to as "D.K.S." in the opinion) struggled with the urge to cross-dress. The parties separated in 1992, with D.K.S. participating in a "Real Life Test" in which he lived as a woman twenty-four hours a day for one year. *See id.* The father drafted a separation agreement specifying that the mother would have sole custody over the children for the one-year period and that he would refrain from visiting the children during the "Real Life Test." D.K.S. did not seek a divorce from the mother. Instead, D.K.S. proposed that the parties remain married and that the boys call him "Aunt Sharon." In 1993, the mother filed for divorce in Missouri. *See id.* at 770.

2. Sex reassignment surgery is the irrevocable and often final step in a gender transition. Surgical alteration of genitalia has existed for thousands of centuries dating back to the forced removal of male testicles to "domesticate" males as "eunuchs." In the early part of the twentieth century, following animal experimen-

tation, individuals sought out physicians who would alter their genitalia in order to change their sex. In 1917, Dr. Alberta Lucille Hart underwent a hysterectomy, as well as a change of clothing, hairstyle, and name and lived out the rest of his life as Dr. Alan Lucill Hart. As plastic surgery techniques improved, physicians began to perform genital transformations where they did not completely remove genitalia but instead, cosmetically altered them. In 1931, at Magnus Hirschfeld's Institute for Sexual Science in Berlin, Dorchen Richter was one of the first individuals to have transformative sex reassignment surgery. In this surgery, her penis was amputated and a vagina was created. As researchers made advances in endocrinology individuals were able to transform, not only their genitalia, but also their secondary sex characteristics by taking hormones. *See* Lynn Conway, *Sex Reassignment Surgery (Male to Female): Historical Notes, Descriptions, Photos, References and Links, at* http://ai.eecs.umich.edu/people/conway/TS/SRSlink.htm (quoting Dennis E. Baron, *Grammar and Gender,* Yale Univ Pr., Reproduction edition (August 1987)).

One of the most celebrated cases is that of Christine Jorgensen. Following a few years of hormone injections and pills, Christine Jorgensen (born George) underwent sex reassignment surgery in Denmark in 1951. Her surgery first consisted of removing male organs and, after a period of healing, surgical construction of a vagina using skin grafts from her thighs. *See id.*

Today, sex reassignment surgery follows the work of Dr. Harry Benjamin, an endocrinologist, who was the first physician to distinguish sexual orientation from transgenderism, and Dr. Georges Burou, who invented the modern form of penile inversion for male-to-female surgeries. Instead of skin grafts from the thighs and buttocks for the vaginoplasty, Dr. Burou's technique uses the sensitive male genitalia tissue to retain sensation. *See id.*

The reference of post-operative individuals as "male-to-female," "MTF," "female-to-male," or "FTM" is indicative of the binary classification of gender in our society. In fact, the English language has not always been gender-specific.

> In 1789, William H. Marshall records the existence of a dialectal English epicene pronoun [a pronoun having one form to represent either sex], singular ou: 'Ou will' expresses either he will, she will, or it will. Marshall traces 'ou' to Middle English epicene a, used by the fourteenth-century English writer John of Trevisa, and both the Oxford English Dictionary and Wright's English Dialect Dictionary confirm the use of 'a' for he, she, it, they, and even I. The dialectal epicene pronoun 'a' is a reduced form of the Old and Middle English masculine and feminine pronouns he and heo. By the twelfth and thirteenth centuries, the masculine and feminine pronouns had developed to a point where, according to the OED, they were 'almost or wholly indistinguishable in pronunciation.' The modern feminine pronoun she, which first appears in the mid twelfth century, seems to have been drafted at least in part to reduce the increasing ambiguity of the pronoun system.

John Williams, *Gender-Neutral Pronoun FAQ, at* http://www.aetherlumina.com/gnp/ (last modified Feb. 17, 2003) (quoting Dennis Baron, *Grammar and Gender*).

Other languages, however, continue to use epicene pronouns. In Finnish, the gender-neutral third-person personal pronoun "hän" can mean either "he" or "she," and it is used to refer to persons, unlike "se," which is used to refer to inanimate object and translates to the English as "it." *See* Ted Schuerzinger, *Gender-Specific and Gender-Neutral Pronouns,* LINGUIST List 4.982, *at* http://www.linguistlist.org/issues/4/4-982.html#1 (last modified Nov. 23, 1993). In Farsi, there is a similar distinction between the animate "u" and inanimate, but

have two "mothers?"

The Missouri Court of Appeals answered both of these questions in the negative by denying "Aunt Sharon" custody of her two sons.[3] Under the guise of the "best interest of the child,"[4] courts have denied biological and legal parents both custody and visitation rights over their children because these parents were either in the process of changing, or had completed a change, in their sexual and/or gender identity.[5] One court has even terminated the parent-child relationship because of a parent's transgender status.[6] This article proposes that a parent's transgender status does not render that parent per se unfit for custody and/or visitation. Rather, a parent's gender change should be used as merely one factor within the nexus test used by the court for creating a custody and visitation arrangement that is in the best interest of the child.

Part II introduces an overview of the legal issues facing transgender individuals and specifically identifies the problems encountered in child custody cases.[7] Several transgender case examples are also discussed in the overview. Part III examines the historical development of the "best interest of the child" standard, as well as the de-evolution of gender preference in child custody cases.[8] Part IV critiques the Anglo-American cultural bias in favor of binary genderism and distinguishes the terms sex, gender, and sexual orientation.[9] Although medical and scientific data prove that sexual identity, gender identity, and sexual orientation are separate but related, categories, the law remains behind in its recognition of this data.[10] Part IV demonstrates the historical acceptance of gender multiplicity in other cultures, such as India, the Dominican Republic, and the Native American Indian culture, and discusses several international cases involving transgender rights.[11]

Part V analyzes judicial decisions denying custody to trans-

---

there is no gender differentiation. *See id.*

3. J.L.S. v. D.K.S., 943 S.W.2d 766, 775 (Mo. Ct. App. 1997).

4. The "best interest of the child" standard developed as a gender-neutral standard for child custody cases. *See* discussion *infra* Part III.A.

5. *See* discussion *infra* Part V.

6. *See* Daly v. Daly, 715 P.2d 56, 57 (Nev. 1986).

7. *See infra* Part II.

8. *See* discussion *infra* Part III.A.

9. *See* discussion *infra* Part IV.

10. *See* discussion *infra* Part IV.A.1-3.

11. *See* discussion *infra* Part IV.B.

gender parents and proposes that a parent's transgender status should not operate as a per se bar to an award of child custody.[12] Part V also analyzes judicial decisions that have used the nexus test to award custody to gay, lesbian, and transgender parents.[13] Part VI discusses the evolving social acceptance of transgender parents and presents data relating to the emotional well-being of their children.[14] This article concludes that courts should not deny a transgender parent custody of his or her children absent evidence of that parent's unfitness.[15]

II. RECENT CASES AND THE PRESENT STATE OF THE LAW

Although courts have had infrequent opportunities to decide transgender legal issues, recent cases have received much media attention. On January 22, 2002, Court TV aired live on national television the child custody battle between he pay alimony and child support.[16] The *Kantaras* case is unprecedented in Florida because Michael Kantaras was born female.[17] Linda Kantaras argued that Michael cannot be a "father" since he is not legally a male.[18] Ironically, Linda wanted Michael to act like a father, requesting that he pay alimony and child support.[19] According to Linda, Michael is male enough to pay the support related to his being a parent and spouse, but not male enough to qualify as a father or a husband.

On February 21, 2003, over one year after the conclusion of the three week trial, Judge O'Brien of Florida's Sixth Judicial

---

12. *See* discussion *infra* Part V.A.

13. *See* discussion *infra* Part V.B.

14. *See* discussion *infra* Part VI.

15. *See* discussion *infra* Part VII.

16. *See* Dana Canedy, *Sex Change Complicates Custody: Gender Identity Plays a Role in Battle for Children in Florida*, S.F. CHRON., Feb. 18, 2002, at A8.

17. *See id. See also* Dana Canedy, *Sex Change Complicates Custody: Gender Identity Plays a Role in Battle for Children in Florida*, S.F. CHRON., Feb. 18, 2002, at A8.

18. At the time of the Kantaras marriage, Florida did not permit gender changes on birth certificates. *See* Press Release, National Transgender Advocacy Coalition, *Florida Quietly Changes Birth Certificate Policy, at* http://www.ntac.org/pr/ (June 29, 2002). Many states today allow individuals to petition for a new and amended birth certificate. *See* Shana Brown, *Sex Changes and "Opposite-Sex" Marriage: Applying the Full Faith and Credit Clause to Compel Interstate Recognition of Transgendered Persons' Amended Legal Sex for Marital Purposes*, 38 SAN DIEGO L. REV. 1113, 1130-32 (2001).

19. *See* Canedy, *supra* note 16, at A8.

Circuit issued his final decision.[20] In his 809 page opinion, Judge O'Brien reviewed the "medical history of transsexualism," and cases addressing the validity of marriages entered into with transgendered individuals.[21] After a lengthy review of the trial testimony, in a decision heralded by transgender activists, the court validated the marriage between Michael and Linda Kantaras,[22] and awarded primary residential custody for both children to Michael Kantaras.[23]

Recent media attention has also focused on cases unrelated to child custody matters involving transgender individuals. In 1999, a California high school teacher was fired for "unfitness for service" after notifying school employees and students about her transition from a man to a woman.[24] Dana Rivers, formerly David Warfield, had taught history and journalism at Center High School in Antelope, California, since 1990.[25] She had been regarded as a stellar teacher and had consistently received excellent evaluations for her teaching.[26] Ms. Rivers challenged the termination as discriminatory and as a violation of her First Amendment right of free speech.[27] Last year, Legal Director of the National Center for Lesbian Rights, Shannon Minter, reported that the case had settled.[28]

In 2002, the Kansas Supreme Court voided a marriage between J'Noel Gardiner and decedent Marshall Gardiner because J'Noel had been born male.[29] The court's decision precluded J'Noel from inheriting an intestate share of Marshall's estate as the surviving spouse.[30] Although J'Noel had legally changed her name and her gender on her birth certificate, the court re-

---

20. *Judge Grants Custody to Transsexual Man,* available at http://www.cnn.com/2003/US/South/02/21/legal.transgender.ap/index.h.

21. In Re Marriage of Kantaras, Case No. 98-5375CA, February 21, 2003 Opinion, *available at* http: www.courttv.com/trials/kantaras.

22. *Id.* at 808.

23. *Id.*

24. Robert Kim, *Transgender Teacher Comes Under Fire,* ACLU NEWS, Vol. LXIV, No. 3, May/June 2000, *available at* http://www.aclunc.org/aclunews/news-32000.html; Walt Wiley, *Teacher at Center Notified of Firing: In Transition from Man to Woman,* SACRAMENTO BEE, Sept. 28, 1999, at B1.

25. *See* Wiley, *supra* note 24.

26. *See* Kim, *supra* note 24.

27. *See id. See also* Wiley, *supra* note 24.

28. Shannon Minter, Address to Santa Clara University School of Law (Apr. 8, 2002).

29. *See In re* Estate of Gardiner, 42 P.3d 120, 136-37 (Kan. 2002).

30. *See id.* at 137.

fused to recognize her as a woman for purposes of intestate succession.[31] The Kansas court thus essentially erased J'Noel's legal existence as Marshall's wife.

A similar result was reached by the Texas Court of Appeals in *Littleton v. Prange*.[32] Christie Lee Cavazos was born male, but underwent years of psychological and physical treatment to complete her gender transition to become female.[33] In 1989, she married Jonathon Mark Littleton.[34] When Jonathon died in 1996, Christie sued for wrongful death as his surviving spouse.[35] The defendant physician moved for summary judgment, asserting that Christie was a man and therefore, could not be the surviving spouse of another man.[36] The Texas court refused to legally recognize Christie's gender change stating, "[a]s a matter of law . . . Christie Littleton is a male."[37] Since Christie could not legally be married to another male, the court invalidated her marriage; thus, Christie lacked the requisite standing to bring an action as Jonathon's surviving spouse.[38] Through this decision, the Texas court created a legal void for transgender individuals. Christie legally exists as a female on her birth certificate but could never be recognized as a woman for purposes of marriage. These decisions leave transgender individuals with incomplete rights in a broad array of legal situations[39] including child custody.

The Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law."[40] This due process right includes a substantive component that "provides heightened protection against government interference with certain fundamental rights and liberty interests."[41] One of the oldest fundamental liberty interests recognized by the Supreme Court is the interest of parents in the

31. Ironically, the court legally permitted a change of sex on J'Noel's birth certificate but then refused to recognize that change for purposes of marriage. *See id.* at 22.

32. Littleton v. Prange, 9 S.W.3d 223, 231 (Tex. Ct. App. 1999), *cert. denied*, 531 U.S. 872 (2000).

33. *See id.* at 224.

34. *See id.* at 225.

35. *See id.*

36. *See id.*

37. *Id.* at 231.

38. *See id.*

39. *See* discussion *infra* Part III.

40. U.S. CONST. amend. XIV, § 1.

41. Washington v. Glucksberg, 521 U.S. 702, 720 (1997).

care, custody, and control of their children.[42] The 'liberty' specially protected by the due process clause includes the right to direct the education and upbringing of one's children.[43] The United States Supreme Court has upheld parents' constitutional rights to custody of their children against third parties such as grandparents[44] and has applied this right to uphold parents' choice to send their children to private school.[45] Since the relationship of parents to their children is a fundamental constitutionally protected right,[46] state courts have held that "the full panoply of procedural safeguards must be applied to child deprivation hearings."[47]

The fundamental right to raise children recognizes three distinct interests: (1) the parents' interest in experiencing the joy and pain of child rearing; (2) the child's interest in being supported and nurtured by those most likely to love the child unconditionally; and, (3) the state's interest in promoting a diverse and pluralistic society.[48] When courts substitute their own moral standards for these interests,[49] all three interests are at risk. The child risks the loss of a parent who potentially understands the child's needs best. The parent loses the experience of nurturing a child. Society risks the "standardization" of children,[50] losing societal diversity and plurality.

In *Pierce v. Society of the Sisters of the Holy Names of Jesus and*

---

42. *See* Stanley v. Illinois, 405 U.S. 645, 651 (1972).

43. *See* Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35 (1925).

44. *See* Troxel v. Granville, 530 U.S. 57 (2000).

45. *See Pierce*, 268 U.S. at 534.

46. *See Stanley*, 405 U.S. at 651.

47. *In re* Chad S., 580 P. 2d 983, 985 (Okla. 1978) (reversing the trial court's decision to terminate a mother's parental rights because she had not been informed of her right to court-appointed counsel). "The Supreme Court of the United States holds the relationship of parents to their children to be a fundamental constitutionally protected right." *Id.*

48. *See* Developments in the Law–The Constitution and the Family VII. The Parent-Child Relationship, 93 HARV. L. REV. 1156, 1350 (1980).

49. *See* Chicoine v. Chicoine, 479 N.W.2d 891, 893-94 (S.D. 1992), in which the South Dakota Supreme Court denied visitation rights to a lesbian mother.

> Lesbian mother has harmed these children forever. To give her rights of reasonable visitation so that she can teach them to be homosexuals, would be the zenith of poor judgment for the judiciary of this state. Until such time that she can establish, after years of therapy and demonstrated conduct, that she is no longer a lesbian living a life of abomination (*see* Leviticus 18:22), she should be totally estopped from contaminating these children.

Id. at 896 (Henderson, J., concurring as to denial of visitation).

50. *See Pierce*, 268 U.S. at 535.

Mary, the United States Supreme Court invalidated an Oregon law requiring parents to send their children to public schools because the Court feared the "standardization" of children.[51] The Supreme Court expressly recognized "the liberty of parents and guardians to direct the upbringing and education of children"[52] because parents hold both the right and the duty to ensure the well-being of their children. That right is lost when a court interjects prejudice and misunderstanding in family custody decisions.

III. THE DE-EVOLUTION OF GENDER PREFERENCE IN CHILD CUSTODY

A. *The Historical Development of the Best Interest of the Child Standard*

The "best interest of the child" standard is a twentieth century legal construct intended as a gender-neutral standard for determining child custody.[53] Historically, under Roman law and the common law of England, the father retained the presumptive right of child custody.[54] Despite this strong presumption in favor of the father under the common law, the English Chancery Court had the equitable authority to award custody contrary to this paternal presumption.[55] Early American colonists continued this paternal presumption from the common law in part because of women's inferior status under the law, but also because of the assumption that men were better able to financially provide for

---

51.

> The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.

Id. at 535.

52. *Id.* at 534.

53. *See* HOMER H. CLARK, JR., THE LAW OF THE DOMESTIC RELATIONS IN THE UNITED STATES, § 20.1 at 495-98 (2d ed. 1987). *See also* Michael Grossberg, *Balancing Acts: Crisis, Change, and Continuity in American Family Law, 1890-1990*, 28 IND. L. REV. 273, 296-307 (1995).

54. *See* Shannon Dean Sexton, *A Custody System Free of Gender Preferences and Consistent with the Best Interests of the Child: Suggestions for a More Protective and Equitable Custody System*, 88 KY. L.J. 761, 765 n.25 (1999-2000) (citing MARILYN LITTLE, FAMILY BREAKUP: UNDERSTANDING MARITAL PROBLEMS AND THE MEDIATING OF CHILD CUSTODY DECISIONS 4-5 (1982)).

55. *See id.* at 765.

the child.[56]

By the late nineteenth century, this paternal presumption shifted to a maternal presumption.[57] The Industrial Revolution of the nineteenth century changed the previous agricultural-based economy to one in which fathers left the farm to find work in urban areas, leaving mothers at home to care for the children.[58] The mother's role was seen as especially important for the development of very young children.[59] Courts began to follow the "tender years doctrine," which presumed that the mother was the better parent to raise a child under the age of four or five.[60] Fathers still retained the right to re-gain custody after the child passed beyond those "tender years."[61] With the growing acceptance of psychological data and the increasing strength of the women's movement, the tender years doctrine eventually eroded and evolved into a maternal presumption for child custody.[62] The resulting maternal presumption only served to shift the gender bias in child custody cases from favoring men to favoring women.

Ironically, the women's rights movement of the nineteenth century found new meaning for fathers' rights in the twentieth century.[63] Several factors contributed to the new fathers' rights movement. More women sought employment outside the home, more spouses were divorced, and more states adopted no-fault divorce.[64] The fathers' rights movement generated legislative changes toward a gender-neutral standard for child custody awards.[65] Joint custody became the goal, with the courts focusing on what is in the "best interest of the child."

The best interest of the child standard[66] is the prevalent test

---

56. *See id.*

57. *See* Gerald W. Hardcastle, *Joint Custody: A Family Court Judge's Perspective*, 32 FAM. L.Q. 201, 202 (1998).

58. *See* Constance R. Ahrons, *Joint Custody Arrangements in the Postdivorce Family*, 3 J. DIVORCE 189, 189 (1980).

59. *See generally* Stephen P. Herman, *Child Custody Evaluations and the Need for Standards of Care and Peer Review*, 1 J. OF THE CENTER FOR CHILD. & THE CTS. 139 (1999).

60. *See* Jo-Ellen Paradise, *The Disparity Between Men and Women in Custody Disputes: Is Joint Custody the Answer to Everyone's Problems?*, 72 ST. JOHN'S L. REV. 517, 526-27 (1998).

61. *See* Sexton, *supra* note 54, at 767.

62. *See id.* at 768.

63. *See* Hardcastle, *supra* note 57, at 203.

64. *See id.*

65. *See* Grossberg, *supra* note 53, at 296-307.

66. *See* Finlay v. Finlay, 148 N.E. 624, 626 (N.Y. 1925) (articulating the "best in-

used in the courts today.[67] When parents dissolve their marriage or terminate their relationship, the parents' constitutional family interests become subordinate to a judicial determination of the child's best interest to reach a decision for an award of legal and/or physical custody.[68] Although the courts consider many factors in deciding the type of custody arrangement that is in the "best interest of the child," the central focus is the respective parents' ability to meet the child's educational, emotional, and medical needs.[69] This catch-all category[70] allows the court to exercise broad discretion in deciding what is in the "best interest" of the child.[71]

When faced with the issue of child custody, the courts often interpret the "best interest of the child" standard in a way that perpetuates a homogenous view of what a mother, father, and family should look like.[72] Courts consider a wide variety of factors in determining what is actually in the best interest of the child.[73] Through the exercise of broad discretion in custody

---

terest of the child" standard). Commentators of cite *Finlay* as the first case to articulate this standard. However, the 1902 decision of *Crater v. Crater*, 67 P. 1049, 1050 (Cal. 1902), actually coins the term and predates *Finlay*.

67. *See Crater*, 67 P. at 1050; Taber v. Taber, 290 P. 36, 37 (Cal. 1930); Prouty v. Prouty, 105 P.2d 295, 298 (Cal. 1940); Munson v. Munson, 166 P.2d 268, 272 (Cal. 1946); S.E.G. v. R.A.G., 735 S.W.2d 164 (Mo. 1987); Ellerbe v. Hooks, 416 A.2d 512, 513 (Pa. 1980) (overruling the "tender years doctrine," but applying the "best interest of the child" standard nonetheless); Rowsey v. Rowsey, 329 S.E.2d 57 (W. Va. 1985); N.Y. DOM. REL. LAW § 70 (McKinney 1999); MINN. STAT. § 518.17 (West 2001); CAL. FAM. CODE § 3011 (West 1994); 750 ILL. COMP. STAT. ANN. 5/602 (West 2001); MO. REV. STAT. § 452.375 (West 2001).

68. *See* David M. Rosenblum, *Custody Rights of Gay and Lesbian Parents*, 36 VILL. L. REV. 1665, 1665-66 (1991).

69. *See* 750 ILL. COMP. STAT. ANN. 5/602 (West 2001); *In re* Marriage of Burham, 283 N.W.2d 269 (Iowa 1979). *See also* Blew v. Verta, 617 A.2d 31, 35 (Pa. 1992) ("The standard 'best interest of the child' requires us to consider the full panoply of a child's physical, emotional, and spiritual well-being.").

70. *See* Andrea Charlow, *Awarding Custody: The Best Interests of the Child and Other Fictions*, 5 YALE L. & POL'Y REV. 267, 268-73 (1987). The best interest of the child standard has been criticized as overly broad and ambiguous. *See id.*

71. *See, e.g.*, Coulter v. Coulter, 347 P.2d 492, 495 (Colo. 1959) ("[W]e are [always] reluctant to disturb a ruling of the trial court in custody matters, absent circumstances clearly disclosing an abuse of discretion."); Gurney v. Gurney, 899 P.2d 52, 55 (Wyo. 1995); Prouty v. Prouty, 105 P.2d 295, 298 (Cal. 1940) (trial courts are given a very broad discretion in determining the best interest of the child).

72. *See* Juliet A. Cox, *Judicial Enforcement of Moral Imperatives: Is the Best Interest of the Child Being Sacrificed to Maintain Societal Homogeneity?*, 59 MO. L. REV. 775, 781-83 (1994).

73. *See, e.g.*, Deirdre Larkin Runnette, *Judicial Discretion and the Homosexual Parent: How Montana Courts Are and Should Be Considering a Parent's Sexual Orientation in Contested Custody Cases*, 57 MONT. L. REV. 177, 209 (1996).

cases, some courts have used a parent's transgender status to preclude an award of custodial rights.[74] Although the medical community has long recognized a multiplicity of sexes,[75] courts continue to adhere to a rigid and unrealistic view of a sexually binary human race.[76] Transgenderism[77] should not per se preclude an award of child custody because a legal parent has a constitutional right[78] to maintain a relationship with his or her[79]

---

74. *See* discussion *infra* Part V.A.

75. *See* William A.W. Walters, *Transsexualism-Medical and Legal Aspects*, 16 AUSTL. J. OF FORENSIC SCI. 65, 69, n.18 (1983); Anne Fausto-Sterling, *The Five Sexes: Why Male and Female Are Not Enough*, THE SCIENCES, Mar.-Apr. 1993, at 20-21.

76. Some courts have refused to recognize transgender legal rights because they do not fall neatly into the binary categories of "male or female." Under the law, transgender individuals cannot exist. *See generally* In Marriage of C. and D. (1979) 35 F.L.R. 340. The Australian court voided a twelve-year marriage because the husband was intersexed. The court concluded that he was neither male nor female and, therefore, incapable of a legal marriage. "I am satisfied on the evidence that the husband was neither man nor woman but was a combination of both, and a marriage in the true sense of the word . . . could not have taken place and does not exist." *Id.* at 345. *See also* Leane Renee, *Impossible Existence: The Clash of Transsexuals, Bipolar Categories, and Law*, 5 AM. U. J. GENDER & L. 343, 345 (1997) ("Transsexuals in the united states [sic] are legally impossible beings.").

77. "Although transgenderism is often conflated with homosexuality, the characteristic, which defines transgenderism, is not sexual *orientation*, but sexual *identity*. Transgenderism describes people who experience a separation between their gender and their biological/anatomical sex." Mary Coombs, *Sexual Dis-Orientation: Transgendered People and Same-Sex Marriage*, 8 UCLA WOMEN'S L.J. 219, 237 (1998).

78. In a long line of cases, the United States Supreme Court has repeatedly confirmed parents' constitutional right to direct the upbringing of their children. *See, e.g.*, Meyer v. Nebraska, 262 U.S. 390, 399-401 (1923) (The "liberty" protected by the Due Process Clause includes the right of parents to "establish a home and bring up children" and "to control the education of their own."); Pierce v. Soc'y of the Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510, 534-35 (1925); Prince v. Massachusetts, 321 U.S. 158, 166 (1944); Quilloin v. Walcott, 434 U.S. 246, 255 (1978) ("We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected.").

79. *See supra* text accompanying note 2. The English language is currently limited in its binary reference to human beings as either "male" or "female," "him" or "her," "he" or "she."

> I has no gender. Neither does you. He and she definitely have a specific gender which is very helpful to all of—us—because we doesn't have a gender either. Does we? Back to he and she or rather to him and to her. He is masculine except when he is universal and means him and her and all of—us, who has no gender still. She is feminine, except of course when she is inanimate, like a ship or a salad, but six of one, half a dozen of the other, am I right? We still doesn't have a gender. You plural has no gender either. Unlike him and her, they has no gender whatsoever, which I admit introduces some confusion, but we're almost finished so live with it. It has no gender at all, except when it refers to an infant about whose gender we are uncertain. Not unlike me. Or you.

KATE BORNSTEIN, *Hidden: A Gender*, *in* GENDER OUTLAW 169, 178 (1995).

child.

Too often, the courts conflate sex, gender, and sexual orientation and then impose a subjective personal moral standard in making an award of custody.[80] With the growing social consciousness of transgender[81] individuals in our society,[82] the courts cannot continue to use a parent's transgender status as the basis to deny that parent's fundamental right to raise his or her legal child without further evidence of that parent's inability to meet the needs of that child.

---

80. *See* G.A. v. D.A., 745 S.W.2d 726, 728 (Mo. Ct. App. 1987) (holding that the mother's open lesbian relationship merited an award of custody in father's favor); Daly, 715 P.2d at 63 (Gunderson, J., dissenting). *See also* Cisek v. Cisek, No. 80 C. A. 113, 1982 WL 6161, at *2 (Ohio Ct. App. July 20, 1982) (denying visitation rights to a father after he had a complete change of sex). The best interest of the child standard has been criticized for permitting judicial biases against women, the poor, and other minority groups. *See* PHYLLIS CHESLER, MOTHERS ON TRIAL: THE BATTLE FOR CHILDREN AND CUSTODY 239-68 (1986). *See also* Nancy D. Polikoff, *Why Are Mothers Losing: A Brief Analysis of Criteria Used in Child Custody Determinations*, 7 WOMEN'S RTS. L. REP. 235, 236-37 (1982).

81. "The word 'transgender' describes much more than crossing between the poles of masculinity and femininity. It more aptly refers to the transgressing of gender norms, or being freely gendered, or transcending gender altogether in order to become more fully human." Holly Boswell, *The Transgender Paradigm Shift Toward Free Expression, in* CURRENT CONCEPTS IN TRANSGENDER IDENTITY 55, 56 (Dallas Denny ed., 1998).

82. Various support groups have formed in the United States. In 1964, philanthropist Reed Erickson founded the Erickson Educational Foundation "to provide assistance and support in areas where human potential was limited by adverse physical, mental, or social conditions, or where the scope of research was too new, controversial or imaginative to receive traditionally oriented support." *See Reed Erickson and The Erickson Educational Foundation, available at* http://web.uvic.ca/~erick123/ (last visited Apr. 9, 2003). The EEF sponsored education on transsexualism and funded the medical research of Dr. Harry Benjamin and the John Hopkins Clinic. Among its many efforts, the EEF sponsored the first three International Symposia on Gender Identity now known as the HBIGDA Symposia (The Harry Benjamin International Gender Dysphoria Association). *See id.*
In 1992, Bet Power formed "The East Coast Female-to-Male Group" as a peer support network. *See* LESLIE FEINBERG, TRANSGENDER WARRIORS: MAKING HISTORY FROM JOAN OF ARC TO RU PAUL 171, app. B (Beacon Press 1996). The group meets monthly in Northampton, Massachusetts. *See id.*
The Intersex Society of North America is a peer support, education, and advocacy group based in San Francisco, California. *See Frequently Asked Questions (FAQ)*, Intersex Society of North America, *at* http://www.isna.org/faq/index.html (last visited Oct. 18, 2002). ("ISNA is working to create a world free of shame, secrecy, and unwanted sexual surgeries for children born with anatomy that someone decided is not standard male or female."). The International Conference on Transgender Law and Employment Policy hosts an annual conference in Houston, Texas each summer to discuss various transgender legal and social policy issues. *See* FEINBERG, *supra*, at 172.

B. *Custody Today*

When parents of minor children separate and divorce, the court must determine the custodial rights of the parents.[83] Four different types of custodial arrangements exist today: sole custody, alternating or shared custody, split custody, and joint custody.[84] In addition to the issue of child custody, the court also must determine the visitation rights of the non-custodial parent.[85] While custody usually is viewed as a privilege, visitation generally is considered within the rights of a legal parent.[86]

Under the sole custody system, children live with the custodial parent and the non-custodial parent receives visitation rights.[87] Visitations are typically scheduled for alternating weekends and may include specific arrangements for holidays and summer vacations.[88] Under the alternating or shared custody system, each parent is awarded custody for alternating periods of the year.[89] Under the split custody system, the parents divide or split the children so that each parent obtains custody over at least one child and the other parent has visitation rights.[90]

Joint custody is the preferred choice in many states today,[91] but has diverse interpretations among the states. Joint custody can mean either legal custody or physical custody.[92] Legal custody means the authority to make major decisions regarding the child's welfare, such as choice of school.[93] If the court orders joint legal custody, the parents share equal responsibility for these decisions, regardless of the child's actual location.[94] Physical custody refers to the responsibility for the child's everyday

---

83. *See Guidelines for Child Custody Evaluations in Divorce Proceedings*, 29 FAM. L.Q. 51, 52 (1995).

84. *See* Judith Bond Jennison, *The Search for Equality in a Woman's World: Fathers' Rights to Child Custody*, 43 RUTGERS L. REV. 1141, 1146-47 (1991).

85. *See id.*

86. *See* Lyons v. Lyons, 591 N.E.2d 1006, 1007 (Ill. App. Ct. 1992).

87. *See* Sexton, *supra* note 54, at 771.

88. *See id. See also Lyons*, 591 N.E.2d at 1007.

89. *See* Sexton, *supra* note 54, at 771. *See also* Arthur M. Berman & David P. Kirsh, *Definitions of Joint Custody*, 5 FAM. ADVOC. 2, 2 (1982) [hereinafter Berman].

90. *See* Berman, *supra* note 89, at 2.

91. At least firty-five states have codified various types of joint custody statutes. *See* Margaret M. Barry, *The District of Columbia's Joint Custody Presumption: Misplaced Blame and Simplistic Solutions*, 46 CATH. U. L. REV. 767, app. A at 825-30 (1997).

92. *See* Hardcastle, *supra* note 57, at 204.

93. *See id.*

94. *See* Berman, *supra* note 89, at 2.

needs.[95] Under a joint physical custody arrangement, the child alternates between parents' homes to ensure "significant" or "substantial" time with each parent.[96] The distinction between "joint" custody and "sole" custody is far from clear. In one California study, researchers concluded that equal sharing of physical and legal custody occurred in only 20% of "joint custody" cases.[97] Thus, the true difference between joint custody and sole custody may be one of semantics.[98]

Another source of inconsistency in the best interest of the child standard is that states vary in their views of whether joint custody is in the best interest of the child. At least one state maintains that joint custody should be awarded only in extraordinary circumstances.[99] Other states, such as California and Alabama, presume that joint custody is in the best interest of the child if the parents agree upon joint custody.[100] Since the award of child custody is based upon the court's determination of what is in the best interest of the child, the court can scrutinize the "lifestyle" of a particular parent[101] and can order psychological

---

95. *See id.*

96. *See id.*

97. *See* Marygold S. Melli & Patricia R. Brown, *The Economics of Shared Custody: Developing an Equitable Formula for Dual Residence*, 31 HOUS. L. REV. 543, 549 (1994).

98. *See* Hardcastle, *supra* note 57, at 208-09.

> By and large, men prefer joint custody and overwhelmingly report being more satisfied with this arrangement than noncustodial fathers report being satisfied with their arrangement, despite the fact that their children tend to reside with the mother. For men, joint custody appears to represent a psychological benefit. Many fathers, for example, perceive that even joint legal custody, which minimally extends fathers' roles and responsibilities, apparently gives them control that they otherwise would not have.

Id. (quoting Joyce A. Arditti & Debra Madden-Derdrich, *Joint and Sole Custody Mothers: Implications for Research and Practice*, 78 FAM. SOC'Y: L. CONTEMP. HUM. SERVICES 26, 37 (1997)).

99. *See* Davis v. Davis, 380 N.E.2d 415, 418-19 (Ill. App. Ct. 1978) (holding that joint custody should only be awarded in "certain exceptional circumstances" and should not be imposed where the parents are "severely antagonistic and openly criticize one another in the child's presence"). *See also* Braiman v. Braiman, 378 N.E.2d 1019, 1021 (N.Y. 1978) ("As a court-ordered arrangement imposed upon already embattled and embittered parents, accusing one another of serious vices and wrongs, [joint custody] can only enhance familial chaos.").

100. *See* CAL. FAM. CODE § 3080 (West 2002); ALA. CODE § 30-3-152 (a) (2002).

101. *See* Jarrett v. Jarrett. 400 N.E.2d 421, 424 (Ill. 1979), *cert. denied*, 449 U.S. 927, *reh'g denied*, 449 U.S. 1067 (1980) (holding that mother's co-habitation with her boyfriend was damaging to the children's moral welfare and development and against public policy); DeVita v. DeVita, 366 A.2d 1350, 1354 (N.J. Super. Ct. App. Div. 1976) (holding that a father's female companion was not permitted to stay overnight when his children were visiting because "the moral welfare of the children is

evaluations of the parents.[102] Some courts have used the "best interest of the child" standard to deny custody and visitation rights to transgender parents because of their transgender identity and status.[103] Few child custody cases involving transgender parents have resulted in reported decisions in the United States. Not surprisingly, the lack of precedent and accurate information regarding transgenderism has led to harsh results, including the termination of the parent-child relationship.[104]

The best interest of the child is served when the court accepts that child's reality instead of adhering to an artificial family model. As one New Jersey court stated, "[f]amilies differ in both size and shape within and among the many cultural and socio-economic layers that make up this society. We cannot continue to pretend that there is one formula, one correct pattern that should constitute a family in order to achieve the supportive, loving environment we believe children should inhabit."[105] A per se preclusion of child custody based on a parent's gender change ignores the reality of that child's life.

III. GENDER MULTIPLICITY: MODERN ANGLO-AMERICAN VERSUS OTHER CULTURES

A. *Modern Anglo-American Cultural Bias in Favor of Binary Genderism*

Modern Anglo-American culture has traditionally merged the categories of sex, gender, and sexual orientation, with the result of recognizing only two alternative and exclusive categories: male and female.[106] Some scholars have posited that our social and legal systems have much invested in the conflation of sex, gender, and sexual orientation.[107] This Anglo-American limita-

---

possibly endangered"); Bunim v. Bunim, 83 N.E.2d 848, 849 (N.Y. 1949) (denying mother custody because of "deliberate adulteries" as "[i]t cannot be said that 'the best interests and welfare' of those impressionable teen-age girls will be 'best served' by awarding their custody to one who proclaims, and lives by, such extraordinary ideas of right conduct").

102. *See* CAL. CT. R. 1257.3; FLA. STAT. ch. 61.20(1) (2002); KAN. STAT. ANN. § 23-1003 (2001).

103. *See* J.L.S. v. D.D.S., 943 S.W.2d 766, 775 (Mo. Ct. App. 1997); Daly v. Daly, 715 P.2d 56, 57 (Nev. 1986).

104. *See* Daly, 715 P.2d at 57.

105. *In re* Adoption of a Child by J.M.G., 632 A.2d 550, 554-55 (N.J. Super. Ct. Ch. Div. 1993).

106. *See* GORDENE O. MACKENZIE, TRANSGENDER NATION 14 (1994).

107. *See generally* Richard F. Storrow, *Naming the Grotesque Body in the Nascent*

tion to only male and female categories for sex, gender, and sexual orientation has been referred to as "the gender box."[108] "If your sex is male, your gender is masculine, and you are sexually attracted to women. Similarly, if your sex is female, your gender is feminine, and you are sexually attracted to men."[109]

Despite the historical, medical, and scientific evidence to the contrary, the Anglo-American legal system persists in its distortion of sex, gender, and sexual orientation.[110] Unfortunately, legislators and jurists often confuse and frequently conflate the definitions for sex, gender, and sexual orientation.[111] These related but distinct identities must first be defined and understood so that courts can make sound and reasoned judicial decisions.[112]

1. *The Identity of Sex in Anglo-American Culture*

Legal experts disagree as to the definition of sexual identity.[113] Confronted with the issue of sexual identity, some courts

---

Jurisprudence of Transsexualism, 4 MICH. J. GENDER & L. 275 (1997).

108. Jennifer L. Nye, *The Gender Box*, 13 BERKELEY WOMEN'S L.J. 226, 228 (1998).

109. *Id.* at 228.

110. *See generally In re* Gardiner, 42 P.3d 120 (Kan. 2002); Littleton v. Prange, 9 S.W.3d 223 (Tex. App. 1999).

111. *See* MINN. STAT. § 363.01(41a) (2001) (defining "sexual orientation" as including "having or being perceived as having a self-image or identity not traditionally associated with one's biological maleness or femaleness"). *See also* Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 10 (1999) (arguing that while "warding off embarrassment or salacious thoughts in the minds of judges, this interchangeability of the words 'sex' and 'gender' has contributed to some analytic confusion").

112. *See* Renee, *supra* note 76, at 348-49.

> Inconsistencies in Britain's laws illustrate how one European legal scheme erases transsexual reality. When Caroline Cossey, known as the model 'Tula,' had sexual reassignment surgery in 1974, her physical metamorphosis from man to woman made her feel simultaneously male, female, and neither. Her experience under law was similar. Tula's passport states that she is female, but her birth certificate designates her as male. The British health care system paid for her surgery to construct female genitals, but if she commits a crime, she will go to a male prison. She pays for health insurance at the higher rate charged to women, but cannot collect her pension until she's sixty-five, the age at which men can collect, although women are able to collect at age sixty.

Id. The American system is no different. In the case of J'Noel Gardiner, the Wisconsin court ordered a new birth certificate for J'Noel to identify her sex as female. J'Noel's driver's license, passport, and health documents were also changed. But for purposes of a legal marriage, J'Noel could not be a female. *See Gardiner*, 42 P.3d at 123, 135-36.

113. For purposes of a valid marriage, some courts limit an individual's sex to birth anatomy. *See Gardiner*, 42 P.3d at 135 ("A male-to-female post-operative trans-

in the past have categorized an individual's sex as either "male" or "female" solely in reference to external genitalia present at birth.[114] This anatomically based definition of sex has social and legal implications with respect to marriage,[115] medical benefits,[116] inheritance,[117] employment discrimination,[118] imprison-

---

sexual does not fit the definition of a female. The male organs have been removed, but the ability to 'produce ova and bear offspring' does not and never did exist. There is no womb, cervix, or ovaries, nor is there any change in his chromosomes." (internal citation omitted)); *In re* Declaratory Relief for Ladrach, 513 N.E.2d 828, 832 (Ohio Prob. 1987) ("[A] person's sex is determined at birth by an anatomical examination by the birth attendant."); *Littleton*, 9 S.W.3d at 231 ("At the time of birth, Christie was a male, both anatomically and genetically. The facts contained in the original birth certificate were true and accurate, and the words contained in the amended certificate are not binding on this court."). Other courts consider a psychological component in determining sex. Richards v. United States Tennis Ass'n, 400 N.Y.S.2d 267, 272 (Sup. Ct. 1977) ("When 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."); M.T. v. J.T., 355 A.2d 204, 209 (N.J. Sup. Ct. 1976) ("[F]or marital purposes if the anatomical or genital features of a genuine transsexual are made to conform to the person's gender, psyche or psychological sex, then identity by sex must be governed by the congruence of these standards."), *cert. denied*, 364 A. 2d 1076 (1976). *See also* Re Kevin: Validity of Marriage of Transsexual (2001) 28 Fam. LR 158 (Austl.), *available at* http://www.familycourt.gov.au/judge/2001/pdf/rekevin.pdf.

> For the purpose of ascertaining the validity of a marriage under Australian law, the question whether a person is a man or a woman is to be determined as of the date of the marriage. . . . There is no rule or presumption that the question whether a person is a man or a woman for the purpose of marriage law is to be determined by reference to circumstances at the time of birth.

Id.

114. *See, e.g.*, Anonymous v. Weiner, 270 N.Y.S.2d 319 (Sup. Ct. 1966); Corbett v. Corbett (otherwise Ashley) (No. 1), [1971] P. 83 (1970), 1970 WL29661; Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 1 (1995).

115. *See Gardiner*, 42 P.3d at 135-36 (voiding a marriage on the grounds that a biologically born male could never become a "female"). *See also Ladrach*, 513 N.E. 2d at 832 ("[I]t is this court's opinion that the legislature should change the statutes, if it is to be the public policy of the state of Ohio to issue marriage licenses to post-operative transsexuals. . . . Therefore, the application of Elaine Frances Ladrach to obtain a marriage license as a female person is denied."); *Littleton*, 9 S.W.3d at 227, 231 ("Once a man, always a man . . . . As a male, Christie cannot be married to another male.").

116. *See generally* Davidson v. Aetna Life & Cas. Ins. Co., 420 N.Y.S.2d 450 (Sup. Ct. 1979) (finding that sex reassignment surgery was a covered insurance benefit under private health insurance policy).

117. *See generally Gardiner*, 42 P.3d at 120; *Littleton*, 9 S.W.3d at 223.

118. *See* Ulane v. Eastern Airlines, Inc., 742 F.2d 1081, 1084 (7th Cir. 1984) ("Title VII does not protect transsexuals."). *See also* Holloway v. Arthur Andersen & Co., 566 F.2d 659, 664 (9th Cir. 1977) ("Holloway has not claimed to have treated dis-

ment,[119] criminal laws,[120] and child custody.[121] Moreover, the judiciary's unwillingness to change an individual's sexual identity on his/her birth certificate precludes any change in that individual's sexual identity in the eyes of the law with ensuing consequences.[122]

Sexual identity is thought to consist of a variety of factors,[123] including: chromosomes,[124] gonads,[125] internal morphology,[126] external morphology,[127] hormones,[128] phenotype,[129] gender of rearing,[130] gender role,[131] and gender identity.[132] Medical scien-

---

criminatorily because she is male or female, but rather because she is a transsexual who chose to change her sex. This type of claim is not actionable under Title VII and is certainly not in violation of the doctrines of Due Process and Equal Protection.").

119. *See* Farmer v. Brennan, 511 U.S. 825, 829-30 (1994) (petitioner who wore women's clothing, had estrogen therapy, and had silicone breast implants was placed in an all male prison and was subsequently assaulted and raped); *see also* Murray v. U.S. Bureau of Prisons, No. 95-5204, slip op. at 1 (6th Cir. Jan. 28, 1997).

120. *See* City of Chicago v. Wilson, 389 N.E.2d 522 (Ill. 1978) (holding unconstitutional a city ordinance prohibiting cross-dressing).

121. *See* discussion *infra* Part IV.

122. *See* Weiner, 270 N.Y.S.2d at 385 (deferring to the Board of Health as the administrative body authorized to maintain birth records which had concluded that "[t]he desire of concealment of a change of sex by the transsexual is outweighed by the public interest for protection against fraud"); Hartin v. Dir. of Bureau of Records & Statistics, 347 N.Y.S.2d 515 (N.Y. Sup. Ct. 1973) (court refused to change sex on a post operative male-to-female's birth certificate).

123. *See* JOHN MONEY, SEX ERRORS OF THE BODY: DILEMMAS, EDUCATION, COUNSELING 11-12 (1968).

124. The typical chromosomal pattern is either XX for females or XY for males. *See id.* at 15-21.

125. Gonads indicate the presence of ovaries or testes. *See* Ruth Hubbard, *Gender and Genitals: Constructs of Sex and Gender*, *in* CURRENT CONCEPTS IN TRANSGENDER IDENTITY 45 (Dallas Denny ed., Garland Publishing, Inc. 1998).

126. Internal morphology is the presence or absence of male or female internal structures. *See* Michael W. Ross, *Gender Identity*, *in* TRANSSEXUALISM AND SEX REASSIGNMENT 2, Table 1.1 (William A.W. Walters and Michael W. Ross eds., Oxford University Press 1986).

127. External morphology is in the form of external genitalia. *See* JOHN MONEY & ANKE A. EHRHARDT, MAN & WOMAN BOY & GIRL: THE DIFFERENTIATION AND DIMORPHISM OF GENDER IDENTITY FROM CONCEPTION TO MATURITY 7 (John Hopkins University Press 1972).

128. The male hormones are androgens and the female hormones are estrogen and progesterone. Typically, men and women possess both types of hormones, but the level of the hormones varies in each individual, thus contributing to the individual's sexual identity. *See id.* at 6-8.

129. Examples of external secondary characteristics associated as male or female are hair and breasts. *See id.* at 197.

130. The gender of rearing is the sex role assigned to the individual as a child. *See id.* at 12.

131. Gender role refers to behavior that is culturally gender appropriate. *See*

tists also recognize that perfect harmony among these factors does not always exist in human nature.[133] Some courts now concede that a person's sex is more complicated than the presence or absence at birth of a penis or a clitoris.[134] Sexual identification at birth based upon external genitalia is neither final nor definite because certain internal incongruities and anomalies may not be visibly apparent at birth.[135] One example is Klinefelter Syndrome, which affects one in 500 to 1,000 babies identified as "male" at birth.[136] The Syndrome means that the child has two or more X chromosomes instead of the typical male XY chromosome pattern.[137] A diagnosis of Klinefelter Syndrome is usually not made until puberty, when the external manifestations of the Syndrome first appear.[138] In addition to the chromosomal pattern found in individuals with Klinefelter Syndrome, medical researchers have documented other chromosomal patterns, concluding that there are many viable genetic possibilities (beyond XX and XY), including: XXY, XO, XYY, XXYY, and XXX,[139] as well as mosaic variations such as X/XY, and XX/XY.[140]

Hormones can also affect the development of "opposite" sex characteristics later in an individual's life.[141] 5-Alpha Reduc-

---

MILDRED L. BROWN & CHLOE A. ROUNSLEY, TRUE SELVES 21 (Jossey-Bass Publishers 1996).

132. Gender identity is sometimes referred to as psychological identity. *See id.* ("It is our own deeply held conviction and deeply felt inner awareness that we belong to one gender or the other."). *See also* Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 ARIZ. L. REV. 265, 282-83 (1999).

133. "Biologists and medical scientists recognize, of course, that absolute dimorphism is a Platonic ideal not actually achieved in the natural world." Melanie Blackless et al., *How Sexually Dimorphic Are We? Review and Synthesis*, 12 AM. J. HUM BIOLOGY 151 (2000).

134. Richards v. United States Tennis Ass'n, 400 N.Y.S.2d 267, 272 (Sup. Ct. 1977); M.T. v. J.T., 355 A.2d 204, 209 (N.J. Sup. Ct. 1976).

135. Congenital Adrenal Hyperplasia can cause a fetus with the typical female XX chromosome pattern to develop male-like genitalia. These individuals will sometimes menstruate through the phallus following puberty. *See* Kenneth Kipnis & Milton Diamond, *Pediatric Ethics and the Surgical Assignment of Sex*, The U.K. Intersex Association, *at* http://www.ukia.co.uk/diamond/ (last visited Oct. 17, 2002). Androgen Insensitivity Syndrome causes fetuses with the typical XY male chromosome pattern to develop external female genitalia. *See id.*

136. *See* ANNE FAUSTO-STERLING, SEXING THE BODY: GENDER POLITICS AND THE CONSTRUCTION OF SEXUALITY 52 (2000).

137. *See id.*

138. *See* MONEY, *supra* note 123, at 17.

139. *See* Blackless, *supra* note 133, at 151-52.

140. *See* MONEY & ERHARDT, *supra* note 127, at 39.

141. *See* Jiang-Ning Zhou et al., *A Sex Difference in the Human Brain and its Rela-*

tase Deficiency occurs from a disruption of fetal hormonal metabolism.[142] 5-Alpha Reductase Deficiency is quite common in a number of populations, including Central America and Vietnam, affecting more than 100 individuals in a sample of more than fifty families.[143] Individuals with 5-Alpha Reductase Deficiency have XY chromosomes and testes but appear phenotypically female at birth.[144] At puberty, the "girl" begins to develop "male" physical features including a penis.[145] Thus, external genitalia at birth represents only one factor contributing to an individual's sexual identity.

Despite the existence of multiple chromosomal patterns for human beings, chromosome testing for determining sex has been widely used in the sports arena.[146] Curiously, although sexual identification at birth is generally based on external genitalia, sexual identification of athletes has been based upon chromosomal structure. In 1968, the International Olympic Committee began requiring female athletes to undergo a sex chromatin test to verify their sex.[147] "Gender verification" was in response to "rumors of men masquerading as women and 'women who were not really women' competing in the Games."[148] The chromatin test, also known as the "Barr body

---

tion to Transsexuality, 375 NATURE 68, 70 (1995) (medical study showing that gender identity develops as a result of an interaction between the developing brain and sex hormones).

142. *See* Blackless, *supra* note 133, at 153.

143. *See id.*

144. *See* Alice D. DREGER, HERMAPHRODITES AND THE MEDICAL INVENTION OF SEX 31 (1998).

145. *See id.* at 121.

146. Until 1999, the International Olympics Committee used various chromosome tests to verify the gender of female athletes. *See* Brendan Pittaway, *Olympic Bosses Suspend Sex Tests*, THE EXPRESS (Jul. 10, 1999), *at* http://www.pfc.org.uk/news/1999/olympic.htm.

147. The original Olympic Games in ancient Greece were limited to men who competed in the nude. Women spectators were prohibited. Women began competing in the Olympics in 1900. As women's sports became increasingly popular, rumors circulated as to the "femininity" of certain athletes. Some female athletes were required to submit to crude physical and gynecologic examinations as a prerequisite to competition. *See* Mryon Genel, *Sport: Gender Verification No More?*, UKPFC-NEWS Archives Apr.-June 2000, *available at* http://www.pfc.org.uk/pfclists/news-arc/200q2/msg00105.htm. *See also* Pamela B. Fastiff, *Gender Verification Testing: Balancing the Rights of Female Athletes with a Scandal-Free Olympic Games*, 19 HASTINGS CONST. L.Q. 937, 938 (1992). According to Mary Peters, Britain's 1972 gold medal Olympic pentathlete, the test was "the most crude and degrading experience I have ever known." Pittaway, *supra* note 141.

148. Fastiff, *supra* note 147, at 938-39 (*citing* Alison Carlson, *When is a Woman Not a Woman?*, WOMEN'S SPORTS & FITNESS, Mar. 1991, at 26). *See also* Lori Ewing, *Gen-*

test," is administered by having the individual rinse her mouth and then a "sample of cells [is then taken from] the inner lining of the cheek."[149] The tissue sample is tested for the presence of a second X chromosome.[150] Due to the existence of genetic chromosome variations, many medical researchers have criticized the chromatin test as unfair and discriminatory.[151] Ironically, men with Klinefelter's Syndrome with two XX chromosomes, would pass the Barr body test as a female athlete.[152]

The limitation of sexual identity based solely on chromosomes is illustrated in the exclusion of Spanish athlete Maria Patino from the 1988 Olympics.[153] Although Ms. Patino identified herself as a "female" and her external morphological sex was "female," she had the male chromosomal pattern of XY known as Androgen Insensitivity.[154] Ms. Patino failed the sex chromatin test and was barred from competition.[155] Upon her return to Spain, Ms. Patino was stripped of her past titles and evicted from her national athletic residence.[156] In addition, her scholarship was revoked and her boyfriend deserted her.[157] Ms. Patino challenged the Barr body test and fought the International Olympic Committee's decision.[158] Two and one-half years later, and thousands of dollars later, she was back on the Spanish Olympic squad.[159]

Ms. Patino's plight caused the International Amateur Athletic Federation to hold a workshop on Methods of Femininity Verification in late 1990.[160] Although the group recommended

---

der Testing Unfair, CALGARY HERALD, Jan. 12, 1992, at F6 ("The incidence of men masquerading as women is negligible.").

149. *See* Richards, 400 N.Y.S.2d at 270.

150. *See id.*

151. *See* Albert de la Chapelle, *The Use and Misuse of Sex Chromatin Screening for Gender Identification of Female Athletes*, 256 JAMA 1920, 1920 (1986). *See also Richards*, 400 N.Y.S.2d at 720. One newspaper reported that the sex chromatin test has an error rate between six to fifteen percent. *See* Howard Wolinsky, *Olympic Test Deserves a Gender Rap*, CHI. SUN-TIMES, Aug. 7, 1988 *available at* 8/7/88 CHI. SUN-TIMES 14, 1988 WL 4677119.

152. *See* Genel, *supra* note 147, at 2. *See also* De La Chapelle, *supra* note 151, at 1922.

153. *See* FAUSTO-STERLING, *supra* note 136, at 1-3.

154. *See id.*

155. *See id.*

156. *See id.*

157. *See id.*

158. *See* FAUSTO-STERLING, *supra* note 136, at 1-3.

159. *See id.*

160. *See* Genel, *supra* note 147, at 3.

that laboratory-based sex determination be discontinued, the International Olympics Committee instead simply replaced the sex chromatin test with another type of chromosome test.[161] In 1991, the International Olympic Committee (IOC) discarded the sex chromatin test in favor of the Dingeon method or polymerase method to test for sexual identity.[162] Like the chromatin test, the Dingeon test samples oral tissue from the individual[163] but, instead of testing for the presence of a second X chromosome, the Dingeon test looks for the presence of a Y chromosome.[164] Since the Dingeon test uses chromosomes as the sole criterion for sexual identity, its substantive limitations are no different than the chromatin test.[165] In 1999, the IOC suspended gender testing of female athletes for the 2000 Olympics due to the inherent ambiguities in chromosome testing.[166]

The recognition of chromosomal variations lead a New York court in *Richards v. U.S. Tennis Association*[167] to reject the use of the Barr body test as the sole means to determine sex for purposes of participation in the United States Tennis Association's tournament.[168] Dr. Renee Richards, a post-operative male-to-female,[169] challenged the validity of the sex chromatin test to determine her sexual identity as female. Dr. Richards had been an accomplished tennis player and was ranked thirteenth nationally in the men's 35-and over category.[170] Following his sex reassignment surgery, Dr. Richards entered various women's tennis tournaments, competing successfully in the women's sin-

161. *See id.*

162. *See* Paul Holmes, *Olympic Chiefs Brush Off Sex Test Storm*, THE REUTERS LIBRARY REPORT, Jan. 29, 1992.

163. *See id.*

164. *See id.*

165. *See* M.A. Ferguson-Smith, *Olympic Row Over Sex Testing*, 355 NATURE 10 (Jan. 2, 1992).

166. *See* Suzanne Miller, *When Sexual Development Goes Awry*, WORLD & I, Sept. 2000, at 148, 154.

167. *See generally Richards*, 400 N.Y.S.2d at 272-73 ("This court is not striking down the Barr body test, as it appears to be a recognized and acceptable tool for determining sex. However, it is not and should not be the sole criterion, where as here, the circumstances warrant consideration of other factors.").

168. The court admitted the testimony of medical expert Dr. John Money who opined that the Barr body test was inadequate to determine sex because "there are human beings who do not belong to the statistical average with respect to their chromosome pattern." *Id.* at 272.

169. Dr. Renee Richards was born as Richard H. Raskind and underwent a sex reassignment operation at age forty-one because she felt that she was "a woman trapped inside the body of a man." *Id.* at 268.

170. *See id.*

gles category.[171] After Dr. Richards applied to the U.S. Tennis Association (USTA) to play in the U.S. Open, the USTA instituted a requirement that players pass a sex determination test.[172] Dr. Richards argued that the test was "insufficient, grossly unfair, inaccurate, faulty and inequitable . . . for purposes of excluding individuals from sports events on the basis of gender."[173]

Judge Ascione of the New York Superior Court decided that the sex chromatin test should not be the sole criterion to determine sex when circumstances warrant the consideration of other factors.[174] After hearing expert testimony as to the definition of sexual identity, the court concluded that "the requirement of [the USTA] that [Dr. Richards] pass the Barr body test in order to be eligible to participate in the women's singles of the U.S. Open is grossly unfair, discriminatory and inequitable, and violative of her rights under the Human Rights Law of this state."[175] Although the court did not invalidate the sex chromatin test, the court nevertheless reaffirmed Dr. Richards' sexual identity as female, stating, "When an individual such as [Dr. Richards], a highly 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."[176]

Other courts have reached similar conclusions, finding that sexual identity is based on a variety of factors. One of the first cases to address the issue of sexual identity for purposes of marriage is the landmark English case *Corbett v. Corbett*.[177] In that

171. *See id.*

172. *See Richards*, 400 N.Y.S.2d at 268.

> The record is clear that USTA's and USOC's decision to require a sex-determination test for the 1976 U.S. Open, the National Championships, was a direct result of plaintiffs application to the 1976 U.S. Open, and plaintiff's frank presentation of her medical situation in a personal letter to the chairman of the U.S. Open, Mike Blanchard. Until August 1976, there had been no sex determination test in the 95-year history of the USTA National Championships, other than a simple phenotype test (observation of primary and secondary sexual characteristics).

Id. Dr. Richards later withdrew her application to play in the 1976 U.S. Open. *See id.*

173. *Id.*

174. *See id.* at 273.

175. *Id.* at 272 (citation omitted).

176. *Id.*

177. 1971 P. 83 (Eng.).

case, the husband petitioned the court to nullify a three-month marriage on the grounds that his wife was male.[178] The husband was not claiming any fraud since he knew that his wife April had been born male. The nine medical experts who testified in the Corbett case all agreed that sex determination is based upon at least four criteria: (i) chromosomal factors, (ii) gonadal factors, (iii) genital factors (including internal sex organs), and (iv) psychological factors.[179] Despite this expert testimony, Judge Ormond concluded "that the biological sexual constitution of an individual is fixed at birth (at the latest), and cannot be changed, either by the natural development of organs of the opposite sex, or by medical or surgical means."[180] The court granted the petition to nullify the marriage.[181]

The reasoning in *Corbett* was recently challenged in the English case of *Bellinger v. Bellinger*.[182] Elizabeth Ann Bellinger sought a declaration that her 1981 marriage to Michael Jeffrey Bellinger was valid under the Family Law Act, notwithstanding her birth as a male.[183] Elizabeth argued that medical research post-*Corbett* established that psychological and hormonal factors should be included as important criteria in determining an individual's sexual identity.[184] The court refused to depart from the determination that sex is biologically fixed at birth, although the court recognized that gender may be impossible to identify at birth.[185] The court believed that social policy required that sex

178. *See id.* at 88.

179. *See id.* at 100.

180. *Id.* at 104.

181. *See id.* at 108.

182. *See* Bellinger v. Bellinger, 2002 Fam. 150 (Eng. C.A.).

183. *See id.* at 155. Elizabeth's petition was supported by her husband Michael Jeffrey Bellinger. *See id.* at 151. Elizabeth began dressing and living as a woman in 1971. *See id.* at 155. She had sex reassignment surgery in 1981 and then married Michael who knew about her background. *See id.*

184. *See id.* at 152.

> In the past 30 years medical knowledge and understanding have developed to show that psychological and hormonal factors should be included as additional important criteria in the determination of a person's sex. It is now known that sexual differentiation occurs in several stages. Transsexualism or gender dysphoria occurs where sex differentiation in the brain does not match the previous physiological development and, since sex differentiation is not complete in the brain until the age of two or three, it is impossible to identify gender at birth.

Id. Elizabeth also argued that the denial of the right to marry is incompatible with international human rights laws. *See id.* at 151.

185. *See id.* at 160. "It would seem from the definition proposed by Miss Cox, with which we would not disagree, that it would be impossible to identify gender

and gender be assigned at birth[186] and that the decision whether an individual's gender status can legally be changed was best left to the legislature.[187]

In the case of *M.T. v. J.T.*,[188] M.T filed a complaint for spousal support against her estranged husband.[189] The husband refused to pay support and sought to nullify the marriage on the grounds that the plaintiff was male.[190] Although M.T. had been born male, she "had always felt that she was [] female."[191] The New Jersey Superior Court specifically recognized the reasoning that there are several criteria or standards that may be relevant in determining the sex of an individual.[192]

The evidence and authority which we have examined, how-

---

at the moment of the birth of a child." *Id.*

186.

> We are however concerned with legal recognition of marriage which, like divorce, is a matter of status and is not for the spouses alone to decide. It affects society and is a question of public policy. For that reason, even if for no other reason, marriage is in a special position and is different from the change of gender on a driving licence, social security payments book and so on. Birth, adoption, marriage, divorce or nullity and death have to be registered. Each child born has to be placed into one of two categories for the purpose of registration. Status is not conferred only by a person upon himself; it has to be recognised by society.

Id. at 176-77. Dr. John Money was a proponent of the Imprinting Theory of gender identity. *See* Kay Brown, *TransGender Theory*, TRANSHISTORY, *at* http://www.transhistory.org/history/TH_Theory.html (last visited Sept. 30, 2002). Dr. Money theorized that parents' sexually dimorphic treatment of a child could imprint an assigned gender identity upon that child. *See id.* Dr. Money's theories lead directly to the tragedy and "experiment" of "John/Joan" Theissen whose penis was accidentally destroyed during circumcision. *Id.* His parents raised him as a girl and his twin brother as a boy. *See id.*

As John grew older, he insisted that he was a boy. *See* Milton Diamond & H. Keith Sigmundson, *Sex Reassignment at Birth: A Long Term Review and Clinical Implications*, 151(3) ARCHIVES OF PEDIATRICS & ADOLESCENT MED. 298 (1997), *available at* http://www.augsburg.edu/psych/psy355/no_penis.html (last visited Sept. 30, 2002.). He was ostracized by other children and suicidal. *See id.* He later obtained phalloplasty and married. *See id.*

187. *See* Bellinger, Fam. *supra* note 182 at 176-78.

188. 355 A.2d 204 (N.J. Super. 1976).

189. *See id.* at 205. The parties married in August 1972 and lived together in New Jersey. *See id.* The husband moved out of the house in 1974 and thereafter failed to provide any support. *See id.*

190. *See id.*

191. *See id.*

192. *See id.* at 209. "Against the backdrop of the evidence in the present record we must disagree with the conclusion reached in *Corbett* 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.*

> ever, 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 sexual identity and character. Indeed, it has been observed that the 'psychological sex of an individual,' while not serviceable for all purposes, is 'practical, realistic and humane.'[193]

The New Jersey court affirmed M.T.'s legal identity as a female, upheld the validity of their marriage, and ordered J.T. to pay spousal support.[194]

Although *Corbett* and *Bellinger* limited the determination of sex to the moment of birth, the courts in those cases nevertheless recognized that sexual identity is based upon a number of different biological factors. The legal system's rigid adherence to a limited test for sexual identity has resulted in legal anomalies. The case of *Farmer v. Brennan*[195] is one such example. In 1986, Dee Farmer was convicted of credit card fraud and incarcerated in a male prison.[196] Prior to her conviction, Ms. Farmer had worn women's clothing, taken estrogen, "received silicone breast implants," and had attempted "'black market' testicle-removal surgery."[197] Although Ms. Farmer appeared to be female, she was placed in a male prison in accordance with federal prison policy to incarcerate preoperative transsexuals according to their biological sex.[198] After placement in several male prisons, Ms. Farmer was ultimately transferred to the United States Penitentiary in Terre Haute, Indiana.[199] Within two weeks of the transfer, Ms. Farmer "was brutally beaten and raped by another

---

193. *M.T.*, 355 A.2d at 209 (citations omitted).

194. *See id.* at 211.

> If such sex reassignment surgery is successful and the postoperative transsexual is, by virtue of medical treatment, thereby possessed of the full capacity to function sexually as a male or female, as the case may be, we perceive no legal barrier, cognizable social taboo, or reason grounded in public policy to prevent that person's identification[,] at least for purposes of marriage to the sex[,] finally indicated.

Id. at 210-11. This requirement of sexual functionality as a prerequisite determinative of sexual identity has been criticized by many scholars. *See* Valdes, *supra* note 109, at 131-35; Renee, *supra* note 76, at 356-61.

195. 511 U.S. 825 (1994).

196. *See id.* at 829-30.

197. *Id.* at 829.

198. *See id.* at 829-30. "The practice of federal prison authorities is to incarcerate preoperative transsexuals with prisoners of like biological [birth-designated] sex . . . ." *Id.* at 829 (citation omitted).

199. *See id.* at 830. Ms. Farmer was transferred to the Terre Haute, Indiana prison for disciplinary reasons. *See id.*

inmate."[200] Ms. Farmer claimed that the transfer and the incarceration violated her Eighth Amendment rights and "amounted to a deliberately indifferent failure to protect [her] safety."[201] The law may validate a name change[202] and even alteration of a sex designation on a birth certificate,[203] but the law can nevertheless refuse to recognize gender as a component of sexual identity for the purposes of marriage and incarceration. In Dee Farmer's case, the result exposed her to unnecessary violence and humiliation.

2. *The Identity of Gender*

While "sexual identity" is often defined by concrete or objective biological factors, "gender identity" is largely subjective, defined by psychological, social, and cultural factors.[204] Although the words "sex" and "gender" are often used interchangeably, today more experts refer to an individual's "sex" as biologically based and "gender" as including an individual's psychological sexual identity.[205] Gender identity therefore refers to an individual's self-perception of sexual identity and the outward manifesta-

200. *Id.* at 852 (Blackmun, J., concurring).

201. *Farmer*, 511 U.S. at 831. The United States Supreme Court adopted a subjective test for liability under the Eighth Amendment holding that prison officials are liable for denying humane conditions of confinement only if they know of and disregard an excessive risk to the inmate's health and safety. *See id.* at 837.

202. Name changes are not difficult to obtain. *See generally* ARK. CODE ANN. §§ 9-2-101 to 9-2-102 (Michie 1987 & Supp. 2001); CAL. CIV. PROC. CODE §§ 1275-1279.5 (West 1982 & Supp. 2002); FLA. STAT. ANN. ch. 68, § 68.07 (Harrison 1997 & Supp. 2002); HAW. REV. STAT. ANN. § 574-5 (Michie 2001); LA. REV. STAT. ANN. §§ 13:4751-55 (West 1991 & Supp. 2002); N.Y. CIV. RIGHTS LAW §§ 60-65 (McKinney 1992 & Supp.2002); OHIO REV. CODE ANN. § 2717.01 (West 2002).

203. *See generally* ARIZ. REV. STAT.§ 36-326(A)(4) (West 1993 & Supp. 2002); HAW. REV. STAT. § 338-17.7(a)(4)(B) (1993 & Supp. 1994).

204. *See* M.T. v. J.T., 355 A.2d 204, 206 (N.J. Sup. Ct. 1976) (concluding that psychological gender was a component of sexual identity). *See also* Bellinger, Fam., *supra* note 179 at 163 (referencing the expert testimony of Professor Green who opined: "The *Corbett* criteria are too reductionistic to serve as a viable set of criteria to determine sex. They also ignore the compelling significance of the psychological status of the person as a man or a woman."). *Accord* Richards v. United States Tennis Ass'n, 400 N.Y.S.2d 267, 269-70 (Sup. Ct. 1977) (referencing the expert testimony of Dr. Daniel Federman who opined that sexual identity is a complex pattern that includes subjective features such as psychological and social sex).

205. *See* Bellinger, [2002] Fam. at 164 (referencing the expert testimony of Professor Green who acknowledged, "There are medical experts who would value the psychological factor as the most important criterion particularly when psychological factors, or the person's gender identity, is at variance with any of the other factors.").

tions of that perception.[206] By implication, "gender" is a fluid concept that shifts and evolves as contemporary standards shift and evolve, and as one's self-image grows and develops. For example, the notion of "unisex" used to appall when it appeared in the 1960s, but now is an accepted part of our culture; "unisex" and cross-dressing permit our collective societal imagination to roam in the realm of sex and gender.[207]

In 1949, Dr. David O. Cauldwell, a psychiatrist, used the term "transsexual" to refer to people who sought to change their sex.[208] In 1966, Dr. Harry Benjamin, an endocrinologist, adopted and popularized the term in his book, The Transsexual Phenomenon.[209] As part of the growing debate surrounding sex-change operations, doctors and scientists shifted their focus from concepts of biological sex to "psychological sex" or "gender identity."[210] The shift in the terminology from "transsexual" to "transgender" is indicative of society's increased awareness of the distinction between sex and gender.[211]

In approximately 1988, Virginia Prince coined the term "transgender" to describe people who live full time as the gender "opposite" of their anatomy (sexual identity).[212] Virginia Prince was a male-to-female activist[213] who sought a term that would include gays, lesbians, bisexuals, straight and gender-

206. In the 1950s, John Money, Joan G. Hampson, and John L. Hampson published a series of articles on intersexuality that introduced the new vocabulary of gender. In 1955, Dr. Money used the term "gender role" to refer to "all those things that a person says or does to disclose himself or herself as having the status of boy or man, girl or woman," and the term "gender" to refer to "outlook, demeanor, and orientation." JOANNE MEYEROWITZ, HOW SEX CHANGED A HISTORY OF TRANSSEXUALITY IN THE UNITED STATES 114 (Harvard University Press 2002).

207. *See* Hubbard, *supra* note 125, at 50.

208. *See* MEYEROWITZ, *supra* note 206, at 5.

209. BROWN & ROUNSLEY, *supra* note 131, at 28.; *see also* MEYEROWITZ, *supra* note 203, at 5-6.

210. MEYEROWITZ, *supra* note 206, at 6.

211. According to Dr. Ruth Hubbard, a professor of biology, "there is a substantial difference between modern transpersons and classical transsexuals, who by and large repudiated the genitals with which they were born and spoke of themselves as men 'imprisoned in the body of a woman' or the other way around." HUBBARD, *supra* note 125, at 51.

212. "There had to be some name for people like myself who trans the gender barrier—meaning somebody who lives full-time in the gender role opposite to their [sic] anatomy. I have not transed the sex barrier." FEINBERG, *supra* note 82.

213. Virginia Prince was part of a network of cross-dressers in Southern California and eventually launched a magazine called Transvestia that became the centerpiece of the transvestite movement. MEYEROWITZ, *supra* note 206, at 181.

diverse people.[214] Ms. Prince was dissatisfied with the term "transvestite" because it was too clinical and did not support or define the deep emotional feelings of gender-diverse individuals.[215]

The term "transgender" has emerged as a popular alternative to "transsexual," and refers generally to a diverse group of individuals who cross or transcend culturally defined categories of gender.[216]

> This group includes male-to-female and female-to-male transsexuals (those who desire or have had hormone therapy or sex reassignment surgery), crossdressers or transvestites (those who desire to wear clothing associated with another sex), transgenderists (those who live in the gender role associated with another sex without desiring sex reassignment surgery), bigender persons (those who identify as both man and woman), drag queens and kings (usually gay men and lesbian women who "do drag" and dress up in, respectively, women's and men's clothes), and female and male impersonators (males who impersonate women and females who impersonate men, usually for entertainment). Within today's transgender coming out and liberation movement, even more alternative identities have emerged such as gender blender, gender bender, [and] genderfree.[217]

Gender dysphoria, or gender identity disorder, is a medical term used to diagnose individuals who possess "a preoccupation to live as a member of the other sex," which "may be manifested as an intense desire to adopt the social role of the other sex or to acquire the physical appearance of the other sex through hormonal or surgical manipulation."[218] The medicaliza-

---

214. *See* Angela Brightfeather, *Unity Community with Angela Brightfeather*, Q-Notes Online, *at* http://www.q-notes.com/unitycommunity.htm (last visited Apr. 9, 2003).

215. Dr. Magnus Hirschfeld invented the word "transvestite" to refer to males who identified as females. The term "trans" meaning to cross over and "vestite" from the Greek for feminine. MEYEROWITZ, *supra* note 206, at 19.
In 1923, Dr. Hirschfeld used the term "seelischen Transsexualismus," or spiritual transsexualism, in a published article, but he apparently did not use the term "transsexual" the way we use it today. For people who hoped to change their sex, he used the term "transvestite." *See id.*

216. *See* Walter O. Bockting, Ph.D., *From Construction to Context: Gender Through the Eyes of the Transgendered*, SEXUAL HEALTH TODAY, vol. 3, no. 1 Winter 2000, at 1, *at* http://www.med.umn.edu/fp/phs/sht/shtv3n1/htm (last visited Apr. 9, 2003).

217. *Id.*

218. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS-IV 533 (4th ed. 1994). *Accord* Bonnie Bullough &

tion of transgender individuals as having an illness that can be "cured" with surgery has been criticized by many activists.[219] In the 1970s, private surgeons discovered that sex reassignment surgery provided a lucrative business.[220] According to one report, transsexuality had grown into a "$10 million-a-year business."[221] Although many surgeons were reputable, at least a few were viewed as "back-alley butchers."[222]

Dr. Anne Fausto-Sterling, a biologist and feminist, has proposed that physicians, "[s]top infant genital surgery."[223] In her book, Sexing The Body,[224] she recounts life stories of individuals who have suffered depression, multiple surgeries, scarring, and feelings of shame and betrayal from secret "corrective" genital surgery.[225] In Dr. Fausto-Sterling's opinion, "medicine's focus on creating the perfect genitals, meant to prevent psychological suffering, clearly contributes to it."[226] She hopes for a future in which "gender variability" is accepted without the need for

---

Vern L. Bullough, *Transsexualism Historical Perspectives, 1952 to Present, in* CURRENT CONCEPTS IN TRANSGENDER IDENTITY 22 (Dallas Denny ed., Garland Publishing, Inc. 1998) ("Gender-identity disorder" replaced "transsexualism" in the 1994 edition).

> The problem was that transsexualism was too specific - it detailed a condition which only the patients' own accounts could demonstrate, and it specified a type of treatment (sex-reassignment surgery). Gender dysphoria is, by contrast, a very general descriptive term for a sympton. To say that a patient suffers from gender dysphoria is as noncommittal as saying a patient suffers from back pain or headaches. Further diagnosis and treatment is firmly retained in professional hands.

Richard Ekins & Dave King, *Blending Genders Contributions to the Emerging Field of Transgender Studies, in* CURRENT CONCEPTS IN TRANSGENDER IDENTITY 97-98 (Dallas Denny ed., Garland Publishing, Inc. 1998) (citation omitted).

219. *See* Dwight B. Billings and Thomas Urban, *The Socio-Medical Construction of Transsexualism: An Interpretation and Critique*, 29 SOC. PROBS. 266 (1982). *See also* FAUSTO-STERLING, *supra* note 136, at ch. 4.

220. *See* MEYEROWITZ, *supra* note 206, at 271.

221. *Id.* at 271 (*citing* Roger Starr, *Cutting the Ties That Bind*, HARPER'S, May 1978, at 49).

222. Dr. John Ronald Brown is one example. Dr. Brown allegedly used Valium before surgery and purposely damaged the vagina of a patient who angered him. He lost his medical license in California in 1977. *See* MEYEROWITZ, *supra* note 206, at 271-72.

223. FAUSTO-STERLING, *supra* note 136, at 79.

224. FAUSTO-STERLING, *supra* note 136.

225. Cheryl Chase, the founder of the Intersexual Society of North America, was raised as a boy until she was eighteen months old when she underwent a complete clitorectomy. *See id.* at 80-81. When she was older, she was told that she needed a hernia operation but in fact, the operation was to remove the testicular portion of her gonads. *See id.* Cheryl did not learn that she had been born intersexed until she was 23 years old. *See id.*

226. *Id.* at 86.

medical intervention.[227]

The diagnosis of "transsexualism" as an illness or disorder seems counter-productive to the acceptance of "gender variability." Nevertheless, the categorization of gender dysphoria as an "illness" has its advantages.[228] The medical diagnosis of "gender dysphoria" has enabled some individuals to obtain health insurance coverage for hormone treatments and sex reassignment surgery.[229] However, some criticize members of the medical profession as the subjective and arbitrary "gatekeepers" in deciding who is eligible for sex reassignment surgery.[230]

The controversy over the medicalization of transgender individuals is similar to the debate that surrounded the prior inclusion of homosexuality as an illness.[231] As the movement for transgender rights continues to grow,[232] the likely result will be the recognition that a transgender individual is not mentally ill simply on the basis of his or her transgender status. "Transgender" is not simply a third category of gender, but a reality of the broad spectrum of human possibilities beyond "male" and "female."[233]

---

227. *See id.* at 101.

228. *See* Susan Etta Keller, *Crisis of Authority: Medical Rhetoric and Transsexual Identity*, 11 YALE J.L. & FEMINISM 51, 59 (1999).

> [A] reliance on a medical model of transsexuality, despite its disempowering potential, is often deemed necessary for the provision of public and private medical insurance benefits for transsexuals, adequate treatment in prison, relief from arrest, and other benefits as well as a justification for the gender reassignment surgery sought by transsexuals.

Id.

229. *See generally* Pinneke v. Preisser, 623 F.2d 546 (8th Cir. 1980). The Eighth Circuit Court of Appeals held that sex reassignment surgery was "medically necessary" as "the only successful treatment" for the "very complex medical and psychological problem" of transsexualism. *Id.* at 550. The court held that the costs of surgery were covered under the state's Medicaid plan. *See id.*

230. *See* Judith Shapiro, *Transsexualism: Reflections on the Persistence of Gender and the Mutability of Sex*, *in* BODY GUARDS: THE CULTURAL POLITICS OF GENDER AMBIGUITY 248, 254 (Julia Epstein & Kristina Straub eds., Routledge, Chapman, and Hall, Inc. 1991) ("Physical attractiveness seems to have provided the major basis for an optimistic prognosis in male to female sex change.").

231. Ironically, transsexualism was included in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders for the first time in 1980, in the same edition in which homosexuality was first removed. *See* Keller, *supra* note 222, at 52.

232. *See supra* note 80.

233. *See* Anne Fausto-Sterling, *The Five Sexes: Why Male and Female Are Not Enough*, THE SCIENCES, Mar./Apr. 1993, at 20-21.

3. *Sexual Orientation*

Sexual orientation is neither sexual identity nor gender. There is no obvious correlation between sexual identity, gender, and sexual orientation.[234] Transgender individuals, like the rest of the human population, may be attracted to men and women, and may sexually interact with homosexual, bisexual, and heterosexually-identified individuals.[235] "Sexual orientation" thus refers to a preference or physical attraction towards individuals of a particular sex or gender.[236] In other words, it seems generally understood, both legally and culturally, that "homosexuals" are those persons whose "sexual orientation" is same-sex directed, that "heterosexuals" are those persons whose "sexual orientation" is cross-sex directed, and "bisexuals" are those persons whose "sexual orientation" is directed at both sexes.[237]

The definition of sexual orientation often implies that individuals are only heterosexual, homosexual, or both.[238] However, the limited tripartite model of sexual preference contradicts the historical variance of sexual practices that has existed throughout the history of humankind.[239] The study of human sexuality is much more complex. Multidimensional models exist rating sexual attraction, sexual behavior, sexual fantasies, emotional preference, social preference, self-identification, and heterosexual/homosexual lifestyle as several factors contributing to sexual orientation.[240]

In ancient Greek and Roman cultures, homosexuality was commonplace and socially tolerated.[241] Beginning in the Middle Ages, the dominant Christian view was that of a distrust of sexual expression, with a grudging tolerance for procreation within the confines of marriage.[242] Since homosexuality and bisexuality do not necessarily involve procreation, most Christians consid-

234. *See Ross, supra* note 126, at 1-8.

235. *See Bockting, supra* note 216, at 4.

236. *See Valdes, supra* note 114, at 51.

237. *See id.* at 135.

238. *See* FAUSTO-STERLING, *supra* note 136, at 12 ("Most Westerners assumed that people's sexuality could be classified two or three ways: homosexual, heterosexual, and bisexual.").

239. *See id.*

240. *See* FAUSTO-STERLING, *supra* note 136, at 10.

241. *See* Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 197 (1988).

242. The American states adopted the prohibition through its incorporation of the common law. *See id.* at 198.

ered such conduct immoral and objectionable.[243] Limiting human sexuality to a primal need for procreation diminishes the emotional value in human relationships and devalues those individuals in our society who cannot or do not procreate.

Society's present conflation of sex, gender, and sexual orientation reinforces the conservative right's moralistic objection to any variance from binary genderism. Just as science and history illustrate that sex and gender are not limited to two categories, sexual orientation likewise cannot be restricted to the categories of homosexuality and heterosexuality; the range of human behavior is much broader.

B. *Gender Multiplicity in Other Cultures*

As discussed above, incongruity among the eight factors that constitute sexual identity has existed throughout the history of humankind.[244] In addition to chromosomal, hormonal, and internal organ ambiguities, which may not be externalized at birth, ambiguity may exist as to external genitalia, resulting in an intersexed[245] condition. Individuals with double, doubtful, and/or mistaken external sex are typically referred to as intersexed or hermaphrodites.[246]

The number of intersexed individuals in the world is difficult to determine with precision, in part because experts disagree as to which ambiguous or doubtful external sex conditions should be included in that statistic.[247] Nevertheless, estimates range from 1-4% of the world's population.[248] At birth, inter-

243. St. Thomas Aquinas argued that non-procreative sex violated the laws of nature. *See id.*

244. Plato wrote that there were originally three sexes-male, female, and hermaphrodite-but that the third sex became lost over time. *See* FAUSTO-STERLING, *supra* note 136, at 33.

245. Beginning in the mid-twentieth century, the term "intersexed" began to replace "hermaphrodite." "Intersexed" literally means that an individual is *between* the sexes—that s/he slips between and blends maleness and femaleness. By contrast the term "hermaphroditic" implies that a person has *both* male and female attributes, that s/he is not a third sex or a blended sex, but instead that s/he is a sort of double sex, that is, in possession of a body which juxtaposes essentially "male" and essentially "female" parts. *See* DREGER, *supra* note 144, at 31.

246. There is a growing momentum to eliminate the word "hermaphrodite" from medical literature because it is viewed by some as stigmatizing and misleading. *See On the Word "Hermaphrodite,"* Intersex Society of North America, *at* http://isna.org/faq/language.html (last visited Apr. 9, 2003).

247. *See* DREGER, *supra* note 144, at 40-42.

248. *See id.* at 42 (crediting Anne Fausto-Sterling as responsible for estimating the number at one percent). *See also* SUZANNE J. KESSLER, LESSONS FROM THE

sexed infants often are assigned a sex based on subjective stereotypes. Penile length is the most important factor in sex assignment at birth.[249] The standard medical practice for intersexed infants is surgery to remove sexual ambiguity.[250] According to one study, 90% of babies with ambiguous genitals are designated as "female" and surgically altered accordingly because, "You can make a hole, but you can't build a pole."[251]

Intersexed individuals have been recognized and accepted without shame in other cultures.[252] Data gathered on the traditional practices of various North American Indians establishes the existence of individuals who "transformed" or "changed sexes."[253] The so-called "berdache" has been used as a "general designation for individuals who take on gender roles in opposition to their anatomical sex by adopting the dress and performing the activities of members of the other group."[254] The Lakota culture used the term "winkte," meaning "male to female."[255] "In paleo-Asiatic, ancient Mediterranean, Indian, Oceanic, and African tribes, men who adopted the ways and dress of women enjoyed high esteem as shamans, priests, and sorcerers–all persons whose supernatural powers were feared and revered."[256]

In several small villages in the Dominican Republic and among the Sambia people in Papua, New Guinea, 5-Alpha Reductase Deficiency occurs with high frequency.[257] Although these children appear female at birth, they have an XY chromo-

---

INTERSEXED 135, n.4 (Rutgers University Press 1998); Greenberg, *supra* note 132, at 267 ("If, as some experts believe, the number of intersexed people is four percent, approximately ten million people in the United States will be affected.").

249. *See* Suzanne J. Kessler, *The Medical Construction of Gender: Case Management of Intersexed Infants,* 16 SIGNS 3 (1990). *See also* PHYLLIS BURKE, GENDER SHOCK: EXPLODING THE MYTHS OF MALE AND FEMALE 221-28 (Anchor Books 1996).

250. *See* R. L. Rothstein & R. M. Couch, *Management of Intersex: Approach to Ambiguous Genitalia,* BRIT. COLOM. MED. J. 493, 495 (Aug. 1992).

251. Melissa Hendricks, "Is It a Boy or a Girl?," JOHN HOPKINS MAG., Nov. 1993, at 10-16.

252. *See* Sue-Ellen Jacobs & Jason Cromwell, *Visions and Revisions of Reality: Reflections on Sex, Sexuality, Gender, and Gender Variance,* 23 J. HOMOSEXUALITY 43, 62 (1992).

253. *See* Richard Green, *Mythological, Historical, and Cross-Cultural Aspects of Transsexualism, in* CURRENT CONCEPTS IN TRANSGENDER IDENTITY 8-10 (Dallas Denny ed., Garland Publishing 1998).

254. Judith Shapiro, *Transsexualism: Reflections on the Persistence of Gender and the Mutability of Sex, in* BODY GUARDS 263 (Julia Epstein and Kristina Straub eds., 1991).

255. *See* Cheryl Long Feather, *Four Directions-Tribal Culture Loses the Element of Acceptance,* BISMARCK TRIB., Jan. 13, 1999, at 1B; FEINBERG, *supra* note 82, at 26.

256. Green, *supra* note 253, at 10.

257. *See* FAUSTO-STERLING, *supra* note 136, at 109.

some pattern and, at puberty, begin to develop male genitalia. The Dominicans call this "third sex," "guevodoche," or "penis at twelve."[258] The Sambians use the term "kwolu-aatmwol," suggesting a transformation "into a male thing."[259]

For the past 2,500 years in India, individuals who wish to live as members of the "opposite" gender may choose to become part of the Hirja caste or "third gender" caste.[260] "Hirja" translates as "hermaphrodite," "eunuch," or "sacred erotic female-man."[261] Religious texts include references to transgendered individuals. The Talmud and the Tosefta have detailed rules regarding "androgynos" and "hermaphrodite" in reference to individuals who have "both male and female characteristics and organs."[262]

Even early English law recognized the existence of transgendered individuals. According to Bracton, individuals could be classified as "male, female, or hermaphrodite."[263] In the sixteenth century, the legal scholar Lord Coke wrote, "[e]very heire is either a male, or female, or an hermaphrodite, that is both male and female. And an hermaphrodite (which is also called Androgynus) shall be heire, either as male or female, according to that kind of the sexe which doth prevaile."[264]

Intersexed and transgendered individuals have existed throughout history and around the globe.[265] Anglo-American culture's rigid adherence to a binary system of sex and gender is contrary to medical and scientific data. Human beings come in many shapes, sizes, colors, sexes, and genders. Intersexed and transgendered individuals have begun to find their voices to demand their right to self-identify both their sexual identity and

---

258. *Id.*

259. *Id.*

260. *See* Serena Nanda, *The Hirjas of India: Cultural and Individualized Third Gender Role*, THE MANY FACES OF HOMOSEXUALITY: ANTHROPOLOGICAL APPROACHES TO HOMOSEXUAL BEHAVIOR 165 (Evelyn Blackwood ed., 1986). *See also* Gianna E. Israel, *Transgenderists: When Self-Identification Challenges Transgender Stereotypes, at* http://www.firelily.com/gender/gianna/transgenderists.html (last visited Apr. 9, 2003).

261. *See id.*

262. *See* ENCYCLOPEDIA JUDAICA (CD ROM, 1997).

263. 2 BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND 81 (Samuel E. Thorne trans., 1968).

264. 1 E. COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 8.a. (1st Am. Ed. 1812).

265. Physicians in the Middle Ages believed in the sexual continuum theory although they argued for sharper divisions of sexual variation. *See* FAUSTO-STERLING, *supra* note 136, at 34.

their gender.[266] Through its laws and judicial decisions, society must hear these voices.

Recently, several international cases have addressed the legal rights of transgendered and intersexed individuals.[267] In 1996, the Court of Justice of the European Communities held that the termination of an employee who intended to undergo sex reassignment surgery was in violation of the European Equal Treatment Directive prohibiting sex discrimination:[268] "To tolerate such discrimination would be tantamount, as regards such a person, to failure to respect the dignity and freedom, to which he or she is entitled, and which the court has a duty to safeguard."[269]

In New Zealand, the High Court of Wellington ruled in *Attorney General v. Otahuhu Family Court* that self-identified sex is an individual's legal sex for purposes of marriage.[270] The New Zealand court recognized that the concept of sexual identity includes a psychological component and criticized the *Corbett*'s court failure to so hold.[271] "There is no social advantage in the law not recognizing the validity of the marriage of a transsexual in the sex of reassignment. It would merely confirm the factual reality."[272]

Although many other international decisions[273] follow the reasoning in *Corbett* and refuse to recognize gender identity as an integral component of an individual's sexual identity, the persistent existence of these cases establish a significant emerg-

---

266. Support groups for intersexed individuals include: the Intersex Society of North America, the Androgen Insensitivity Syndrome Support Group, Transgender Menace, Klinefelter Syndrome and Associates, and the Genital Mutilation Survivor's Support Network and Workgroup on Violence in Pediatrics and Gynecology.

267. Many courts have refused to recognize an individual's self-claimed gender. In C v. C, 1992 Ont. C.J. Lexis 1518 (1992), a Canadian court held that a marriage between a female-to-male transsexual and a woman was invalid because the husband had never "changed" his sex to male. *Id.* at *4. *See also* Lim Ying v. Hiok Kian Ming Eric, 1991 SLR LEXIS 184 (the Singapore High Court nullified a marriage between a woman and a post-operative male on the grounds that legal sex for purposes of marriage is fixed at birth.).

268. *See* Case C-13/94, P v. S, 1996 ICR 795 (1996).

269. *Id.* at 814.

270. *See* (1995) 1 NZLR 603, 606.

271. *See id.* at 606-07.

272. *Id.* at 607.

273. Rees v. United Kingdom, 9 EHRR 56 (1986) (refusing to recognize a "transsexual" female for purposes of marriage). *See also* Cossey v. United Kingdom, 13 EHRR 622 (1990); C v. C 1992 Ont. C.J. Lexis 1518 (voideing a marriage because the female-to-male transsexual remained a male for purposes of marriage).

ing area of transgender rights.[274]

V. JUDICIAL TREATMENT AND MISTREATMENT OF TRANSGENDER PARENTS

A. *Trans-Parent-See*[275] *and the Per Se Rule Against Custody*

Courts have generally followed two approaches[276] in child custody cases: the per se rule and the nexus test.[277] Although few cases have strictly applied the per se rule to preclude an award of child custody,[278] the per se rule has been widely used to deny child custody to gay and lesbian parents simply because of their sexual orientation.[279] A majority of courts today follow the nexus test in deciding child custody.[280] Under the nexus test, a court will consider a parent's behavior only if that behavior has some negative nexus or influence on the child.[281] In a true determination of what is in the best interest of the child, the courts should likewise determine whether a negative "nexus"[282]

---

274. The decision in Case C-13/94, *P v. S*, (1996) led to the Sex Discrimination (Gender reassignment) regulations 1999 (SI 1999/1102) enacted under Section 2(2) of the European Communities Act 1972. *See also* Sheffield and Horsham v. United Kingdom 27 EHRR 163 1998 (The European Court of Human Rights stated "there is an increased social acceptance of transsexualism and an increased recognition of the problems which post-operative transsexuals encounter. Even if it finds no breach of article 8 in this case, the court reiterates that this area needs to be kept under review by contracting states.").

275. "Within the last decade, there has been greater visibility of transgendered people as a permanent status or 'third sex.' Formerly, the transsexual ideal was to disappear into the 'other' gender and to be known simply as a man or a woman." *See* Ekins & King, *supra* note 218, at 104.

276. Some commentators have identified more than two approaches in custody cases. *See generally* Robert A. Beargie, *Custody Determinations Involving the Homosexual Parent*, 22 FAM. L.Q. 71 (1988) (identifying a third category of consisting of a rebuttable presumption); Katheryn D. Katz, *Majoritarian Morality and Parental Rights*, 52 ALB. L. REV. 405 (1988) (identifying four categories).

277. *See* Julie Shapiro, *Custody and Conduct: How the Law Fails Lesbian and Gay Parents and Their Children*, 71 IND. L.J. 623, 635-41 (1996). The per se rule establishes an irrebuttable presumption that a parent is unfit because of certain behavior or conduct, while the nexus test merely considers such conduct as one factor affecting the welfare of the child. *See id.*

278. *See id.* at 634. *See also* Cox, *supra* note 72, at 792.

279. *See* Thigpen v. Carpenter, 730 S.W.2d 510, 513 (Ark. Ct. App. 1987); Roe v. Roe, 324 S.E.2d 691, 693 (Va. 1985); M.J.P. v. J.G.P., 640 P.2d 966, 969 (Okla. 1982). *But see* Bottoms v. Bottoms, 457 S.E.2d 102, 108 (Va. 1995).

280. *See* Shapiro, *supra* note 277, at 635.

281. *See id.* at 633.

282. Courts using the nexus test consider a parent's behavior as only one factor in the determination of what is in the best interest of the child. *See* S.N.E. v. R.L.B., 699 P.2d 875, 878 (Alaska 1985) ("We have often endorsed the requirement that

exists between a parent's transgender status and the well-being of the child before precluding an award of custody based upon that parent's transgender status. Gender identity is a social construct generally limited to the binary categories of

female and male; those who do not fit neatly into one or the other simply cannot exist in the law.[283] In child custody cases across the United States, transgender parents have faced presumptions and assumptions about their sexual identity and gender.[284] Transgender parents have fought to retain their rights as parents under the law.

In *Daly v. Daly*,[285] the Supreme Court of Nevada took the extreme position of terminating the parental rights of a father who had undergone sex reassignment surgery to change his sexual anatomy from male to female.[286] The court concluded that termination of the parent-child relationship was "in the child's best interests."[287] The court opined that the father, now living his life as "Suzanne," was a "selfish person whose own needs, desires and wishes were paramount and were indulged without regard to their impact on the life and psyche of the daughter, Mary."[288] Notably absent from the court's majority opinion is any discussion regarding the historical existence of gender multiplicity.

According to the Nevada court, Suzanne had effectively terminated her parental rights by choosing "to discard his fatherhood and assume the role of a female who could never be either mother or sister to his daughter."[289] The court also objected to Suzanne's friendships with lesbians, homosexuals and transsexuals.

> Suzanne, who admitted that many of her friends are to be found among the aforementioned groups, has thus postured

---

there be a nexus between the conduct of the parent relied on by the court and the parent-child relationship."); *see also* M.A.B. v. R.B., 510 N.Y.S.2d 960, 965 (App. Div. 1986) ("[T]he homosexuality of a parent should only be an issue insofar as the parent's sexual orientation can be proven to have harmed the child.") (quoting Rhonda R. Rivera, *Queer Law: Sexual Orientation Law in the Mid-Eighties*, 11 U. DAYTON L. REV. 275, 330 (1986)).

283. *See* Renee, *supra* note 76, at 345-46.

284. *See generally* J.L.S. v. D.K.S., 943 S.W.2d 766, 769 (Mo. Ct. App. 1997); Cisek v. Cisek, No. 80 C. A. 113, 1982 WL 6161, at *2 (Ohio Ct. App. July 20, 1982); Daly v. Daly, 715 P.2d 56, 57 (Nev. 1986).

285. 715 P.2d at 58-59.

286. *See id* at 57.

287. *Id.* at 58.

288. *Id.* at 59.

289. *Id.*

> herself in a position of recurring conflict with the child's mother and the 'traditional' upbringing enjoyed by Mary during her formative years. The resulting equation does not bode well for the emotional health and well-being of the child.[290]

The Nevada Supreme Court attempted to clarify that its decision was based on the negative effect on Mary of Suzanne's gender change rather than on the change itself,[291] but the attempted distinction appeared half-hearted and disingenuous. The majority claimed to terminate Suzanne's parental rights because of "the substantial risk of emotional or mental injury were [Mary] forced to visit with her father."[292] This claim by the majority was disingenuous, given that Suzanne was willing to forego any visitation rights with Mary, provided that she could maintain her status as Mary's parent.[293] Suzanne hoped that Mary would eventually wish to resume a relationship with her.[294] As the dissent aptly stressed, "[a]t the outset, it should be emphasized that the father does not seek visitation rights at the present time. Hence, with all respect to my brethren in the majority, it seems inappropriate to bottom a ruling against him on the supposition that visitation with him could injure Mary."[295]

The Nevada court erroneously substituted its own vision of "family" in place of Mary's real family–Mary has a mother and a father who changed his gender identity. The court's prevention of Mary's exposure to a particular minority group that the court found offensive is an example of personal prejudice and bias. The majority's decision represents the very "standardization" of children that the United States Supreme Court warned against in 1925.[296]

---

290. 715 P. 2d at 59.

291. *See id.* at 58 n.4.

292. *Id.* at 59.

293. *See id.*

> In conclusion, I reiterate that Mary and her father currently are totally separated, for he is willing to forego visitation rights at present, in order to maintain his legal status as Mary's parent. This separation protects Mary from all of the concerns, imagined or real, which underlay the district court's termination of parental rights.

Id. at 63 (Gunderson, J., dissenting).

294. *See id.* at 64.

295. *See id.* at 60.

296. *See* Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (challenging an Oregon law requiring parents and guardians of children between the ages of eight and sixteen to send those children to public school).

Another case applying the per se rule against a transgender parent is *Cisek v. Cisek*, in which the Ohio Court of Appeals terminated the father's visitation rights with his two minor children following a "complete change of sex."[297] The mother's medical expert, Dr. Giannini, opined that the daughters would have difficulty adjusting to their father as a woman.[298] Dr. Giannini recommended that "physical contact . . . be stopped."[299] Demonstrating a fundamental lack of understanding about transgenderism, the court terminated visitation with a gratuitous question: "Was his sex change simply an indulgence of some fantasy?"[300] The court incorrectly conflated sexuality, sexual identity, and gender identity and failed to comprehend the enormous social cost, individual stress, legal consequences and financial expense involved in changing one's gender identity.[301]

Another example of a per se preclusion of custody based on a parent's change in gender identity can be found in the Missouri case of *J.L.S. v. D.K.S.*[302] In *J.L.S.*, the father struggled with his gender identity throughout his marriage and ultimately underwent sex reassignment surgery after divorce. Although the trial court found him to be a "loving and caring father, the Missouri Court of Appeals nevertheless reversed the award of joint custody."[303] The court also precluded any visitation until "the children are emotionally and mentally suited for physical contact with their father."[304]

In all of the aforementioned decisions, the courts reiterated their deference for the "best interest of the child," but failed to

---

297. 1982 WL 6161 at *1.

298. *See id.*

299. *Id.*

300. *Id.* at *2.

301. *See* Katrina C. Rose, *The Transsexual and the Damage Done: The Fourth Court of Appeals Opens Pandoma's Box by Closing the Door on Transsexuals' Right to Marry*, 9 LAW & SEXUALITY 1, 134 n.8 (1999-2000).

> No one wakes up one morning and says, "Gee. I think that from now on I will willingly choose to become part of (one of) the most misunderstood minorities in America. I want to make my life more difficult by confusing and perhaps losing the love of my family and friends. I want to be subjected to hate crimes and employment discrimination. I want to go through the physical and financial pain of obtaining sex reassignment surgery."

Id. (quoting Sarah DePalma, Littleton Update, TGAIN Press Release e-mail (Jan. 14, 2000)).

302. 943 S.W.2d 766 (Mo. Ct. App. 1997).

303. *Id.* at 771.

304. *Id.* at 773-74.

balance that standard against the legal parent's constitutional right of due process in raising his or her own child.[305] Missing from all of these reported decisions is the medical data evidencing gender mulitiplicity.

A transgendered individual does not "choose" to live his or her life as a member of the "opposite" sex.[306] The courts' erroneous belief that transgenderism is a "choice,"[307] and the courts' proclamation of a transgender parent as "selfish,"[308] is indicative of the courts' refusal to see beyond binary genderism and refusal to consider the constitutional rights of the biological parent. In applying the "best interest of the child" standard, these courts have abused their discretion by injecting their own subjective standard of morality and prejudice without first gaining an understanding of the human continuum of sex and gender.

B. *Trans-Parent-See and the Negative Nexus Test*

In making child custody decisions, few courts in the United States have applied the negative nexus test in cases in which a transgender parent is involved.[309] These courts concluded that if a parent's transgender status did not have a negative effect on the well-being of the child, transgenderism did not per se preclude an award of custody to that parent. With one exception,[310] the few cases awarding child custody to a transgender parent were based upon that parent's willingness to keep his/her transgender identity and behavior repressed or a secret.[311] Since the parent's transgender status had no 'negative' effect on the child, the fact of transgenderism did not preclude an award of custody.

---

305. *See supra* notes 43-50.

306. *See, e.g.*, Gretchen Edgren, *The Transformation of Tula*, PLAYBOY, Sept. 1991, at 103, 105 ("I can't understand why people don't realize that my predicament had nothing to do with choice." (quoting Caroline "Tula" Cossey, a transsexual model)).

307. "It was strictly Tim Daly's choice to discard his fatherhood and assume the role of a female who could never be either mother or sister to his daughter." Daly v. Daly, 715 P.2d 56, 59 (Nev. 1986).

308. *Id.* at 63.

309. *See* Christian v. Randall, 516 P.2d 132, 134 (Colo. Ct. App. 1973); *In re* T.J., No. C2-87-1786, 1988 WL 8302 *1 (Minn. Ct. App. Feb. 9, 1988); In Re Marriage of Kantaras, Case No. 98-5375CA, February 21, 2003 Opinion, *available at* http: www.courttv.com/trials/kantaras.

310. *See generally Christian*, 516 P.2d 132 (Colo. Ct. App. 1973).

311. *See infra* notes 312-23.

In the Minnesota case of *In re T.J.*,[312] the court of appeals refused to disturb the father's award of custody despite the father's "gender conflict."[313]

> [The father] has decided to maintain his male identity. T.J. has exhibited no atypical manifestations which would lead the Court to conclude that his father's gender dysphoria has affected him in any way... In addition, there is no evidence which would lead the Court to believe that providing primary parenting responsibilities to a gender dysphoric father would cause future problems for T.J.[314]

Although the court stated that the father's "condition does not automatically disqualify him from having a relationship with his child," notably, in *In re T.J.*, the father was neither living life as a female nor dressing like one.[315] He remained trans-parent;[316] as long as he retained a gender identity consistent with his biological sex, the court was willing to retain the award of custody.

The Minnesota case *In re Welfare of V.H.* was similarly decided.[317] In that case, the father was awarded physical custody of the parties' daughter despite his transvestism.[318] The result was influenced with the existence of evidence that the child had suffered physical and sexual abuse at the hands of her mother.[319] Evidence was also presented as to the effect of the father's transvestism on the emotional and psychological well-being of the child.[320] One expert testified that knowledge of the father's behavior would prove harmful to the child's own sexual identity.[321] The court responded, "On the other hand, [the father] has taken positive steps to keep his behavior from his daughter. He does not cross-dress in front of her and he has made plans for discussing his transvestism with his daughter and a therapist when she is old enough to be told."[322] Since the father had agreed to keep his daughter from discovering his cross-dressing and since the mother had abused the child, the court readily

312. *See In re T.J.*, 1988 WL 8302.
313. *Id.*
314. *Id.*
315. *Id.*
316. Ekins & King, *supra* note 218 , at 104.
317. 412 N.W.2d 389 (Minn. Ct. App. 1987).
318. *See id.*
319. *See id.* at 392.
320. *See id.*
321. *See id.* at 393.
322. *Id.*

awarded physical custody of the child to the father, finding this result to be in the "best interest of the child."[323]

In *Christian v. Randall*,[324] the Colorado Court of Appeals applied the negative nexus test to a custodial mother who had undergone a change in her gender identity. In that case, the father petitioned for custody of his four daughters after learning that his former wife had undergone a "transsexual change"[325] and had married a woman. Since all of the children were happy and well-adjusted, the Court of Appeals relied on a Colorado statute that precludes the court's consideration of "conduct that does not affect [the custodian's] relationship with the child."[326] The court concluded that the mother's transgenderism "did not adversely affect [her] relationship with the children nor impair their emotional development."[327] The court denied the father's petition for change in custody because the mother's transgender status had no negative nexus to the children's well-being.[328] The children were aware of their mother's gender change and apparently were "happy, healthy, well-adjusted children who were doing well in school and who were active in community activities."[329]

In the case of *In re Marriage of Kantaras*, the Florida court reviewed the criteria[330] to be followed in determining which par-

---

323. *See id.*

324. 516 P.2d 132 (Colo. Ct. App. 1973).

325. *See id.* at 132.

326. "1971 Perm. Supp., C.R.S.1963, 46-1-24(2), specifically directs that, in determining best interests, 'The court *shall not* consider conduct of a proposed custodian that does not affect his relationship with the child.'" *Id.* at 134.

327. *Id.*

328. *See id.*

329. *Id.* at 133.

330. The Kantaras court considered the following criteria: (1) The parent who is more likely to allow the child frequent and continuing contact with the nonresidential parent; (2) The love, affection and other emotional ties existing between the parents and the child; (3) The capacity and disposition of the parents to provide the child with food, clothing, medical care or other remedial care, and other material needs; (4) The length of time the child has lived in a stable, satisfactory, environment and the desirability of maintaining continuity; (5) The permanence, as a family unit, of the existing or proposed custodial home; (6) The moral fitness of the parents; (7) The mental and physical health of the parents: (8) The home, school, and community record of the child; (9) The reasonable preference of the child, if the Court deems the child to be of sufficient intelligence, understanding and experience to express a preference; and, (10) The willingness and ability of each parent to facilitate and encourage a close and continuing parent-child relationship between the children and the other parent. In Re Marriage of Kantaras, supra note 2 at 785-90.

ent should be the "primary residential custodian" and concluded that Michael the father, qualified best, despite the father's transgender status.[331] In a thoughtful and lengthy opinion, the court reviewed cases involving the issue of marriage for transgendered individuals and whether birth sex is conclusive for purposes of marriage.[332] The court rejected the "traditional approach"[333] of limiting an individual's sex to that designated at birth, stating, "To adhere to a two-part biological classification of sex, male and female, with no variations between has the benefit of dogmatic rigidity."[334] The court validated the marriage and awarded primary residential custody of the children to Michael.[335]

The remaining reported custody decision involving a transgender parent is the Oregon case *In re Darnell*.[336] The court terminated the parental rights of the mother Linda Thain Darnell because of drug use, her failure to provide an adequate environment for her four-year old daughter, and her continued relationship with David Darnell.[337] Thus, David was identified by the court as a "transsexual,"[338] whose parental rights were terminated in an earlier proceeding before the court.[339] Although the court objected to the mother's continued relationship with

---

331. *Id.*

332. *Id.* at 722-28.

333. "It would appear from the decisions the "traditional approach" to marriage is the main road traveled. Possibly because of its utter simplicity." *Id.* at 721.

334. *Id.*

335. *Id.* at 808.

336. 619 P.2d 1349 (Or. Ct. App. 1980).

337.

> Linda Darnell is not a credible witness; Linda Darnell is not amenable to supervision of this Court; Linda Darnell used drugs in 1978 - this finding based upon the testimony of witnesses that the Court finds are credible; Linda Darnell committed perjury regarding the activities of David Darnell; Linda Darnell has maintained an uninterrupted association with David Darnell to the date of this hearing; Linda Darnell failed to provide the child with an adequate environment to meet the child's physical and emotional needs; Linda Darnell has failed to effect a lasting adjustment of her circumstances after reasonable efforts by available social agencies for such extended durations of time that it appears reasonable no lasting adjustment can be effected; Linda Darnell is unwilling or unable to disassociate herself from David Darnell and her continuation of the relationship with David Darnell is detrimental to the best interests of the child.

Id. at 1351.

338. *See id.* at 1352 n.3.

339. *See id.* at 1352.

David, the court's objection to the relationship does not appear to be based on David's transsexuality. Rather, the court's termination of parental rights was based upon a number of factors, including the mother's lack of responsibility and credibility.[340] David's "transsexuality" had little impact on the court's final decision. *In re Darnell* is important if only to establish that transsexuality, or a change in gender identity, should only be one of many factors used to determine the best interest of the child. As discussed in the following section, children of transgender parents do not necessarily experience gender confusion, nor are they unable to accept a parent's gender change.

VI. CHILDREN OF TRANSGENDER PARENTS

> Linda wants to be a woman. Linda wants to start a fresh life. She likes living as a woman. I think that is happy for her. At first (when I was 4½) I didn't quite understand. As I got older, I realized she must be happy living as a woman, so I'll just accept that.
>
> —Seven year old boy with a male-to-female transsexual parent.[341]

Is it possible for a child to accept a parent's gender change? Not according to psychiatrist Dr. James Giannini, who testified before the Ohio Court of Appeals in *Cisek v. Cisek*.[342] In his opinion, the parent's transsexualism "would have a sociopathic affect on the child . . . without appropriate intervention."[343] Dr. Giannini, thus, recommended that "physical contact should be stopped."[344] Based upon these "negative medical opinions,"[345] the Ohio court terminated the parent's visitation rights without considering any expert opinion or evidence to the contrary.[346]

To the contrary is renowned psychiatrist Dr. Richard Green.[347] "Available evidence does not support concerns that a

340. The petition for termination alleged that the mother believed that David Darnell was Jesus Christ and that she was the Holy Spirit. *See id.* at 1350.

341. Richard Green, *Transsexuals' Children*, [2 No. 4] INT'L. J. OF TRANSGENDERISM, (Oct.-Dec. 1998) *available at* http://www.symposion.com/ijt/ijtc0601.htm.

342. Cisek v. Cisek, No. 80 C. A. 113, 1982 WL 6161, at *2 (Ohio Ct. App. July 20, 1982).

343. *Id.*

344. *Id.*

345. *Id.* at *2.

346. "Common sense dictates that there can be social harm." *Id.*

347. Richard Green is both a psychiatrist and an attorney who has authored, co-

parent's transsexualism directly adversely impacts on the children."[348] He suggested that courts should be educated regarding clinical and research findings about these children.[349] In deciding the best interest of a child who has a transgender parent, the court should first distinguish sex and gender and then undertake a study of gender multiplicity. Since studies conclude that children can accept a parent's change in gender, the courts should not deny custody to a transgender parent based upon a misconception that a child will be unable to cope with the change.

> In resolving disputes about the custody of children, the court system should recognize the reality of children's lives, however unusual or complex .... By failing to do so, they perpetuate the fiction of family homogeneity at the expense of the children whose reality does not fit this form .... [The child's] best interest is served by exposing [the child] to reality and not fostering in [the child] shame or abhorrence for [a parent's] nontraditional commitment.[350]

When a child has a transgender parent, the courts must be ready to accept that child's reality and fashion a custody arrangement that addresses that child's needs without perpetuating any social bias or prejudice against transgenderism. The law should never serve to reinforce social bias and prejudice. Indeed, such biases are constantly in flux as social morals change.[351] As society's morals shift, so too must the law.[352] The law often serves to maintain a power imbalance between those

---

authored, or edited more than 150 professional journal articles, textbook chapters, and books. *See* DALLAS DENNY, CURRENT CONCEPTS IN TRANSGENDER IDENTITY 435 (Dallas Denny ed., 1998). *See also Richard Green,* University of Cambridge Institute of Criminology, *at* http://www.crim.cam.ac.uk/staff/RichardGreen.html.

348. Green, *supra* note 341.

349. *See id.*

350. Blew v. Verta, 617 A.2d 31, 36 (Pa. 1992) (quoting Nancy Polikoff, *This Child Does Have Two Mothers; Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families,* 78 GEO. L.J. 459, 469 (1990)).

351. *See* Kenneth L. Karst, *Religion, Sex, and Politics: Cultural Counterrevolution in Constitutional Perspective,* 24 U.C. DAVIS L. REV. 677, 689-90 (1991) ("The law, especially the criminal law, speaks to everyone, shaping the moral order and defining the community itself. Legislation regulating sexual morality, in other words, specifies not only what conduct is permissible but also who belongs.").

352. *See, e.g.,* Minersville School District v. Gobitis, 310 U.S. 586 (1940) (upholding Pennsylvania's requirement that public school teachers and students pledge allegiance to the flag). Three years later, the United States Supreme Court overruled *Gobitis* in *West Virginia State Bd. of Educ. v. Barnette,* 319 U.S. 624, 642 (1943) (holding West Virginia's requirement that students state the pledge of allegiance violated their First Amendment rights).

in the majority and those who are disenfranchised and marginalized.[353] When the disenfranchised demand social equality, the power paradigm is threatened and the law must respond.

History is replete with examples of legal responses to changing morals. In 1883, the United States Supreme Court upheld the validity of anti-miscegenation laws in *Pace v. State*.[354] In the 1950 case *Ward v. Ward*, the mother was Caucasian and the father was African-American.[355] In their divorce proceeding, both parents sought custody of their two young daughters. Although the Washington court did "not question the mother's love for her children,"[356] custody of the girls–"victims of a mixed marriage and a broken home"[357]–was awarded to the father: "They will have a much better opportunity to take their rightful place in society if they are brought up among their own people."[358] The Washington court identified the girls as "colored" and ignored the Caucasian heritage of their mother.[359] This decision is hardly palatable today.

As race-based classification became increasingly unacceptable, the courts responded with decisions refusing to tolerate race as a divisive factor. By 1967, contemporary moral standards no longer regarded inter-racial marriages as "unnatural,"[360] and the United States Supreme Court invalidated all anti-miscegenation laws.[361] Until the U.S. Supreme Court's 1984 decision in *Palmore v. Sidoti*,[362] courts frequently made custody

---

353. *See* Cox, *supra* note 72, at 779.

> In the struggle to legally define the boundaries of social acceptance, those who capture authority have an inherent advantage over those not in power. Those wishing to maintain a certain boundary invoke their concept of morality 'to define deviance' in ways that produce stigma, excluding people from respectable membership in the community.... This exclusionary function of law is understood not only by those who are stigmatized but also by those who are using the law to draw the community's boundaries.

Id. (quoting Karst, *supra* note 351, at 690)

354. 106 U.S. 583 (1883).

355. 216 P.2d 755 (Wash. 1950).

356. *Id.* at 756.

357. *Id.*

358. *Id.*

359. *See id.*

360. Kinney v. Virginia, 30 Gratt 858, 869 (Va. 1878) (holding that alliances between people of different races are so unnatural that God and nature seem to forbid them).

361. *See* Loving v. Virginia, 388 U.S. 1, 12 (1967).

362. 466 U.S. 429 (1984). In *Palmore*, the father sought custody of his three year old child after learning that the child's mother was cohabitating with an African-

awards based on racial factors, in which the family included biracial children.[363] As the United States Supreme Court stated in *Palmore*:

> The question, however, is whether the reality of private biases and the possible injury they might inflict are permissible considerations for removal of an infant child from the custody of its natural mother. We have little difficulty concluding that they are not. The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.[364]

Race-based classification was not always unconstitutional, but the Supreme Court's decisions in the twentieth century began to reflect a change toward racial classifications in the right direction regarding society's evolving attitudes about race. Likewise, the law must be prepared to see beyond the gender classifications of "male' and "female" and allow for the multiplicity of gender identification.

The Supreme Court's statement reflecting on the institutional rejection of private biases is worthy of application to transgender parents. Potential social stigmatization cannot serve as the basis to deny custody to a transgender parent. Transgenderism does not presumptively harm children. "Transphobia stigmatizes children."[365] Transgender parents are a reality for many children in the United States today. As society raises its collective conscience of transgenderism, the courts must follow in kind.

American man whom she later married. The Florida state court concluded that the best interest of the child would be served by awarding custody to the father because without such a change in custody, the child would be "vulnerable to peer pressures [and] suffer from the social stigmatization that is sure to come." The United States Supreme Court reversed the Florida decision holding that "[t]he court made no effort to place its holding on any other ground than race" and that a "core purpose of the 14th Amendment was to do away with all governmentaly imposed discrimination based on race." *Id.* at 431-32.

363. *See generally* Ward v. Ward, 216 P.2d 755, 755 (Wash. 1950). *See also* Potter v. Potter, 127 N.W.2d 320 (Mich. 1964); Murphy v. Murphy, 124 A.2d 891 (Conn. 1956).

364. *Palmore*, 466 U.S. at 433.

365. Center for Alternative Families in San Francisco: The Transgender Parent Support Group, *Transgender Parenting: Myths and Truths* (Sept. 1996), *at* http://mc01.equinox.net/users/a/afp/tgpmyths.html.

VII. CONCLUSION

A legal parent's constitutional interest in the care and custody of that parent's child is well-established law in the United States. When parents divorce or separate, the court must balance the parents' constitutional rights with the child's best interests to determine the most beneficial custodial and visitation arrangement. The "best interest of the child" standard is intentionally broad to allow courts to exercise discretion and consider a wide range of factors. The necessary vagueness in the standard carries the potential for abuse, as judges inject their personal moral and political agendas upon parents who do not fit neatly into preset social and legal constructs. Transgender parents who challenge traditional conceptions of sex and gender face the private prejudices and biases of the family judges who preside over their divorce and custody cases.

Many scholars agree that a child benefits the greatest from continued contact with the non-custodial parent and that the greater the degree of this contact, the more positively the child will adapt to the post-divorce arrangement.[366] Interference by the court's application of private biases to preclude custodial rights to a transgender parent denies that parent's child the reality of her own family and risks the "standardization" of children that the Supreme Court warned against as early as 1925.[367] As society's awareness of gender multiplicity grows, the courts must follow and act to recognize a transgender parent's constitutional right to be a parent to his or her child. The per se preclusion of child custody to a trans-parent perpetuates both ignorance of history, science, and medical research, and marginalizes transgender individuals.

When the court considers the totality of circumstances affecting the child's best interest, a parent's gender status should be merely one of many factors to be balanced–not the ultimate determinant. Application of the nexus test rather than a per se rule against transgender parents, requires that the court find that the parent's gender status has a negative nexus to the child's well-being before that parent's gender status becomes relevant to the determination of what will serve the best interest of the child. Without such a finding to support a denial of custody or visitation, the court effectively denies the trans-parent his or her

366. *See* Sexton, *supra* note 54, at 775-76.
367. *See* Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925).

constitutional rights.

Children can and do adjust to a parent's gender change. Gender change does not presumptively cause a child to have gender confusion or injury. The courts must be prepared to uphold the constitutional rights for all individuals regardless of gender.[368] Perhaps in another twenty years, we will wonder why we ever thought otherwise.

368. "We must learn that being a person is more important than being either man or woman, male or female." Virginia Prince, *Sex vs. Gender*, Proceedings of the Second Interdisciplinary Symposium on Gender Dysphoric Syndrome, at 23 (Donald R. Laub & Patrick Gandy eds., 1973).