

# The Gender Caste System: Identity, Privacy, and Heteronormativity

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*“I defend my right to be complex.”*

—Leslie Feinberg<sup>†</sup>

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## I. TRANSSEXUALITY AND THE CASTE SYSTEM

### A. *The Existence of the Caste System*

The heterosexual norm is the idea that people are, by virtue of heredity and biology, exclusively and aggressively heterosexual: males

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are masculine men, and are attracted only to feminine women. The opposite is supposed to be true of females.<sup>1</sup> In contrast, the fundamental claim of transsexuality<sup>2</sup> is that physical “sex” can be incongruent with psychological “gender”:<sup>3</sup> males can be feminine females, and females can be masculine males.<sup>4</sup> Advocates of legal rights for transsexual people often appear to assume that the proposition has been established in their favor. Opponents often appear to assume that the transsexual claim is obviously untrue. Statutes, regulations and court decisions show conflicting resolutions of the issue. This Article addresses that conflict.

The term “norm” as applied to heterosexuality in our culture is a misnomer: while a “norm” implies that a minority falls outside it, as in a standard statistical bell curve, in regard to gender identity there is no room for outsiders. Thus, heterosexuality is not just a norm—it goes much further than that. It is actually a normative principle, a norm which creates a standard to be met, below which people are not permitted by society to deviate: a “heteronormative” standard. This standard has been enshrined into law, transforming a social custom into a legal control mechanism, a sort of “natural law” theory of gender.

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1. This is so obvious as to require no authority today, but the word “heterosexual” did not exist until 1892, at which point it connoted a “so-called male erotic attraction to females and so-called female erotic attraction to males” in one person. JONATHAN NED KATZ, *THE INVENTION OF HETEROSEXUALITY* 20 (1995). Mr. Katz traces the usage of the term “heterosexual” through the ensuing years, noting the emergence of “heterosexual” as both a sexual orientation and a script of gender identity. He writes: “By December 1940, when the risqué musical *Pal Joey* opened on Broadway, a tune entitled ‘Zip’ satirized the striptease artist Gypsy Rose Lee by way of a character who, unzipping, sang of her dislike for a deep-voiced woman or high-pitched man and proclaimed her heterosexuality. That lyric registered the emergence in popular culture of a heterosexual identity.” *Id.* at 95. For a detailed explication of the modern U.S. script of femininity, see SUSAN BROWNMILLER, *FEMININITY* (1984), and NAOMI WOLF, *THE BEAUTY MYTH* (1991).

2. This Article specifically discusses the intersection between gender theory and transsexual people, i.e., those who intend to change physical sex. I refer to them as transsexual people because I wish to emphasize that they are people, not a monolithic group or statistical blips of abnormality in a theoretical game. The use of the adjective “transsexual” has been disparaged by some, in favor of the use of the term “transgender” as an umbrella term for all gender-variant people. However, the term “transgender” was originally coined and is still used to refer to an individual whose behavior and/or appearance crosses or blurs genders and has no desire for sex reassignment surgery, whereas the term “transsexual” more specifically refers to an individual who changes his or her physical “sex.” See *supra* note 68. Some writers use the term “transsexualism,” which incorrectly implies that transsexuality is an “ism,” which refers to a doctrine, cause, or theory. It is more properly referred to using the suffix “-ity,” which refers to a quality or state.

3. “‘Sex’ refers to the classification of being either male or female and is usually determined by the external genitalia. ‘Gender’ refers to the culturally determined *behavioral, social, and psychological* traits that are typically associated with being male or female.” MILDRED L. BROWN & CHLOE ANNE ROUNSLEY, *TRUE SELVES* 19 (1996).

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

American law generally mandates that there are only two genders, male and female, that each person be labeled at birth, and that the label may not be changed. The derivation of legal power to regulate our lives in this way has never been clearly explicated, but has been presumed. Our society assigns a highly specific set of meanings to each gender. These meanings are what we call masculinity and femininity. This system appears to be justified by science, being simply a reflection of the natural order of biology and heredity. Transsexual people are not only abnormal, but their very humanity is in question.<sup>5</sup> Our law merely reflects our society and science in its rejection of the transsexual claim, denying the right of transsexual people to self-determination and self-identification.

A clear comparison can be made to the historical caste system of India. That system is also justified by reference to “heredity” and “biology.”<sup>6</sup> The claim that some people are “untouchable” is, of course, opposed to the claim that all people are equal. The former claim is therefore utterly rejected by American law. But the American gender classification system, no less than the historical caste system of India, also creates “untouchables” who exist in a netherworld of discrimination outside the order established by “heredity” and “biology.” The basis for this American caste system is artificial in nature, as demonstrated by the fact that some jurisdictions find no impediment to acknowledging the changed classification of some of our “untouchables” (read transsexuals),

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5. *See id.* at 373-78.

6. While the nature of discrimination against transsexuals in America and dalits (untouchables) in India is historically and socially different, the justifications used in each case are similar:

In ancient India there developed a social system in which people were divided into separate close communities. These communities are known in English as caste. The origin of the caste system is in *Hinduism*, but it affected the whole Indian society. The caste system in the religious form is basically a simple division of society in which there are four castes arranged in a hierarchy and below them the outcast. But socially the caste system was more complicated, with much more castes and sub-castes and other divisions. Legally the government disallows the practice of caste system but has a policy of affirmative discrimination of the backward classes. The untouchability feature in the caste system is one of the cruelest features of the caste system. It is seen by many as one of the strongest racist phenomena in the world. In the Indian society people who worked in ignominious, polluting and unclean occupations were seen as polluting peoples and were therefore considered as untouchables. The untouchables had almost no rights in the society. In different parts of India they were treated in different ways. In some regions the attitude towards the untouchables was harsh and strict. In other regions it was less strict.

Aharon Daniel, *Information on India* (1999), at <http://adaniel.tripod.com/castes.htm>. *See generally* V.T. RAJSHEKAR, *DALIT: THE BLACK UNTOUCHABLES OF INDIA* (3d ed. 1995) (discussing hereditary nature of caste system). *See also* National Campaign on Dalit Human Rights, at <http://www.dalits.org>.

but others insist that biology and heredity forbid them from doing so.<sup>7</sup> The “scientific” discourse used to deny transsexual claims to self-determination and self-identification appears to be at odds with American principles of privacy and equality, creating a system which largely refuses to acknowledge or give rights to transsexual people.

It may be difficult for nontranssexual people to understand how pervasive this system is and how oppressive it is. Although gender identity and sexual orientation are different in nature, the following quote from Michelangelo Signorile illustrates the problem well:

Many heterosexuals don't understand the closet because they've never been in it. Because heterosexuality is the order of things, many heterosexuals think they never discuss their sexuality. They say gays who come out are going too far, making an issue of their sexuality when heterosexuals don't.

These heterosexuals don't realize that they routinely discuss aspects of their own sexuality every day: telling coworkers about a vacation they took with a lover; explaining to their bosses that they're going through a rough divorce; bragging to friends about a new romance. Heterosexual reporters have no problem asking heterosexual public figures about their husbands, wives, girlfriends, boyfriends or children—and all these questions confirm and make an issue of heterosexuality. The ultimate example of making an issue of heterosexuality is the announcements in the newspapers every Sunday that heterosexuals are getting married.<sup>8</sup>

Despite the neatness and “naturalness” of the heteronormative standard, it does not appear to be reflective of current reality, either in regard to sexual orientation or gender identity. It has been reported that at least 25,000 Americans have undergone sex reassignment surgery, 60,000 consider themselves candidates for such surgery, and the doctors who perform it have long waiting lists.<sup>9</sup> This new reality has been

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7. The British case of *Corbett v. Corbett*, [1971] P. 83, [1970] 2 All E.R. 33, [1970] 2 WLR 1306, was one of the first to rely on detailed descriptions of biological facts in this context.

8. MICHELANGELO SIGNORILE, *QUEER IN AMERICA: SEX, THE MEDIA AND THE CLOSETS OF POWER*, at xvii-iii (1993).

9. See Carey Goldberg, *Shunning 'He' and 'She,' They Fight for Respect*, N.Y. TIMES, Sept. 8, 1996, § 1, at 24; see also John Cloud, *Trans Across America*, TIME MAG., July 20, 1998, at 48. As of 1988, there were approximately 6,000 to 10,000 Americans who had undergone such surgery. See BROWN & ROUNSLEY, *supra* note 3, at 9. The earliest estimates of prevalence for adults were stated as one in 37,000 males and one in 107,000 females. The most recent information of the transsexual end of the gender identity disorder spectrum from Holland is one in 11,900 males and one in 30,400 females. Four observations, not yet firmly supported by systematic study, increase the likelihood of a higher prevalence: 1) unrecognized gender problems are occasionally diagnosed when patients are seen with anxiety, depression, conduct disorder, substance abuse, dissociative identity disorders, borderline personality disorder, other sexual disorders, and intersexed conditions; 2) some nonpatient male transvestites, female impersonators, and male and female homosexuals may have a form of gender identity disorder; 3) the intensity of some persons' gender identity disorders fluctuates below and above a clinical

reflected in some laws. In some jurisdictions, an individual may obtain legal recognition of a change in physical sex pursuant to statute, and a corresponding change may be made in gender identity on government documents. However, the legal recognition of a change in sex is not always given effect. This leads to incongruent results in law and concomitant institutional tension between legislative pronouncements, to which courts must defer, and court judgments which ignore or limit the effect of those legislative pronouncements. For example, individuals have changed physical sex, obtained legal recognition of the change pursuant to statute, had the change made on all government documentation, and have functioned without opposition in the new sex role within the community for years. Then, the individual is involved in a lawsuit, the adversary discovers the change, and seeks to have the court give effect to the former sex.<sup>10</sup>

In such cases, the argument is that transsexual people are responsible for their own problem, because they are asking courts to deny reality, like a man who insists he is a donkey. According to this school of thought, the heteronormative standard identifies transsexuality as creating an incongruity between physical sex and psychological gender that must be resolved by the courts. This argument is very tempting to courts, because it appeals to the heteronormative standard. These courts fail to take into account the alternative possibility that the incongruity is created not by transsexuality, but by our society and the heteronormative standard itself.<sup>11</sup> Just as the Indian caste system creates artificial disparities between people, it could be that the heteronormative standard, which artificially and prediscursively defines a set of behaviors,

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threshold; and 4) gender variant behavior among female-bodied individuals tends to be relatively invisible to the culture, particularly to mental health professionals and scientists. See Harry Benjamin International Gender Dysphoria Association, *Standards of Care for Gender Identity Disorders*, § II (6th version 2001) [hereinafter *Standards*], available at <http://www.hbgida.org/socv6.html>; AMERICAN PSYCHIATRIC ASSOCIATION: DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. 1997) [hereinafter DSM IV] (citing older statistics suggesting that roughly one in 30,000 adult males and one in 100,000 adult females seek sex reassignment surgery). Time Magazine reported that “[p]sychologists say that gender identity disorder occurs in at least two percent of children,” TIME MAG., July 20, 1998 at 48.

10. See, e.g., *Littleton v. Prange*, Case No. 04-99-00010-CV, (Bexar Co., Tex., Oct. 27, 1999) (holding male to female (mtf) transsexual married to male for seven years could not sue for wrongful death of husband); see also Alex Tresniowsky et al., *Split Heirs*, PEOPLE MAG. Aug. 28, 2000, at 75 (noting a Kansas court ruling *In re Estate of Gardiner*, holding that a mtf woman married to decedent for one year could not inherit).

11. As one writer put it: “Biological determinism is misconceived intellectually, as well as politically loathsome. For it places our problem in our bodies, not in our society. We now commonly think, ‘Well, of course, biology and society together determine our destinies.’ But that simply restates the old bio fatalism within a ‘sociobiological’ framework.” KATZ, *supra* note 1, at 189.

body images, and genitalia as gendered in a fixed way, then calls the transsexual person's gender incongruent.<sup>12</sup> Could the heteronormative standard itself be responsible for the incongruity?

The unacknowledged incongruity of the heteronormative standard, as embraced by judicial opinions, has been touched upon in a recent law review article by Professor Susan Etta Keller:

Individual legal opinions in a particular doctrinal area may appear to offer coherent and unified explanations of their decisions. However, they also offer a shifting and a doubleness of the rhetoric used to justify outcomes, both in the conflicts apparent in the aggregate and in the incoherencies in any particular opinion. The phenomenon of transsexuality provides writers of judicial opinions with the sort of controversy that renders these qualities of legal texts particularly visible.

An increasing number of transgender theorists and activists urge that claims about and images of transsexual identity undergo a shift in perspective. By moving the experience of surgical operations to the conceptual foreground, these theorists hope to reveal more fully the complex mechanisms of gender at work in the lives and histories of transsexual people. I seek a similar foregrounding of the rhetorical operations in judicial opinions in order to reveal the more complex mechanisms of decisionmaking. Just as an embrace by transsexual people of their personal histories might have significant implications for an understanding of gender, so might an embrace within legal decisionmaking of the repudiated, the excluded, the crisis-generating features that appear to mar the smooth consistency of opinions alter our understanding of judging.<sup>13</sup>

In her article, Professor Keller shows that judicial rhetoric unconsciously shifts identity, using dual rhetoric, in an attempt to gain coherence and simplicity in decisionmaking.<sup>14</sup> She illustrates how judicial opinions, in assessing the tenability of transsexual identities, rely on cultural background and "natural" attitudes which appear to offer coherence. However, her analysis of these opinions demonstrates that they ignore inconvenient data in favor of simplicity, unwittingly confirm the complexity of gender identity, and reveal fundamental incoherencies in legal theories of gender. The unacknowledged judicial shifting prevents a more meaningful understanding of the difficult issues involved.

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12. See, e.g., JUDITH BUTLER, GENDER TROUBLE 7 [hereinafter BUTLER, GENDER] (suggesting that "gender" and "sex" are not "natural facts of sex [but are] discursively [created] by various scientific discourses in the service of other political and social interests").

13. See Keller, *Operations*, *supra* note 4, at 329-30 (citations omitted).

14. See *id.* at 348-52.

This dual rhetoric, seemingly intended to produce coherence, demonstrates an astounding lack of coherence in the courts' discussion of gender. She cites as an example their use of pronouns, wherein the manipulation of internal versus external identity marks the transsexual person as unprotected outsider.<sup>15</sup> The opinions she discusses show that judges know little or nothing about transsexuality or the lives of transsexual people whom their judgments affect so fundamentally. Rather, cultural imagery weighs heavily compared to logic or policy in judicial decisions.<sup>16</sup> She notes that "[c]ourts differ, even within a single opinion, on whether they consider genitals to be the ultimate internal measure of identity or external and irrelevant to identity."<sup>17</sup> This combination of ignorance of transsexuality and unexamined cultural assumptions regarding gender permits a continuously shifting ground of argument designed to defeat transsexual peoples' claims.

Thus, a litigant who considers herself female, and is considered by others in the community to be female, is referred to by the court as "he" and "him." This does not produce the intended coherence. The standard rhetorical device appears to be "abjection," relegation to outsider, unprotected status. Professor Keller ultimately concludes that judicial opinion writers should engage, rather than expel, difference, incoherence, and confusion, and employ something she calls "elastic tenability," permitting judges to assess claims of gender variation without having to change their concept of gender.<sup>18</sup> In her opinion, this will allow judges, without overhauling the law or societal concepts of gender, to create a richer understanding, contribute to the safety of nonconformists, and achieve self-consciousness of judicial double rhetoric.<sup>19</sup>

Professor Keller's article represents a breakthrough in the understanding of the legal theory of transsexuality by demonstrating how prejudice rather than logic often rules. Transsexual people are treated as disenfranchised outsiders, subjects of controversy and interpretation, not quite human, whose self-proclaimed identity is rarely honored. Professor Keller's solution of "elastic tenability" permits tolerance of the gender dysphoric while avoiding the need to overhaul the status quo.<sup>20</sup>

From the standpoint of transsexual people themselves, however, Professor Keller's solution represents a somewhat unsatisfactory

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15. *See id.*

16. *See id.* at 336-37.

17. *Id.* at 356.

18. *See id.* at 371-72.

19. *See id.*

20. "Gender dysphoria" is a term which refers to unhappiness with one's gender. The term presupposes that psychological gender identity is based solely on physical sex, and so is not viewed with favor by some in the gender community.

beginning. It represents a sort of noblesse oblige or cultural imperialism of gender: transsexual peoples' ideas about gender may be perverse, but we must have tolerance. There is no reference to the heteronormativity which has shaped the judicial rhetoric. The doubling of rhetoric and the shifting of identity is acknowledged, but there is no recognition of the incongruity of heteronormativity, the mismatch between our society's twentieth century theory of gender and the twenty-first century reality of the transsexual person. There is no recognition that, working within the heteronormative standard, the law *requires* disallowance of claims by transsexual people for fair treatment. There is no alternate theory of gender suggested in which such claims could be allowed. The system of gender "castes" remains unacknowledged and unchallenged.

Another important source of incongruity within the heteronormative standard which contributes to the problem is the fact that it wrongly conflates transsexuality and homosexuality.<sup>21</sup> Transsexuality, despite the inclusion of the word "sex," is not fundamentally about sexuality or sexual orientation. At its core is an incongruence between physical sex and psychological gender identity. It is not about liking boys or girls; it is about being boys or girls, a qualitatively different experience from the gay experience. Sexual orientation refers to hetero/homosexuality, a choice of sexual partner; gender identity refers to male/female, a self-identification. Conflating the two is a fundamental error of analysis, which has led to legal treatment of transsexuality as if it were a variant of sexual orientation.

The legal analysis of sexual orientation has proceeded along the lines of equal protection, i.e., whether persons of homosexual orientation are constitutionally entitled to the same treatment under the law as persons of heterosexual orientation.<sup>22</sup> The legal analysis of transsexuality has generally been approached the same way in the

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21. See BROWN & ROUNSLEY, *supra* note 3, at 14-15, 18-19; see also Mary Coombs, *Transgender and Sexual Orientation: More than a Marriage of Convenience* 1 (1997), reprinted in 3 NAT'L J. SEXUAL ORIENTATION L. 4 (1997), at <http://www.ibiblio.unc.edu/gaylaw/issue5>; Mary Anne C. Case, *Disaggregating Gender from Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1 (1995); Katherine M. France, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 34, n.137 (1995); Francisco Valdez, *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); Edward S. David, Comment, *The Law and Transsexualism: A Faltering Response to a Conceptual Dilemma*, 7 CONN. L. REV. 288, 292 (1974-75); Michael W. Ross, *Gender Identity: Male, Female or a Third Gender?*, in TRANSSEXUALISM AND SEX REASSIGNMENT (William Walters & Michael Ross eds., 1986).

22. See, e.g., *Bowers v. Hardwick*, 478 U.S. 186 (1986); *Shahar v. Bowers*, 114 F.3d 1097 (11th Cir. 1997) (en banc).



courts.<sup>23</sup> Although transsexual people have been litigating their mostly unsuccessful claims since the 1970s,<sup>24</sup> and legal commentators have been addressing the issues for about as long,<sup>25</sup> the legal discourse has not changed much. Yet the essential difference inherent in the nature of gender identity renders such a simple analysis markedly incomplete. Both homosexuality and transsexuality transgress societal norms regarding sex, but the differences have been ignored.

Gender identity is different from sexual orientation in that it is considered so fundamental to personal identity that it is fixed and recorded by the government, and is required by law to be disclosed whenever personal identity is in question. Gender identity constitutes, in ways both intentional and unintentional, a major part of our identities from the moment of our birth by the simple act of affixing a letter to our birth certificate. This letter publicly identifies us in every area of life, whether it be a license to drive or conduct business, proof of citizenship required to obtain employment, a benefit program such as social security, or filing of income taxes. Gender identity is also different in that its expression is composed of many immediately perceptible clues such as body shape, body styling, voice, gait, and attire. Sexual orientation can be denied; transsexuality is much more difficult to deny. Thus, gender identity is subject to scrutiny in a way which sexual identity is not. Furthermore, unlike current notions of sexual identity, the heteronormative standard denies even the right of self-definition of gender identity; there is no widespread acceptance of the legitimacy of the fundamental transsexual claim. Thus, prior to and independent of any equal protection issue which they may have, transsexual people must establish the legitimacy of their fundamental claim to gender identity. This Article examines the incongruity of the heteronormative standard, proposing a legal theory of gender which accommodates the new reality of transsexuality.

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23. See, e.g., *Brown v. Samaras*, 63 F.3d 967 (10th Cir. 1995) (rejecting transsexual claims to Fourteenth Amendment equal protection); *Holloway v. Arthur Andersen & Co.*, 566 F.3d 659 (9th Cir. 1977) (rejecting transsexual claims to Title VII equal protection).

24. See, e.g., *Holloway*, 566 F.2d at 659; *Powell v. Read's Inc.*, 436 F. Supp. 369 (D. Md. 1977) (holding that Title VII does not reach discrimination against transsexuals); *Grossman v. Bernards Township Bd. of Educ.*, No. 74-1904, 1975 U.S. Dist. LEXIS 16261 (D.N.J. 1975); *In re Anonymous*, 293 N.Y.S.2d 834 (Civ. Ct. 1968) (holding that a transsexual person was entitled to change name from an obvious male name to an obvious female name).

25. See, e.g., *David*, *supra* note 21; Note, *Transsexuals in Limbo: The Search for a Legal Definition of Sex*, 31 MD. L. REV. 236 (1971).

### B. Caste Prejudice

Under the prevailing heteronormative standard, transsexuality, while not so immoral as to be criminal, is a corrupt form which should be legally suppressed in favor of the “naturalness” of heterosexuality. It is not enough that heterosexuality be a norm; anyone falling outside of it falls short of human. This forcible compliance or excommunication is designed to repress nonheterosexual paradigms. Because of this oppressive heteronormativity, transsexual people usually choose to live “under the radar,” seeking to limit or erase their “transsexual” status, for two reasons.

First, their self-identified gender identity is not “transsexual,” but male or female, and they seek to live as normal males or females.<sup>26</sup> Privacy is essential for this purpose, and transsexual people often make life changes designed to retain privacy.<sup>27</sup> Most seek to keep their transsexuality a private matter. Relatively few appear on television talk shows or write books to discuss their gender identity.

Second, disclosure can subject them to public shame, discrimination, harassment, and physical danger.<sup>28</sup> Government policies,

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26. “[V]ery seldom did the transsexuals we interviewed refer to themselves as ‘transsexual.’ Instead, they thought of themselves in terms of gender identity—man or woman.” Keller, *Operations*, *supra* note 4, at 332 (quoting SUZANNE KESSLER & WENDY MCKENNA, GENDER: AN ETHNOMETHODOLOGICAL APPROACH 121 (1978)); *see also* DEBORAH HELLER FEINBLOOM, TRANSVESTITES & TRANSSEXUALS: MIXED VIEWS 210 (1976) (detailing construction of new life history); *see also* Ronald Garet, *Self-Transformability*, 65 S. CAL. L. REV. 121, 142 (1991) (comparing the process to conversion or immigration). The type of dissociation necessary to avoid questions of identity is reminiscent of Star Wars’ Ben (Obi-wan) Kenobi, waving his hand magically to convince the Imperial storm troopers that there is no need for identification papers, as in this movie scene: Exterior: Tatooine—Mos Eisley—Street. The speeder is stopped on a crowded street by several combat-hardened stormtroopers who look over the two robots. A Trooper questions Luke . . . Trooper: Let me see your identification. Luke becomes very nervous as he fumbles to find his ID while Ben speaks to the Trooper in a very controlled voice. Ben: You don’t need to see his identification. Trooper: We don’t need to see his identification. Ben: These are not the droids you’re looking for. Trooper: These are not the droids we’re looking for. Ben: He can go about his business. Trooper: You can go about your business. Ben: (to Luke) Move along. Trooper: Move along. Move along. Star Wars, Episode IV, “A New Hope,” by George Lucas, Lucasfilm Ltd. (1976), *available at* <http://www.hamline.edu/njstoller/texts/anh.txt>.

27. *See* The International Conference on Transgender Law and Employment Policy, *Discrimination Against Transgender People in America* 2 (1997), 3 NAT’L J. SEXUAL ORIENTATION L. 1 (1997) [hereinafter *Discrimination*], at <http://metalab.unc.edu/gaylaw/issue5> (noting the tendency of transsexuals to make changes designed to increase privacy). There are transsexuals who publicize their transsexuality to fight oppression, arguing that transsexual secrecy feeds shame and intolerance. *See generally*, RIKI ANN WILCHINS, READ MY LIPS: SEXUAL SUBVERSION AND THE END OF GENDER (1997). Because other transsexuals prefer privacy, and are not speaking publicly, such advocates are often assumed to be the voice of the entire transsexual community.

28. *See* BROWN & ROUNSLEY, *supra* note 3, at 1; *see also* *Discrimination*, *supra* note 27; *infra* notes 81-87.

however, make privacy a difficult task. Transsexual people, like all other citizens, have a right to privacy, to keep their sensitive personal information private. However, some jurisdictions prevent transsexual people from changing their gender classification on government documents, making disclosure a constant risk. Often, transsexual people are in the position of living in one gender role while their identification tells another story, threatening or compelling disclosure of transsexuality against the will of the individual.

However, transsexual people seeking to change their government documentation are subject to another incongruity: in order to obtain sex reassignment surgery,<sup>29</sup> a transsexual person must live in the opposite sex role<sup>30</sup> for a substantial period of time.<sup>31</sup> However, in those jurisdictions which allow gender reclassification on some government documents, it often cannot be done until sex reassignment surgery is performed.<sup>32</sup> Further confusing the issue, “sex reassignment” refers generically to those medical treatments that are performed for the purpose of changing sexual characteristics, and since there are many different procedures which fall into this category it is often unclear which procedures are required. The rules for changing gender classification are a mix of statutory, regulatory, and case law, which are extremely difficult to find. Probably due to the controversial nature of transsexuality, a search of indices of state and federal statutory and regulatory law reveals nothing under the categories “transgender,” “transsexual,” “sex change,” “gender change,” or any other recognizable category. The laws relating to such changes are obscure and frequently unfamiliar to government employees and institutional authorities.<sup>33</sup> Nonetheless, as we all know, identification is required for such basic human needs as getting a job, buying or renting living quarters, buying or renting a vehicle, obtaining utility service, opening a bank account, getting a credit card, receiving government

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29. “Sex reassignment surgery” refers to surgical procedures which change genitals, sometimes including secondary sex characteristics, to the opposite sex. This is sometimes referred to as “gender reassignment surgery,” which incorrectly implies that the surgery changes one’s gender.

30. “Sex role” refers to the social role of male or female.

31. See *Standards*, *supra* note 9.

32. See SPENCER BERGSTEDT, *TRANSLEGALITIES: A LEGAL GUIDE FOR MTFs* 38-57 (1997) [hereinafter BERGSTEDT].

33. In doing research for this Article, the author was unable to find references to statutes or administrative regulations in any federal or state statutory or administrative index. The Social Security Administration hotline in Washington, D.C. was unable to identify the regulation which permits gender change, and calls to the vital records offices of those states which permit gender reclassification found that no one in any state office could identify such statutes or regulations, if at all, without great difficulty. These calls were also punctuated by frequent laughter, jokes, attitudes of ridicule, and covert hostility.

benefits, and obtaining medical services in a hospital. In the absence of a change of gender classification on government documents, transsexual persons, whether “pre-operative” or “post-operative,” are compelled to reveal their transsexuality every time identification is required.

If anyone else were to force the revelation of such sensitive and private information, that individual may be subject to tort liability for violation of privacy.<sup>34</sup> The government, however, in its function of regulator of identity, classifying gender by birth sex, compels transsexual people to reveal themselves whenever identity is in issue. Imagine for yourself having to explain the “M” or “F” on your drivers’ license every time you produced it for identification, and the astonishment, ridicule or outright refusal to accept your I.D. which would attend such an explanation. A few encounters would quickly convince you of the need to avoid or finesse activities requiring identification.

Transsexual people, in claiming that they fall outside of the rigid schema equating “sex,” “gender,” and “genitalia,” are arguing that physical birth sex and psychological gender identity are incongruent. The courts, in rejecting this claim, have created another sort of incongruity with those state laws which recognize this claim and permit a change of sex. Furthermore, the fact that some jurisdictions acknowledge the changed classification of some transsexual people, but not others, demonstrates the artificial nature of the heterosexual norm in this area. Those who argue for the necessary congruence of physical sex and psychological gender identity may be furthering incongruity rather than eliminating it. For these reasons, transsexual people are exposed to systemic prejudice.

## II. TRANSSEXUALITY AND CRITICAL LEGAL THEORY: UNVEILING THE ARCHITECTURE OF THE CASTE SYSTEM

### A. *Deconstructing Caste*

There are critical legal theories which have tackled just these types of issues in the context of race and gender. In them can be seen the seeds of a legal theory of transsexuality. The experience of such critical legal theories demonstrates that it is useful to examine the system to find the invisible and unacknowledged workings of individual prejudice and its institutional forms. A critical understanding can be formulated based on the experiences of individuals in the system, examining the social

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34. Some jurisdictions recognize a cause of action similar to “intrusion on seclusion” or “unreasonable publicity of private lives” as set forth in the RESTATEMENT (SECOND) OF TORTS §§ 652A—652I. See, e.g., *Diaz v. Oakland Tribune, Inc.*, 139 Cal. App. 3d 118 (Cal. App. 1983) (recognizing a cause of action for the publicity of transsexuality).

realities in which they live and the unstated assumptions and values which create both their lives and their disempowerment. Such theory employs skepticism of the dominant legal theories that perpetuate those assumptions and values. It posits alternate understandings of law.

Critical legal theory challenges laws which oppress women based on their differences from men, calling into question stereotypes and the supposed value-neutrality of law and examining the assumptions embedded in modern legal theory using other disciplines such as psychology and philosophy.<sup>35</sup> It reexamines the assumptions underlying supposedly race-neutral laws, positing that racism is an ordinary and fundamental part of American society, not an aberration that can be readily remedied by law.<sup>36</sup> It exposes and challenges unacknowledged social reality by storytelling and narrative analysis. It is skeptical of dominant legal theories supporting “hierarchy, neutrality, objectivity, color-blindness, meritocracy, ahistoricism and single-axis analyses.”<sup>37</sup> Race and sex discrimination are different from discrimination based on transsexuality, but the critical tools used by legal scholars to expose race and sex discrimination in seemingly neutral doctrine can be used here as well.

I start with the observation that nontranssexual people, because they have not personally experienced it, cannot fully understand the existence and nature of the caste system which discriminates against transsexual people without being educated by the experience of transsexual people themselves. Justice depends on whose ox is being gored, and the corollary is that no ox is gored until it is your own. Our own sense of being male or female is something taken for granted. One can only imagine what it would be like to lose that sense of ourselves and to be discriminated against. There is a joke which illustrates the inability to see what transsexual people are complaining about: It is difficult to tell what fish talk about, but we can be sure it is not water. Gender is the water we swim in. Those who are accorded privilege by society do not experience the pervasive and life-altering effects of such discrimination, and may well wonder if such effects really exist and to what extent. It is therefore necessary to unmask the assumptions which create our reality and to examine them in light of the reality that transsexual people experience.

Members of a disempowered group, such as transsexual people, are not simply empowered people with a disability. The disempowerment is

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35. See, e.g., KATHERINE T. BARTLETT & ROSANNE KENNEDY, FEMINIST LEGAL THEORY: READINGS IN LAW AND GENDER 1 (Katherine Bartlett & Rosanne Kennedy eds. 1991).

36. See CRITICAL RACE FEMINISM: A READER 2 (Adrien Katherine Wing ed., 1997).

37. *Id.*

pervasive, infecting every aspect of their lives as well as their position within the system. It is entrenched within and perpetuated by the very language we use to examine it. The feelings and the effects can only be imagined by those not in that position. Disempowerment is a filter of false consciousness through which one views the world. Here is how this concept was set forth narratively by two co-authors in discussing the nature of race:

While this chapter was being written, Trina Grillo who is of Afro-Cuban and Italian descent was diagnosed as having Hodgkin's Disease (a form of cancer) and underwent several courses of radiation therapy. In talking about this experience, she said that "cancer has become the first filter through which I see the world. It used to be race, but now it is cancer. My neighbor just became pregnant and all I could think was 'how could she get pregnant? What if she gets cancer?'" Stephanie Wildman, her coauthor, who is Jewish and white, heard this remark and thought "I understand how she feels. I worry about getting cancer too. I probably worry about it more than most people because I am such a worrier." But Stephanie's worry is not the same as Trina's. Someone with cancer can think of nothing else. She cannot watch the World Series without wondering which players have had cancer, or who in the player's families might have the disease. Having this world-view of cancer as a filter is different from just thinking or even just worrying often about cancer. The worrier has the privilege of forgetting the worry sometimes, even much of the time. The worry can be turned off. The cancer patient does not have the privilege of forgetting about her cancer; even when it is not at the forefront of her thoughts, it remains in the background, coloring her world.<sup>38</sup>

Transsexual people, too, have such a filter through which they view the world, albeit very different from that of a cancer patient. Sympathetic outsiders can be told of the filter, but they cannot experience it. For example, one author, discussing poverty programs, noted:

They are designed predominantly by white male elite unilinear thinkers who have never personally experienced the problems that are the subject of the legislation they pass. If these men had to raise their children single-handedly (without the support of housewives, spouses or servants) plus work full-time, many would crack within a week.<sup>39</sup>

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38. Trina Gillo & Stephanie Wildman, *Obscuring the Importance of Race: The Implication of Making Comparisons Between Racism and Sexism (or Other Isms)*, in *CRITICAL RACE FEMINISM*, *supra* note 36, at 44.

39. Katherine Neal Cleaver, *Racism, Civil Rights and Feminism*, in *CRITICAL RACE FEMINISM*, *supra* note 36, at 30, 32.

While racism and discrimination against transsexual people are distinguishable, the idea of living as a transsexual person for a week is a useful thought experiment.<sup>40</sup>

The “otherness” between the sympathetic outsider and the disempowered insider is too distorting. Here is how one feminist expressed her “otherness”:

My accent, my color, the Caribbean rhythm in my words felt “different.” The established feminist authorities assented with their heads to my thoughts. Yet in their faces you could see their inability to grasp and apprehend my feelings and emotions. They were too distant; I was too “other.” Their otherness as women allowed them to walk with me halfway. But only halfway.<sup>41</sup>

Prejudice and the caste system are invisible, entrenched and function effortlessly. The effort required to expose them, let alone dislodge them, is vast. Here is how one author described the effortless functioning of race and racism:

Worse, they may blindly fail to perceive how their ancestry positions them to benefit passively from racism’s perpetuation and remain oblivious to the racialized nature of gender. Cultural, political and economic institutions that mask deeply entrenched patterns of thought and action sustain white superiority almost automatically as they have sustained male power. This enables racism to function with very little conscious individual attention. Educated, well-meaning whites will insist “I am not a racist,” which is quite true if one accepts their fragmentary definition of racist. But what is the source of those slights, remarks, insults or overt behavior that blacks interacting with them interpret as revealing a belief in black inferiority? What explains the gross media stereotypes that pervert the image of blacks. Why are blacks singled out for suspicious treatment because of their appearance even in the hallowed halls of the Ivy League? How did it

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40. Keller suggests the following thought experiment:

Imagine you have gone to the doctor with some troubling symptoms and are told: You have a rare condition. Without further medical intervention you will transform biologically over the next three months into the other gender. Biologically means hormonally and anatomically, internally and externally. However, there are steps that can be taken to forestall this change. These treatments involve major surgery, and can be painful and costly. Your insurance may or may not cover them. Furthermore, you may find the results unsatisfactory; we will never be able to restore you to the way you look and feel today. You may not have the same degree of sexual function you have had in the past or would have in your new gender without the intervention. However, we can ensure that your physical appearance will allow others, whether strangers or intimates, to attribute to you your old gender. Which choice do you make?

Keller, *Operations*, *supra* note 4, at 330-31.

41. Celina Romany, *Ain't I a Feminist?* in *CRITICAL RACE FEMINISM*, *supra* note 36, at 24.

happen that over eighty percent of white Americans live where they have no black neighbors?<sup>42</sup>

Lastly, it is important to note that there is a tension between uniting a disempowered group into a single effective voice or allowing many different voices to demonstrate the varied experience of the group.<sup>43</sup> Transsexual people are of every race, creed, and economic status.<sup>44</sup> While they share disempowerment because of their transsexuality, there are a wide variety of different life experiences within the group. Some are disempowered for additional reasons besides their transsexuality, such as race, class, and disability. In assessing the experience of the group, we must take into account its diversity as well as its fundamental sameness.

### B. *The Transsexual Caste and Their Reality*

Just as it has done in areas involving race and gender, critical legal theory can contribute to an understanding of the architecture of heteronormativity which oppresses transsexual people. The first step in doing so is to examine the nature of transsexual people's reality and the obscuring heteronormative mythology which keeps compulsory heterosexuality firmly in place.

While there have been gender-variant<sup>45</sup> people throughout recorded human history in many cultures,<sup>46</sup> only recently have these begun to emerge as a visible group.<sup>47</sup> Among the various constituents of the

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42. Cleaver, *supra* note 39, at 30, 32.

43. See *Essentialism and Anti-Essentialism: Ain't I a Woman?*, in CRITICAL RACE FEMINISM, *supra* note 36, at 7-9.

44. See BROWN & ROUNSLEY, *supra* note 3, at 4, 8.

45. "Gender-variant" refers to those who do not completely identify with their sex designated at birth.

46. See BROWN & ROUNSLEY, *supra* note 3, at 26 (referring to examples of gender variance in cultures throughout history). See generally LESLIE FEINBERG, TRANSGENDER WARRIORS: MAKING HISTORY FROM JOAN OF ARC TO RUPAUL (1996) (discussing the multinational and multicultural history of transgender persons); Heike Bodeker & Kiira Trica, *Native v. White Sex Cosmologies, Sex and Gender Variability v. Variance in Inter-v. Intracultural Perspective* (1998), at <http://www.sonic.net/~cisae/yumtzilob.html>; Babylonian Talmud, Tractate Yevamot 64a (quoted in Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 ARIZ. L. REV. 265, 294 [hereinafter Greenberg] (discussing intersex conditions); *Deuteronomy* 22:5 (mandating prohibition against cross-dressing). The first reported modern sex reassignment surgery took place in 1912. See FRIEDEMANN PFÄFFLIN & ASTRID JUNGE, SEX REASSIGNMENT. THIRTY YEARS OF INTERNATIONAL FOLLOW-UP STUDIES AFTER SEX REASSIGNMENT SURGERY: A COMPREHENSIVE REVIEW, 1961-1991, at ch. 6.1 (Roberta B. Jacobson and Alf B. Meier trans., 1998), available at <http://www.symposion.com/ijt/pfaefflin/1000.htm>.

47. See BROWN & ROUNSLEY, *supra* note 3, at 27-28 (referring to the publicized mid-twentieth century cases of Christine Jorgensen, Renee Richards, Billy Tipton, Wendy Carlos, Jan Morris, Nancy Hunt, and Mario Martino).



gender community, the least visible are the transsexual people, “individuals who strongly feel that they are, or ought to be, the opposite sex.”<sup>48</sup> Their physical sex and psychological gender identity are not congruent.

Contrary to popular belief, transsexuality occurs in the lives of both males and females and some clinicians report an equal number of patients of both sexes.<sup>49</sup> It is not susceptible to change. “Over the years, transsexual people have undergone all kinds of mental health treatment including daily psychoanalysis, hypnosis, aversion therapy, and even shock therapy[, but] there has been little, if any, change in their internal feelings.”<sup>50</sup> It has been reported that at least 25,000 Americans have undergone sex reassignment surgery, 60,000 consider themselves candidates for such surgery, and the doctors who perform it have long waiting lists.<sup>51</sup> Of the larger number of transsexual people who have not had surgical intervention, little is known statistically.<sup>52</sup>

While there has been much speculation about what causes transsexuality, there is no agreement on any single determinant or trigger. As in many debates about human behavior, there are proponents of nature, proponents of nurture, and proponents of nature and nurture together, but there is no scientific consensus.<sup>53</sup>

Standard definitions of transsexuality delineate its boundaries, but do not and cannot explain what it means, to the transsexual, to be transsexual. This leaves the true nature of transsexuality unstated and unrevealed, making room for misinformation and misunderstanding.

Transsexuality is not a whim. No one wakes up one day and says, “Gee, I think I’ll be a transsexual.” To the transsexual person, it is an

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48. BROWN & ROUNSLEY, *supra* note 3, at 6. “The body they were born with does not match their own inner conviction and mental image of who they are or want to be. Nor are they comfortable with the gender role society expects them to play based on that body. This dilemma causes them intense emotional distress and anxiety and often interferes with their day-to-day functioning.” Another definition is “[t]he desire to change one’s anatomic sexual characteristics to conform physically with one’s perception of self as a member of the opposite sex.” STEDMAN’S MEDICAL DICTIONARY 1625 (25th ed. 1990). Transsexuality is classified as a specific form of a broader psychiatric disorder termed “gender identity disorder.” See DSM IV, *supra* note 9, at 537-38 (listing criteria for diagnosing transsexuality).

49. See BROWN & ROUNSLEY, *supra* note 3, at 9. She also notes that “female-to-male transsexuals may simply be underreported [because] women in the United States have far more flexibility with regard to clothing and demeanor than men do, female-to-male transsexuals are able to cross-dress without attracting as much attention as their . . . male-to-female counterparts. They can [also] blend more easily into society without hormones or surgery.” *Id.* at 10.

50. *Id.* at 11.

51. See *supra* note 9.

52. See BROWN & ROUNSLEY, *supra* note 3, at 8-9.

53. See *id.* at 21-25. See generally ROBERT J. STOLLER, M.D., SEX AND GENDER: THE DEVELOPMENT OF MASCULINITY AND FEMININITY (1994); CLINICAL MANAGEMENT OF GENDER IDENTITY DISORDERS IN CHILDREN AND ADULTS (Ray Blanchard & Betty W. Steiner eds. 1990).

inner reality which begins in early childhood, one which may or may not have been initially understood, recognized, or acknowledged. As Brown and Rounsley say, gender identity “cannot be attributed by others. It is our own deeply held conviction and deeply felt inner awareness that we belong to one gender or the other. This awareness is firmly in place by the time we are five years old.”<sup>54</sup> One learns slowly during the course of childhood that one feels different from one’s peers in a fundamental way.<sup>55</sup> Prior even to the emergence of sexuality, the rough games and verbal aggressiveness of other boys may not appeal in a thousand different ways every day, the quiet submissiveness and subtle competitiveness of other girls may seem foreign. You wish you were not separated from those like you. You wish you could spend time with your peers. What do these cues mean? There is no information for transsexual children about their condition; they are left to guess as best they can. And if you did guess, who would you tell? If tried, the experiment would not likely be repeated by most, unless and until there is a chance of dealing effectively with the condition, which generally does not come until after the age of majority, and which requires a maturity not ordinarily possessed by most eighteen-year-olds in the current social milieu. Those who do vocalize their feelings are brought to mental health professionals by concerned parents, none of whom can alter the nature of the situation.<sup>56</sup> Only on TV sitcoms could such a discovery lead directly to a happy ending. In reality, it is a terrifying self-discovery, albeit fraught with relief at *finally* knowing who you are and why you are different. Stringer describes the experience this way:

Then one day you come across a news item in the paper, or a word in the dictionary that points to the term “transsexual.” Suddenly a light shines brightly that clearly illuminates the problem you’ve been experiencing all these years. . . . Just as suddenly when the relief of finally knowing dawns, you immediately realize what that means in cold, hard truth. Then the terror strikes from the bittersweet reality of your discovery. Terror because you don’t know what to do or how to go about it, or where to turn for direction and guidance.<sup>57</sup>

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54. BROWN & ROUNSLEY, *supra* note 3, at 21.

55. *See id.* at 30-31.

56. *See* DSM IV, *supra* note 9, at 537-38 (containing diagnostic criteria for “gender identity disorder of childhood” by which the psychiatric profession seeks to label transgendered children). *See also* Eve Kosofsky Sedgwick, *How To Bring Your Kids Up Gay*, in FEAR OF A QUEER PLANET 69 (Michael Warner ed., 1994); Shannon Minter & Phyllis Randolph Frye, *GID and the Transgender Movement: A Joint Statement by the International Conference on Transgender Law and Employment Policy (ICTLEP) and the National Center for Lesbian Rights (NCLR)* (1996) (unpub. ms.).

57. JOANN ALTMAN STRINGER, *THE TRANSSEXUAL’S SURVIVAL GUIDE* 9 (1990).

Like Jonah fleeing Nineveh, the gender conflict eventually cannot be ignored without causing serious damage. As Brown and Rounsley say:

Sooner or later, most transsexuals reach the point where their gender dysphoria dominates their lives to such an overwhelming extent that daily functioning becomes difficult, if not impossible. Although they may have been able to contain their cross-gender feelings, longings and behaviors in an internal “vault” for many years, eventually that coping technique no longer works. The combination of internal and external stress causes “cracks” to appear. In addition, defense mechanisms that may have served them in the past are no longer effective. The dysphoria begins to slip out. And once it’s out, it is nearly impossible to force it back inside.

Debilitating depression often sets in. Things that used to be important in their lives are no longer meaningful. The pleasures previously experienced from relationships or personal interactions fade. Even simple joys like listening to music, communing with nature, or engaging in creative endeavors may diminish to the point of extinction. Nothing seems to matter. Transsexuals eventually find that they cannot ignore or deny their gender dysphoria any longer; something has to change.

‘I felt like I was in an endless maze,’ one patient said. ‘I’d gotten to the point in my life where I felt like the path I was going down was spinning wildly around in ever-decreasing circles, finally to disappear. I had to do something or die.’<sup>58</sup>

Brown describes her first attendance at a support group for transsexual people: “At that meeting, I saw a level of emotional pain greater than I had previously imagined possible. After listening to one individual after another share heartbreaking stories, I was overwhelmed. ‘My God,’ I said, ‘where do you all go for help? Who works with you?’ They said they had no one.”<sup>59</sup>

Myths about transsexuality are prevalent. There is a dearth of information communicating the transsexual experience, and many aspects of transsexuality remain controversial despite years of effort by professionals in the field.<sup>60</sup>

Transsexual people are often considered mentally unstable and/or sexually perverse.<sup>61</sup> Exposure to gender variant people may be limited to a comic drag queen on a television sitcom or a sensational tabloid story about the arrest or murder of transvestite prostitutes. Television talk shows sometimes feature people they erroneously refer to as “transsexuals” who are transvestites or female impersonators.

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58. BROWN & ROUNSLEY, *supra* note 3, at 96-97.

59. *Id.* at xii.

60. *See id.* at 2.

61. *See* BROWN & ROUNSLEY, *supra* note 3, at 6.

A common misconception is that sexual reassignment surgery will remake anyone into an undetectable member of the opposite sex. This is far from the truth, as such surgery only changes sex characteristics. Their appearance will remain their appearance, and they must make the best of it. There is facial cosmetic surgery available, but it is extremely expensive, costing tens of thousands of dollars, and this will at most ameliorate a few undesired characteristics, not remake the entire face. They must work with what they have. An identity cannot be created by surgical means.

A great deal of diversity exists in the transgender community, which is confusing to outsiders. There are many shades of gender variance, as well as considerable disagreement about the terms used to describe them. Here are some definitions:

(a) *Transgender*: persons “who choose to live in the world as the opposite gender on a full-time basis but do not wish to undergo sex reassignment surgery. [It is also] an umbrella term used to describe the full range of individuals who have a conflict with or question[s] about their gender.”<sup>62</sup>

(b) *Transvestite*: “individual[s] who wear[] clothing of the opposite gender primarily for erotic arousal or sexual gratification, although some do so for emotional or psychological reasons as well . . . [T]ransvestites have a male gender identity, enjoy their male bodies, including their genitals, and have no desire to change their sex.”<sup>63</sup>

(c) *Drag queens*: “homosexual cross-dressers who don female clothing for their own erotic and sexual pleasure or for that of partners who are attracted to female *presentation* in a male. Drag queens don’t aspire to *be* females, and their partners don’t want anatomical females—both value their own and their partner’s maleness.”<sup>64</sup>

(d) *She-males*: “men, often involved in prostitution, pornography or the adult entertainment industry, who have undergone breast augmentation but have retained their male genitalia.”<sup>65</sup>

(e) *Female Impersonators*: “males who wear female apparel to entertain a theater audience. . . . A female impersonator may be a homosexual male, a bisexual male, or a heterosexual male. Only female impersonators who are also preoperative transsexuals desire sex reassignment surgery.”<sup>66</sup>

(f) *Intersex*: those who have ambiguous sex organs, internally or externally, and/or have chromosomal ambiguities.<sup>67</sup>

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62. *Id.* at 17-18.

63. *Id.* at 12.

64. *Id.* at 15. There are also “drag kings” which are females who imitate men in performance. *See, e.g.*, JUDITH “JACK” HALBERSTAM, *THE DRAG KING BOOK* (1999).

65. BROWN & ROUNSLEY, *supra* note 3, at 16.

66. *Id.* at 16-17.

67. *See id.* at 12.

These definitions are by no means universally agreed upon.<sup>68</sup> However, their usefulness in this context is to distinguish the nature of transsexuality from their other phenomena: even though transsexual people dress in clothing traditionally associated with the other gender, their motivation is distinctly different.<sup>69</sup>

As Brown and Rounsley stated:

For transsexuals, cross-dressing is *not* about playfulness, eroticism, fetishism, exhibitionism, or show business. Nor is it about power and status. Transsexuals do not cross-dress as a form of rebellion or to make a political statement, nor do they do so to get attention or attract partners or, as was assumed in the medical literature of past decades, as a form of denial of a homosexual orientation. Transsexuals dress in the attire of the other gender solely as an outward expression of their core identity.<sup>70</sup>

Colloquially, a “female to male” transsexual (ftm) refers to one born with female sex organs who considers himself of the male gender. A “male to female” transsexual (mtf) refers to one born with male sex organs who considers herself of the female gender. Today, with modern technology, it is possible to surgically change genitalia to match. A “post-operative transsexual” has undergone sex reassignment surgery; a “pre-operative transsexual” intends to undergo such surgery. A “non-

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68. Riki Anne Wilchins has discussed the difficulty of any set of definitions:

Who knows what to call transpeople these days? The dominant discourse in the transcommunity is at best a moving target. *Transgender* began its life as a name for those folks who identified neither as crossdressers nor as transsexuals—primarily people who changed their gender but not their genitals. An example of this is a man who goes on estrogen, possibly lives full-time as a woman, but does not have or want sex-change surgery. The term gradually mutated to include any genderqueers who didn’t actually change their genitals: cross-dressers, transgenders, stone butches, hermaphrodites, and drag people. Finally, tossing in the towel on the noun-list approach, people began using it to refer to transsexuals as well, which was fine with some transsexuals, but made others feel they were being erased. . . . *Transgender* began as an umbrella term, one defined by its inclusions rather than its boundaries, coined to embrace anyone who was (in Kate Bornstein’s felicitous phrase) “transgressively gendered.”

Alas, identity politics is like a computer virus, spreading from the host system to any other with which it comes in contact. Increasingly, the term has hardened to become an identity rather than a descriptor. . . . The result of all this is that I find myself increasingly invited to erect a hierarchy of legitimacy, complete with walls and boundaries to defend. Not in this lifetime . . . . But at some point such efforts simply extend the linguistic fiction that real identities (however inclusive) actually exist prior to the political systems that create and require them. This is a seduction of language, constantly urging you to name the constituency you represent rather than the oppressions you contest. It is through this Faustian bargain that political legitimacy is purchased.

WILCHINS, *supra* note 27, at 15-17.

69. See BROWN & ROUNSLEY, *supra* note 3, at 18.

70. *Id.*

operative” transsexual is one who desires to undergo such surgery, but is prevented by medical, financial, or other practical reasons. All of these may also undergo nonsurgical treatment to change sexual characteristics.

There is no single profile of the “typical” transsexual person.<sup>71</sup> They represent a cross-section of society. They are professionals, scientists, academics, office workers, laborers, factory workers, unemployed, and homeless. Sometimes transsexuality is recognized and acted upon very early in life, and sometimes it is not acted upon or recognized until later in life.<sup>72</sup> Some transsexual people have had heterosexual marriages and children, and some couples choose to continue the marriage after a change in gender.<sup>73</sup>

Just as transsexuality itself is not a whim, medical intervention cannot be obtained frivolously. “Most gender therapists, physicians and surgeons follow the Standards of Care (SOC) originally developed in 1979 by the Harry Benjamin International Gender Dysphoria Association.”<sup>74</sup> These standards call for a minimum three-month-period between the initiation of sex-role change (and/or psychotherapy) and the provision of hormones.<sup>75</sup>

As described by Brown and Rounsley:

Prior to sex reassignment surgery, the SOC calls for a minimum twelve-month period during which the patient lives full-time in the social role of the “genetic other sex.” . . . This gives patients time to determine how effectively they will be able to function in the opposite gender role. . . . [T]he *minimum* amount of time required . . . frequently takes a year or more, instead of three months, to reach the point where both patient and therapist are comfortable about beginning hormone treatments. Similarly, a responsible decision regarding sex reassignment surgery (SRS) can sometimes take several years to make. Some patients who desire SRS cross-live for many years before going ahead with surgery.

All of these protective measures, as well as the others outlined in the SOC guidelines, help ensure that patients have the benefit of ongoing counseling about their specific gender issues and adequate time to consider all of the ramifications of hormone treatment and surgery before taking major steps that will change their bodies. Sex reassignment surgery is a drastic step. It is very costly—both emotionally and financially. Gender therapists, almost without exception, urge patients to consider surgery as a last resort rather than a first option.<sup>76</sup>

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71. See *id.* at 4, 8.

72. See STRINGER, *supra* note 57, at 9.

73. See *id.*

74. BROWN & ROUNSLEY, *supra* note 3, at 101-02.

75. *Standards*, *supra* note 9, at § VII.

76. BROWN & ROUNSLEY, *supra* note 3, at 102-03.

As a rough average, it generally takes five years to complete the transition process. There are many personal arrangements that need to be made. Mental health professionals must be consulted to work through any ego-dystonic aspects of cross-gender identity, to decide whether to transition, and to give approval for medical treatment. Physicians must be consulted to obtain hormone therapy, sex reassignment surgery, and any related cosmetic surgery. Family and friends must be notified. Neighbors must be notified, or perhaps there is a move to a new neighborhood or town. Arrangements must be made at work, or a new work environment must be found. Old employers may have to be notified for work references. Divorce and/or children may be involved. The amount of time, effort, and emotional fortitude required is hard to overestimate.

Gender is a very sensitive subject. Even for those who deal professionally with transsexual people, the reality of changing gender can be uncomfortable. Brown describes one such moment:

At the workshop, I became friendly with another attendee named Nick. He and I had many long conversations and really got to know each other—or so I thought.

On the last day, I got to class early, and only a few other people had arrived. One of them was an attractively dressed woman I had not seen before.

“May I help you?” I asked, puzzled, since the workshop was almost over and was closed to outsiders.

“Millie, don’t you recognize me? It’s me, Nick.” I was amazed. What was Nick doing in a dress? Despite my professional training, seeing him that way really startled me. Suddenly, I didn’t know what to say or do, and I had trouble making eye contact with him. For this to happen to me, a sexologist, was incomprehensible. The intellectual understanding I had gained at school from books, lectures, and doing term papers on gender identity didn’t help when it came to handling the emotional aspects of a situation involving someone I knew personally.<sup>77</sup>

So what does it mean to be “transsexual?” In relation to her or himself, it means nothing more than to be a woman or a man, as most of us consider ourselves to be.<sup>78</sup> However, those visibly identified as

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77. *Id.* at xi-xii. See also KATE BORNSTEIN, GENDER OUTLAW: ON MEN, WOMEN AND THE REST OF US 72-73 (1994) (calling the gender disorientation we experience in the presence of the gender variant “seasickness.”).

78. See KESSLER & MCKENNA, *supra* note 26, at 121. Keep in mind that this generality may not apply to all transgender people. See generally FEINBERG, TRANSLIBERATION, *supra* note † (discussing self identification as a mixture of female and male that cannot be characterized as one or the other).

“transsexuals” are not always seen as quite human.<sup>79</sup> The heteronormative standard requires transsexual people to conceal their past in order to live as an unremarkable male or female. It means going to great lengths to avoid discovery, contributing to disempowerment in the halls of power, at the peril of discrimination, harassment and physical danger—losing one’s job, friends and possibly, life. As Wilchins says:

The problem with transsexual women is not that we are trapped in the wrong bodies. The truth is that that is a fairly trivial affair corrected by doctors and sharp scalpels. The problem is that we are trapped in a society which alternates between hating and ignoring, or tolerating and exploiting us and our experience.

More importantly, we are trapped in the wrong minds. We have, too many of us for too long, been trapped in too much self-hate: the hate reflected back at us by others who, unwilling to look at the complexity of our lives, dismiss our femaleness, our femininity, and our sense of gender and erotic choices as merely imitative or simply derivative. Wanting desperately to be accepted, and unable to take on the whole world alone, we have too often listened to these voices that were not our own. We have forgotten what Alice Walker says when she declares: *No person is your friend (or kin) who demands your silence, or denies your right to grow and be perceived as fully blossomed as you were intended. Or who belittles in any fashion the gifts you labor so to bring into the world.*<sup>80</sup>

### C. *The Oppression of Caste*

We must hear the voices of those who are not heard in the halls of power in order to understand what is happening to them and why. Transsexual voices are rarely represented in legal texts. As in the case of other oppressed groups, hearing the stories of this group is necessary to generate a more critical understanding of the underlying cultural and legal assumptions, i.e., the heteronormative standard, and their effect on transsexual peoples’ lives. No legal argument exists in a vacuum outside society. Those who are assessing a legal argument regarding transsexuality from a position of franchise and empowerment, while they can never experience the reality of the disempowerment themselves in its repressive and depressing fullness, can at least learn more powerfully and viscerally for themselves what effect the current legal framework has on those people in day-to-day society, and what effect its continuation has on our society.

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79. See Keller, OPERATIONS, *supra* note 4, at 373-75.

80. WILCHINS, *supra* note 27, at 47 (quoting ALICE WALKER, IN SEARCH OF OUR MOTHERS’ GARDENS (1983)).



Transsexual people often experience anxiety about and problems resulting from legal identity issues.<sup>81</sup> Discrimination takes the form of unemployment or underemployment, inability to find housing, or denial of access to public accommodations, and involves changes in economic and social status.<sup>82</sup> Ambiguity in gender presentation can bring ridicule and ostracism.<sup>83</sup> Medical care may be denied.<sup>84</sup> Problems with the police and other legal officials are legion.<sup>85</sup> There is a higher incidence of violence affecting transsexual people and other gender variant people,<sup>86</sup> and a higher incidence of suicide.<sup>87</sup>

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81. “For example, they worry about being stopped by the police for a traffic violation, having an accident and being hospitalized, or being confronted or questioned about their gender in public places such as rest rooms, fitting rooms, and locker rooms . . . . [U]nforeseen circumstances can arise that can be inconvenient, uncomfortable or even dangerous . . . .” BROWN & ROUNSLEY, *supra* note 3, at 131-32.

82. For instance, in a 1998 National Survey of Discrimination Based on Sexual Orientation and Gender in the Workplace (conducted by GenderPAC, the National Center for Lesbian Rights, and NGLTF) forty-one percent of G/L/B-only respondents reporting discrimination said it was due at least in part to their expression of gender, and twenty-nine percent said that it was due strictly to their gender expression. See *First National Gender and Employment Discrimination Survey*, Gender and Public Advocacy Coalition (1999). Sixty-seven percent of transgender or transsexual respondents reported employment discrimination based exclusively on gender. *Id.* See, e.g., STRINGER, *supra* note 57, at 35-48 (noting that the transsexual must expect employment discrimination and possible changes in economic and social status).

83. See, e.g., WILCHINS, *supra* note 27, at 34 (noting that her body became the target of virulent social inspection and pronouncements).

84. See, e.g., FEINBERG, TRANSLIBERATION, *supra* note †, at 2-3.

85. See *id.* at 10-11 (speaking of police harassment). For example, in *City of Chicago v. Wilson*, 389 N.E.2d 522 (Ill. 1978), two preoperative transsexuals were arrested when leaving a restaurant for violating a city ordinance forbidding cross-dressing. Although the Illinois Supreme Court eventually upheld the right of these citizens to freely dress, they were taken to the police station, and “were required to pose for pictures in various stages of undress,” which revealed that “[b]oth defendants were wearing brassieres and garter belts; both had male genitals.” *Wilson*, 389 N.E.2d at 522. The neutrality of the language employed contrasts harshly with the degrading drama of the scene that must have occurred at the police station. This severe humiliation is mild compared to the treatment received by the defendant in *Farmer v. Brennan*, 511 U.S. 825 (1994), in which a slightly built twenty-one-year-old transsexual, convicted of credit card fraud, was imprisoned with violent male criminals. She was severely beaten and raped in her cell. The responsible officials claimed they were not aware of any danger.

86. Although a study released in 1999 by the *National Coalition of Anti-Violence Programs* found that “anti-gay incidents” overall decreased four percent between 1997 and 1998, it also reported that the number of transgender victims of hate crimes had increased by forty-nine percent. See *Anti-Lesbian, Gay, Bisexual and Transgender Violence in 1998*, National Coalition of Anti-Violence Programs (1999). A study of violence directed at gender variant people by GenderPAC in 1997 found that sixty percent reported being a victim of harassment or violence. See *Anti-Lesbian, Gay, Bisexual and Transgender Violence in 1996*, National Coalition of Anti-Violence Programs (1997) for details on the study. Wilchins notes the violence surrounding transsexuals:

No one writes about the names we cannot forget, names we still hear in the night—like Christian Paige, a young woman who moved to Chicago to earn money for surgery and ended up brutally beaten, strangled, and then stabbed in the chest and breasts so many

The deck appears to be stacked against transsexual people. Despite the psychiatric view of transsexuality as a mental disorder, transsexual people are not protected under federal laws that prohibit discrimination on the basis of handicap or disability. While gender identity disorder is considered a psychiatric disorder in the American Psychiatric Association Diagnostic and Statistical Manual of Mental Disorders [“DSM IV”],<sup>88</sup> nevertheless both the Rehabilitation Act of 1973<sup>89</sup> and the Americans with Disabilities Act<sup>90</sup> explicitly exclude transsexuality and gender identity disorders not resulting from “physical impairments” from protection under either Act. Several states which prohibit discrimination against people with disabilities exclude transsexuality, either explicitly in legislation or by judicial decision.<sup>91</sup> Transsexual people are protected under neither Title VII’s prohibition of sex discrimination nor state and local sex discrimination laws, on the ground that “sex” does not include transsexuality.<sup>92</sup> Eight states and the District of Columbia prohibit

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times that her family at first thought her body had been intentionally mutilated. We don’t hear about Marsha P. Johnson (drowned), Richard Goldman (shot by his father for crossdressing), Harold Draper (multiple stab wounds), Cameron Tanner (beaten to death with baseball bats), Mary S. (fished out of the trunk of her car—beaten, stabbed and drowned), Chanelle Pickett (strangled), Brandon Teena (raped, beaten, stabbed, and shot), Deborah Forte (strangled and stabbed), Jessy Santiago (beaten, repeatedly stabbed with box cutter, screwdriver, and knife), or her younger sister, Peggy, also transgender, who was killed just three years earlier.

WILCHINS, *supra* note 27, at 23.

87. The rate of attempted suicide by transsexuals is estimated to be between seventeen to twenty percent. See BROWN & ROUNSLEY, *supra* note 3, at 11.

88. See DSM IV, *supra* note 9, at 532.

89. See 29 U.S.C. § 705(20)(F)(i) (2000).

90. See 42 U.S.C. § 12211(b)(1) (1997).

91. See, e.g., IND. CODE ANN. § 22-9-5-6(d)(3) (Michie 1992); IOWA CODE ANN. § 15.102(5)(b)(1)(b) (West 1995); LA. REV. STAT. ANN. § 51.2232 (11)(b) (West 1997); NEB. REV. STAT. § 48-1102(9) (1993); OHIO REV. CODE ANN. § 4112.01(A)(16)(b)(ii) (Anderson 1995); OKLA. STAT. ANN. tit. 25, § 1451(6) (West 1997); TEX. PROP. CODE ANN. § 301.003(6) (Vernon 1995); VA. CODE ANN. § 36-96.1:1 (Michie 1996). See also *Holt v. Northwest Pennsylvania Training Partnership Consortium, Inc.*, 694 A.2d 1134 (Pa. Commw. 1997) (holding that transsexuality is not a protected disability under the Pennsylvania Human Relations Act); *Dobre v. Nat’l R.R. Passenger Corp. (AMTRAK)* 850 F. Supp. 284 (E.D. Pa. 1993) (holding that transsexuality is not a protected disability under Pennsylvania Human Relations Act); *Sommers v. Iowa Civil Rights Commission*, 337 N.W.2d 470 (Iowa 1983) (stating that transsexuality is not a protected disability under Iowa Civil Rights Act).

92. For Title VII cases, see *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984); *Sommers v. Budget Marketing*, 667 F.2d 748 (8th Cir. 1982); *Holloway*, 566 F.2d at 659; *James v. Ranch Mart Hardware, Inc.*, 881 F. Supp. 478 (D. Kan. 1995); *Powell*, 436 F. Supp. at 369; *Voyles v. Ralph K. Davies Med. Ctr.*, 403 F. Supp. 456 (N.D. Calif. 1975). For state and local cases, see *Conway v. City of Hartford*, 1997 WL 78585 (Conn. Super. 1997); *Underwood v. Archer Mgmt. Servs., Inc.*, 857 F. Supp. 96 (D.D.C. 1994); *Dobre*, 850 F. Supp. at 284; *Kirkpatrick v. Seligman & Latz, Inc.*, 636 F.2d 1047 (5th Cir. 1981). But cf. *Maffei v. Kolaetion Indus., Inc.*, 626 N.Y.S.2d 391 (Sup. 1995) and *Rentos v. OCE Office Sys.*, 72 Fair Empl. Prac. Cas. (BNA) 1717, 23 A.D.D. 508, 1996 WL 737215 (S.D.N.Y. 1996).

employment discrimination on the basis of sexual orientation, but implicitly exclude transsexual people.<sup>93</sup>

When some credence is occasionally given to transsexual claims, it is often immediately withdrawn. One state court in Washington held that transsexuality is a medically cognizable condition. However, the court also found that no special accommodation was owed for this condition under the state's disability law because the condition did not interfere with the job requirements. Therefore, the transsexual litigant's challenges to the company dress requirements legitimized her termination.<sup>94</sup> When the Oregon Bureau of Labor and Industry ruled in 1996 that a transsexual person was protected under the Oregon state disability law, the Oregon Legislature immediately amended the state law to the effect that transsexual people are not entitled to reasonable accommodation.<sup>95</sup>

As Brown notes:

Unfortunately, transition (and thereafter) is a time when many transsexuals experience discrimination because of their condition. They may find it difficult to find a place to live, a community in which to make their home, or a work environment that offers them the same opportunities afforded other men and women. Some even find themselves thrown out of their living quarters, driven out of or summarily dismissed from their jobs, or denied basic human rights. As a result, some transsexuals wind up jobless, homeless and in the streets. . . . Discrimination can be a life-or-death situation. Transsexuals have been attacked and beaten up in the streets and in their homes. Medical professionals have refused necessary medical treatment to transsexuals upon becoming aware of their situation. And one transsexual who was involved in a car accident was denied lifesaving treatment by fire department rescue workers when they discovered her male genitalia. She died at the accident scene, and onlookers reported that in the last minutes of her life, she was laughed at and humiliated by the rescue workers.<sup>96</sup>

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93. See, e.g., *Conway v. City of Hartford*, 1997 WL 78585 (Conn. Super. 1997); *Underwood*, 857 F. Supp. at 96; *Maffei*, 626 N.Y.S.2d at 391. But cf. MINN. STAT. ANN. § 363.01 SUB 45 (West 1996) (implicitly including transsexuality in its definition "having or being perceived as having a self image or identity not traditionally associated with one's biological maleness or femaleness."). Some cities have municipal ordinances against employment discrimination which include transsexuality in their definition of sexual orientation, including Santa Cruz, Berkeley, and San Francisco, California, as well as Seattle, Minneapolis-St. Paul, Minnesota, and also Cedar Rapids and Iowa City, Iowa. See Note, *Discrimination Against Transgender People in America* 3 (1997), reprinted in 3 NAT'L J. SEXUAL ORIENTATION L. (1997), at <http://ibiblio.unc.edu/gaylaw/issue5>.

94. See *Doe v. Boeing*, 846 P.2d 531 (Wash. 1993).

95. OR. REV. STAT. § 659.439(2) (1997).

96. BROWN & ROUNSLEY, *supra* note 3, at 144.

Transsexual voices show that the invisible status of the transsexual in society matches their invisibility in officialdom. There are often no regulations covering the transsexual, or the regulations are practically unobtainable, in effect secret, or even where there are regulations, they are unknown or ignored by the government agents who are required to enforce them.<sup>97</sup> Furthermore, the gender rules place the transsexual in a classic Catch-22 situation. Some jurisdictions require that sex reassignment surgery be completed prior to approval of a name or gender change. However, the psychiatric approval required by surgeons to perform such surgery will not be given unless the transsexual person has lived and worked in the role of the opposite gender for a substantial period of time. This can make life very complicated and even hellish. Leslie Feinberg describes it this way:

But I live in a society in which I will never fit either of the little stick figures on public bathroom signs, and I cannot shoehorn myself into either the “M” or “F” box on document applications. Does the “M” or “F” on a driver’s license mean Male or Female, Masculine or Feminine? Those who created the M-or-F boxes may think the two are one and the same, since the contemporary dictate is that females will grow up to be feminine and boys to be masculine. But we in this room are all living proof of the gender variance that exists in our society and societies throughout human history.

So I, and millions like me, are caught in a social contradiction. It’s legally accurate to check off the “F” on my driver’s license permit. But imagine if a state trooper stops me for a taillight violation. He (they have always been he in my experience) sees an “F” on my license but when he shines his flashlight on my face he sees an “M.” Now I’m the middle of a nightmare over a traffic infraction.

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Authorities like to say such rules cannot be changed. But when I was a kid, I was required to put down my race on documents. That was mandatory—until the Civil Rights and Black liberation movements challenged the racist underpinnings. Then the authorities were forced to remove the “race” box.<sup>98</sup>

Susan L. Solomon has described the heroic efforts necessary to obtain government approval of transsexuality. She is smart, well-educated, white, Jewish, and a lawyer, and clearly empowered in many ways. Here is her description of an attempt to obtain a passport, illustrating the incongruities:

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97. See *supra* note 33.

98. FEINBERG, *TRANSLIBERATION*, *supra* note †, at 19-21.

Since I had an existing passport showing me to be someone as whom I can no longer pass (either physically or emotionally), I had no choice but to explain who and what I am, and that I needed to change both the name and sex designation on my passport. He looked puzzled for a moment. He truly wanted to cooperate in my efforts, but he had never before been faced with this situation (or, to his knowledge, a six foot transsexual). The only advice he could give me was what is “engraved” on the stele which is the Passport Office’s written instructions. These instructions provide that, in order to permit a change of sex designation, the transsexual must submit a letter from a surgeon, affirming that the SRS [sexual reassignment surgery] has been completed.

I showed the Postmaster my Social Security Card and my driver’s license, and explained that the New York courts will not approve a transsexual name change until after the “operation,” but that I couldn’t qualify for the operation until I had lived and worked as a woman, and that I couldn’t work as a woman until I could prove my work eligibility (another of those potential catch-22s).

“So,” I concluded, “if you look real hard, I’m sure you can find a way to help me.” . . . Nice man. Interested. He spent a half hour with me, reviewing the regulations as he had them, but could find no solution. Finally, he gave me the telephone number of the National Passport Office in New Hampshire. . . . I phoned the Passport Office and was connected to a warm and empathetic individual, named Kristin. I explained to Kristin that I am a pre-operative transsexual, that I am in the process of changing my personal Paper Trail (i.e., the record of my name), and that I am seeking to renew my passport, in my adopted name, for the primary purpose of having another piece of “identity paper”—one that will help demonstrate my right to work in America.

Kristin advised me to send a copy of my “name change papers” (i.e., the court order), and a copy of the “surgeon’s letter,” confirming my SRS. I explained that I had not yet undergone the surgery, and that, without the Surgery the New York courts were hesitant to sanction a transsexual name change (if you’re becoming bored with the rehearing of this tale of woe, consider how I feel about the constant retelling).

Whoops! This brought about a moment of silence, as my new friend tried to think of what could be done to help me in my quest. The instructions Kristin had, only dealt with the common questions. The problem of a pre-op, pre-”official” name change TS [transsexual] is certainly not common as far as the Passport Office (or the Department of State, which runs it), is concerned. The best that Kristin could do at that moment was to ask for my telephone number, and offer to speak with her supervisor. She promised that she would call me back.

She was as good as her word. Early the next morning . . . my phone rang, and on the other end was Kristin’s cheery voice.

“I spoke with my supervisor,” she said. “It seems that in order to change your name on your passport (or to get a new one in your new name), we’d need the surgeon’s letter, I wish the news was better.”

. . . I presented the problem this way: There are only a few surgeons in the world who perform most of the sex reassignment surgeries. What would happen if I elected to use the services of a doctor in London, or in Brussels. . .? In such a circumstance, I would need to travel abroad, presented as a woman, because I am required to (and actively choose to—but why confuse her) live that way. What would happen if I try to clear customs, and a quasi-policeman begins to examine the credentials of this six foot tall, angular “woman,” who is traveling under the passport of a man? Containing the photograph of a man who does not look anything like this “woman” in front of him? Which identifies this person, clearly, as a “male?” A simple search would show that I am not what I present myself to be.

“Why not just supply passport photos of yourself dressed as a woman?” Kristin asked innocently. “We could probably do that.”

I let the suggestion hang for a moment. Then I said: “Right.”

I went on: “Then, of course, there is the problem of traveling home as a post-op.”

Now, besides everything else, when the Immigration Service inspects my passport and then me, that inspection will reveal a physiological woman, traveling under a “man’s” passport.

“Kristin,” I said, “things being as they are, I’d never be able to get back into the United States.”

Although some “true Americans” would think that a good thing, Kristin understood the “problem.” Sometimes you’ve got to ask the right question. Kristin thanked me for the additional information, and said that she would take it back to her supervisor. She again promised to call me back. She did so the next morning.

This time the news was somewhat more “hopeful.” It seems that under this circumstance, one can arrange for a passport of limited one year duration (instead of the normal ten year—five year for children—term). As far as the name is concerned, the passport would still be under my “legal” name, but might show my new “female” name as an “alias.” . . . However, the acceptance of the “alias” would be up to the discretion of the “adjudicator” (the person examining the materials which one submits with one’s passport application). Kristin advised that under the circumstances presented to her (i.e., that I was traveling to Europe in order to receive the SRS), there should be no problem having the “adjudicator” approve this.

Right.<sup>99</sup>

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99. SUSAN LYNN SOLOMON, *EXPLORING THE PAPER TRAIL* 59-62 TRANSAGENDA PRESS (1995).

This story illustrates not only the nature of one governmental barrier to gender autonomy, but also the self-empowerment, tenacity and knowledge required even to learn what the rules themselves are. The nature of the problem may not be readily apparent to those, such as “empowered” white heterosexual males, “normally” gendered, with education and higher economic status, who have not experienced the continual lack of respect accorded the transsexual. When one learns from regular experience that one’s needs and person are not respected by government and institutional officials and also that almost every such interaction results in long delays due to unknown rules, denial of services, and personal disdain, one soon learns not to spend a lot of time hoping that anyone cares. Ms. Solomon describes the typical interaction:

If you seem unsure of yourself, if the world has made you feel shame, if you are uncertain of what you are doing there, the clerk will pick up on this “vibe,” and begin a cross examination of you. The clerk will examine your papers several times. The clerk will be suddenly unsure of how to accomplish this simple task (or begin to wonder whether he/she is even allowed to do it in the first place), and will take an immediate coffee break so that she/he can consult with the supervisor of supervisors. . . . You will, though, have been made to feel embarrassed, humiliated, and generally less than human.<sup>100</sup>

Ms. Solomon has also described the type of reception which a transsexual person more often encounters when their status is revealed to a governmental or institutional clerk to whom a request for assistance must be made. She describes a visit to the New York State Division of Motor Vehicles to change a driver’s license from male to female, which has explicitly been permitted by regulation since 1987:

Caroline properly filled out all of the required forms, as described in this Chapter. She remembered to bring with her all of the materials necessary to support the requested changes (except that she hadn’t yet arranged for her new Social Security registration). She had her photo taken . . . . She walked confidently up to the assigned examiner, and heard the inevitable words: “I can’t do this!” “Yes, you can,” Caroline insisted, pushing the materials back to the examiner. “Please speak to your supervisor.”

The examiner did just that, and Caroline could hear the two women twittering over her request. The examiner then returned with a photo copy of a DMV regulation in her hands.

“See!” she announced. “The regulations say that I can’t change your sex before you’ve had the operation.”

At this point Caroline became flustered by the examiner’s disdain. She didn’t notice that the regulation which the examiner had so carefully

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100. *Id.* at 16-17.

copied for her, was the rule before regulation 4335 was amended in 1987. . . . Caroline . . . just drew a complete blank, and was forced to retreat from the confrontation without accomplishing the mission she had set for herself.

Clearly, the DMV examiner . . . was aware of the appropriate regulation (she couldn't have missed it if she took the trouble to find the older version), and just chose not to focus on it.<sup>101</sup>

Even when one is empowered and armed with knowledge and confidence, the reception is not necessarily any more pleasant:

I was at the DMV in Medford with my friend, Katy. It is a truism that two transsexual people together are likely to be "read." Add to this the fact that my friend was identifying herself as transsexual in the papers she was presenting to the clerk. The clerk was less than thrilled to be facing us, and apparently decided to be less than cooperative.

"I can't do this!" She finally announced, after staring first at us, then at the papers, then at us again.

"Yes, you can." I was just as firm.

"I don't think so. See *he* just isn't a female, and I don't see any court papers which tell me he's changed *his* name."

"You certainly can do it." I could remain calm, because I knew that I was right. "Why don't you look at your procedure manual under procedure 4335, as it was amended in 1987, by a memo numbered "c" 15. . . .

She stared at us for a moment. She didn't even bother to reach for her manual. "How did you know that?" she asked.

As you can see, she certainly knew that it was possible to effectuate the change requested. At the very least, she could have inquired of her supervisor. She just chose not to do so. I don't ascribe any reasons for her acting in that manner, and the "why" really doesn't matter.<sup>102</sup>

In her writings, Riki Ann Wilchins transmits the raw emotional force triggered by governmental regulation of her gender autonomy:

I go down to the County Recorder's office and don't even get to see a judge. Alas, I will miss the irony of a man who lives half his life running around publicly in a floor-length black dress passing judgment on my gender. Instead I get some bored clerk who looks like a third-year law student. He eyes me sourly from behind a battered gray desk, one of those broad, rough things that invites graffiti. I try to read the desktop art upside

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101. *Id.* at 32-33.

102. *Id.* at 25-26. Ms. Solomon also describes interactions with the Social Security Administration giving the erroneous information that a court order is required for a name change on a Social Security account, and describing the secret nature of the regulations, *id.* at 14-15, as well as problems with credit card companies, *id.* at 72, telephone utilities, *id.* at 86, the Bar Association, *id.* at 96, and other governmental and institutional offices.



down while he examines my proof that I've publicized my legal change of name in the *Cleveland Legal Register* for the required thirty days.

He asks me how the sovereign state of Ohio can know I'm not doing this to defraud someone, because that kind of name change is strictly illegal. *I mean, look at me, asshole. I'm a guy in a dress who gets hassled in the restroom for trying to take a pee and you're worried that I'm going to turn out to be John Freaking Dillinger on the lam in drag? Get a life.* I say nothing, of course . . . . He finally signs the papers, staring up at me as if I'm something he's discovered in the back of the fridge from last year's hunting trip. . . . But I'm not done. I ask him about changing my Ohio birth certificate, which still lists me as male. He loftily informs me that the state of Ohio doesn't do that sort of thing. It turns out they want a record "contemporaneous with my birth." He intones contemporaneous solemnly. . . .<sup>103</sup>

As Wilchins says:

Trans-identity is not a natural fact. Rather, it is the political category we are forced to occupy when we do certain things with our bodies. That so many of us try to take our own lives, mutilate ourselves, or just succeed in dying quietly of shame, depression, or loneliness is not an accident. We are supposed to feel isolated and desperate. Outcast. That is the whole point of the system. Our feelings are not causes but effects.<sup>104</sup>

D. *Unveiling a Non-Caste, Non-Heteronormative Gender Theory: Physical Sex and Psychological Gender Are Divisible and Separable*

The denial of the fundamental transsexual claim regarding physical sex and psychological gender may appear to be a non-issue of simple logic applied to objective facts: there are two sexes and birth sex is the same as gender. It seems like a semantic exercise in categorization and taxonomy: we can play games with the definitions of sex and gender, but it all comes down to the same thing. It seems like an opposition between liberty and order: we cannot let women call themselves men, and vice versa. It seems like a question of the limits of technology: we can change externals but not chromosomes, so we cannot really change gender.

However, none of these arguments explain the incongruities of a fuller reality which includes transsexual people. The challenge of transsexuality is the examination of the limits of our ability to know what exists and does not exist. It involves an examination of heteronormative constructs regarding identity so deeply embedded in our consciousness

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103. WILCHINS, *supra* note 27, at 52-53.

104. *Id.* at 25.

since birth that we cannot recognize them as constructs. It requires us to discern and acknowledge the foundations of our own identity, which makes it impossible to be objective in this arena. Our own being is so invested in the outcome that impartiality is impossible. Because of this, the discourse used to deny transsexual peoples' rights shifts continuously in order to maintain the status quo.<sup>105</sup> Our language constructs our reality, and it is in language that we can see the heteronormative construct at work.

Most people assume that gender is essentially genitalia, i.e., sex, a biologically determined characteristic like the height or the number of our fingers and toes. "Sex" is a simple fact, based on "genitalia," which immutably determine one's "gender." One cannot change one's gender, and therefore, transsexual people should not be permitted to legally change their gender classification. To argue otherwise is to enter the realm of fantasy, of delusion. Of course, gender has not been the only characteristic considered biologically related to a single physical characteristic. There are many who have espoused the biological imperative of race, and it was not so very long ago in this country that those of mixed Caucasian and black heritage in any degree were legally considered "biologically black," regardless of color or cultural identification, and thereby disadvantaged in law.<sup>106</sup> Anyone not purely white was dismissively considered black on the basis of "biology." This, too, was simple "logic" applied to objective "facts."

Let us examine the assumptions. Those who argue that gender equals genitalia are in fact making a different claim altogether. In the year 2001, there are people born with female genitalia who have a male self-image and consider themselves male, have consistent observable behavior within the range of culturally male behavior, have a male presentation, dressing and styling themselves within the range of culturally male presentation, and have male genitalia by virtue of sex reassignment surgery. If such a person has a male self-image, male behavior, a male presentation, and male genitalia, functions and is accepted day-to-day as a male, then clearly he is functioning socially and culturally as a male. When faced with such a person, there is often no physical, social, or cultural cue which would identify that individual as female. Only an examination of the original birth certificate or the testimony of close relatives would reveal the incongruity of gender.

Should that person be considered legally male? Many would answer in the negative because, in the words of one correspondent,

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105. See Keller, *Operations*, *supra* note 4, at 348-52 (discussing the shifting of discourse).

106. See Greenberg, *supra* note 46, at 294 n.191 (1999) (discussing "one drop" rule).

“what your momma gave you is what you is.” Yet, in what sense is this person properly considered a female? Would it make sense to tell such a person to act like a woman? Should such a person be required to use the women’s bathroom? And what is the importance, legally, of maintaining that this person is female?

Here, we see the terms of the argument beginning to shift. Those who would initially argue that gender simply equals genitalia cannot maintain the terms of that argument in such a case. To argue that such a person is female, one would have to argue that the existence of male genitalia does *not* determine gender. The existence of male genitalia must be dismissed on the grounds that such medical intervention does not change one’s “true” gender. Thus, gender must exist independent of actual genitalia. But if gender does not equal actual genitalia, but only “birth sex,” then what is it?

The OXFORD ENGLISH DICTIONARY defines “gender” as follows:

Gender

- 1. Kind, sort, class; also genus as opposed to species. The general gender: the common sort (of people). Obs. . . . .
- 2. Gram. Each of the three (or in some languages two) grammatical ‘kinds’, corresponding more or less to distinctions of sex (and absence of sex) in the objects denoted, into which substantives are discriminated according to the nature of the modification they require in words syntactically associated with them; the property (in a sb.) of belonging to, or (in other parts of speech) of having the form appropriate to concord with, a specified one of these kinds. Also the distinction of words into ‘genders’, as a principle of grammatical classification . . . .
- 3. transf. Sex. Now only jocular . . . .
- b. In mod. (esp. feminist) use, a euphemism for the sex of a human being, often intended to emphasize the social and cultural, as opposed to the biological distinctions between the sexes. Freq. attrib.<sup>107</sup>

The MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY defines “gender” as follows:

gen\*der\jender\ n [ME *gendre*, fr. MF *genre*, *gendre*, fr L genes *genus* birth, race, kind, gender—more at KIN](14c) 1 **a**: a subclass within a grammatical class (an noun, pronoun, adjective, or verb) of a language that is partly based on distinguishable characteristics (as shape, social rank, manner of existence, or sex) and that determines agreement with the selection of other words in grammatical forms **b**: membership of a word or

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107. OXFORD ENGLISH DICTIONARY (4th ed. 1993).

a grammatical form in such a subclass **c**: an influential form showing membership in such a subclass 2 **a**: SEX <the feminine~> **b**: the behavioral, cultural, or psychological traits typically associated with one sex.<sup>108</sup>

These definitions reveal another shift in the argument. The two connotations of gender separate biological “sex,” i.e., genitalia and psychological “sex” characteristics which we have attributed to biological sex. Brown distinguishes between the terms “sex” and “gender” as follows: “*Sex* refers to the *biological* classification of being either male or female and is usually determined by the external genitalia. *Gender* refers to the culturally determined *behavioral, social* and *psychological* traits that are typically associated with being male or female.”<sup>109</sup> Thus, at least in certain contexts, “gender” does not always equate to “genitalia.”

The distinction between gender, i.e., an observable and consistent set of psychological characteristics, and physical sex implies that gender is not essentially physical sex, and that gender is something nonmaterial.<sup>110</sup> The work of theorists such as Foucault and Butler suggest the same, and further that “gender” is or has become a cultural phenomenon. However, this does not necessarily imply that gender is therefore fluid and changeable, and advocates of the idea, such as Dr. John Money, have fallen into controversy in the scientific community.

In one case, a tragic circumcision accident resulted in the parent’s decision, guided by Dr. Money, to raise the child as a girl.<sup>111</sup> The case was often cited as proof that gender is constructed by social factors alone. However, the “gender change” was not in fact successful, and, the child underwent significant distress in the assigned gender role, deciding at the age of fourteen to live as a boy.<sup>112</sup> Neither being raised as a girl nor medical intervention “changed” the child’s gender.

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108. MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY (10th ed. 1998).

109. BROWN & ROUNSLEY, *supra* note 3, at 19.

110. See BUTLER, GENDER, *supra* note 12, at 6; PHYLLIS BURKE, GENDER SHOCK (1996); JUDITH LORBER, PARADOXES OF GENDER (1994) (analyzing the cultural construction of gender). See also France, *supra* note 21, at 2 (“[S]ex bears an epiphenomenal relationship to gender; that is, under close examination, almost every claim with regard to sexual identity or sex discrimination can be shown to be grounded in normative gender rules and roles.”); Meredith Gould, *Sex, Gender, and the Need for Legal Clarity: The Case of Transsexualism*, 13 VAL. U. L. REV. 423 (1979); Note, *Patriarchy Is Such a Drag: The Strategic Possibilities of a Postmodern Account of Gender*, 108 HARV. L. REV. 1973, 1980-83 (1995).

111. See JOHN COLAPINTO, AS NATURE MADE HIM (2000).

112. See *id.* In addition, a recent study by John Hopkins Hospital of male children who were born without penises and raised as girls found that most of them considered themselves boys when they got older, suggesting that gender identity is determined by hormonal influences in the womb. See Greenberg, *supra* note 46, at 290-92 (regarding similar cases).

Opponents of transsexuality have correctly attacked the notion that medical intervention can change gender and seek thereby to discredit the notion of transsexuality.<sup>113</sup> However, this misapprehends the transsexual claim. The claim that gender, i.e., an observable and consistent set of psychological characteristics, can be changed by medical intervention is similar to the simplistic and ludicrous notion that gender can be changed simply by putting on stereotypical clothes of the opposite sex. It is significant in this context to understand that neither transvestites, who form a fetishistic attachment to clothing of the opposite sex, nor female impersonators or drag kings, who professionally don clothing of the opposite sex to perform sometimes startlingly realistic imitations of celebrities, claim to change their gender. The idea that we can choose or change our gender fails to take into account that “gender” is not a solitary experience, individually and subjectively determined, but one that is had by everyone, and is culturally and objectively observed. The idea that we as individuals can choose or change our gender fails to take into account that it is gender, as given to us by the cultural conversation, which determines the nature of our experience, and not vice versa. Essentially, gender chooses us, and not the other way around. It makes us what we are. Neither we nor transsexual people choose or change gender. However, the choice is not always settled neatly by reference to physical sex.

Similarly, the argument by Judith Butler that gender is “performative,” was also misapprehended by some.<sup>114</sup> “Performative” sounds suspiciously like saying that gender is a performance, and her work was misread by some as meaning that anyone can choose any gender by simply performing it because physical bodies do not matter. However, such misreadings failed to understand that Butler, a professor of comparative literature and rhetoric at the University of California, was using “performative” as a term of art espoused by J.L. Austin.<sup>115</sup>

Austin asserted that relatively few statements are provably true or false. Austin called true/false statements “constatives,” and others he called “performatives,” statements which bring into being that which they name or cause changes in the behavior of observers by the simple fact of their pronouncement.<sup>116</sup> A clear example would be the recitation by the minister at the wedding: “I now pronounce you husband and wife.” However, the same statement made at the dinner table is not performative.

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113. See, e.g., JANICE RAYMOND, *THE TRANSSEXUAL EMPIRE*, at xxiv (1994).

114. See BUTLER, *GENDER*, *supra* note 12.

115. See J.L. AUSTIN, *HOW TO DO THINGS WITH WORDS* (1962).

116. See *id.*

Butler speaks of bodies as texts<sup>117</sup> which may be read as representations of certain cultural ideas, arguing that gender is “performative,” meaning that our gender creates and recreates us as a specific kind of being, a gendered being, which has effects in the behavior of those who observe it. This negates the idea of a subject who chooses its gender. It also suggests that gender is not a true/false proposition. She explained the misreadings in her 1997 book, *Bodies That Matter*, as follows:

For if I were to argue that genders are performative, that could mean that I thought that one woke in the morning, perused the closet or some more open space for the gender of choice, donned that gender for the day, and then restored the garment to its place at night. Such a willful and instrumental subject, one who decides *on* its gender, is clearly not its gender from the start, and fails to realize that its existence is already decided by gender.<sup>118</sup>

Thus, both opponents of and advocates for transsexual people agree that gender cannot be chosen, for it is given to us. However, this does not require that gender be the same as physical sex.

What we perceive as “gender” is a set of behaviors which has been *defined* for us as masculine or feminine. It differs, in some major or minor degree, from culture to culture, from region to region, and from family to family. A New York businessman and a Texas cowboy are both male and masculine, but not in the same way, as is true of an Italian from Naples and a Maori, a Tibetan and a Saudi Arabian, *ad infinitum*. Thus, as Butler says, “[t]he presumption of a binary gender system implicitly retains the belief in a mimetic relation of gender to sex whereby gender mirrors sex or is otherwise restricted by it.”<sup>119</sup> But when masculinity is seen for what it is, which is a set of behaviors which has been defined by society and assigned to a physical sex, then it makes no sense to say that possessing a given physical sex guarantees a specific set of behaviors. We would have to know where the person was born and raised, their cultural background, economic status, religion, sexuality and much more, in order to even begin to predict the set of behaviors assigned to them. In that sense, then, physical sex is not determinative of psychological gender.

Even our view of physical sex as a natural fact has been questioned. Butler theorized that gender does not exist simply because we are born

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117. See BUTLER, GENDER, *supra* note 12. Others have specifically referred to transsexual bodies as “texts” which may be read. See Keller, *Operations*, *supra* note 4, at 334-36.

118. JUDITH BUTLER, BODIES THAT MATTER—ON THE DISCURSIVE LIMITS OF “SEX,” *at* (1993) [hereinafter BUTLER, BODIES].

119. BUTLER, GENDER, *supra* note 12, at 6.

with certain physical differences. Those physical differences are not by themselves the determinant of gender in a vacuum.

Butler proposes:

Consider first that sexual difference is often invoked as an issue of material differences. Sexual difference, however, is never simply a function of material differences which are not in some way both marked and formed by discursive practices. Further, the claim that sexual differences are indissociable from discursive demarcations is not the same as claiming that discourse causes sexual difference. The category of “sex” is, from the start, normative: it is what Foucault has called a “regulatory ideal.” In this sense, then, “sex” not only functions as a norm, but is part of a regulatory practice that produces the bodies it governs, that is, the regulatory force is made clear as a kind of productive power, the power to produce—demarcate, circulate, differentiate—the bodies it controls.

... In other words, “sex” is an ideal construct which is forcibly materialized through time. It is not a simple fact or static condition of a body, but a process whereby regulatory norms materialize “sex” and achieve this materialization through a forcible reiteration of those norms. That this reiteration is necessary is a sign that materialization is never quite complete, that bodies never quite comply with the norms by which their materialization is impelled. Indeed, it is the instability, the possibility for rematerialization opened up by this process, that mark one domain in which the force of the regulatory law can be turned against itself to spawn rearticulations that call into question the hegemonic force of that very regulatory law.<sup>120</sup>

Thus, both “sex” and “gender” are a function of physical differences, but these physical differences are invested with meaning by culture. This is not to say that culture causes sexual differences. Rather, the culture promulgates an ideal which includes standards of normality for our bodies and how we think about them. At the same time, this ideal forces our bodies into those standards. “Sex” is a continuing process. We could make it into a verb: “sexing.” Constant “sexing” is necessary because how we think of our bodies never quite conforms to the standards. This calls into question the authority of the standards. Therefore, while “sex” is in one sense a physical fact, it is also an ideal in the sense that we create artificial standards of normality to which we must continually strive to conform. While most people deviate in a limited way from the ideal set of behaviors which in our culture we associate with males or females, transsexual people consistently and coherently deviate from society’s ideal so far as to fall outside of the range traditionally associated with their sex. Thus, while the gender of a

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120. BUTLER, BODIES, *supra* note 118, at 1.

transsexual person is essentially congruent throughout his or her life, it is at variance with his or her “sex.”

“Sex” may itself be an artificial concept. The idea that different people with the same organs are *ipso facto* the same in certain predefined ways may be as pseudo-scientific as phrenology. Butler argues:

When the sex/gender distinction is joined with a notion of radical linguistic constructivism, the problem becomes even worse, for the “sex” which is referred to as prior to gender will itself be a postulation, a construction, often within language, as that which is prior to language, prior to construction. This “sex” posited as prior to construction will, by virtue of being posited, become the effect of that very positing, the construction of construction. If gender is the social construction of sex and if there is no access to this “sex” except by means of its construction, then it appears not only that sex is absorbed by gender, but that “sex” becomes something like a fiction, perhaps a fantasy, retroactively installed at a prelinguistic site to which there is no direct access.<sup>121</sup>

Or as Wilchins more colloquially says:

Maybe the formula is reversed. Gender is not what culture creates out of my body’s sex; rather, sex is what culture makes when it genders my body. The cultural system of gender looks at my body, creates a narrative of binary difference, and says, “Honest, it was here when I arrived. It’s all Mother Nature’s doing.”<sup>122</sup>

Before one glibly dismisses all this as wild-eyed radical theory, one must deal with the fact that a significant number of people are born outside the range of what society assumes to be the only two sexes. The correctness of the assumption must be questioned in the face of such inconvenient reality.

The essentialist argument is not only problematic on the level of epistemology, but also on the level of biology. There are a statistically significant number of persons born with genitalia and chromosomal structure which show signs of both maleness and femaleness.<sup>123</sup> How common is intersexuality? The question is difficult to answer, as ethicist Alice Dreger explains:

I suspect that ethicists have ignored the question of intersex treatment because like most people they assume the phenomenon of intersexuality to be exceedingly rare. It is not. But how common is it? The answer

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121. *Id.* at 5.

122. WILCHINS, *supra* note 27, at 51.

123. See Greenberg, *supra* note 46. I note that the experience of intersexed people is quite different from that of transgendered or transsexual people, and must not be conflated. These are not statistical blips, these are people. However, such experience demonstrates the absurdity of oversimplification of gender.



depends, of course, on how one defines it. Broadly speaking, intersexuality constitutes a range of anatomical conditions in which an individual's anatomy mixes key masculine anatomy with key feminine anatomy. One quickly runs into a problem, however, when trying to define "key" or "essential" feminine and masculine anatomy. In fact, any close study of sexual anatomy results in a loss of faith that there is a simple, "natural" sex distinction that will not break down in the face of certain anatomical, behavioral, or philosophical challenges. Sometimes the phrase "ambiguous genitalia" is substituted for "intersexuality," but this does not solve the problem of frequency, because we still are left struggling with the question of what should count as "ambiguous." (How small should a baby's penis have to be before it counts as "ambiguous"?)<sup>124</sup>

If we equate genitalia with gender, how do we accommodate the biological fact of intersexed genitalia? As Wilchins says:

The argument that intersexed bodies are pathology doesn't help us much, because—assuming the bodies are perfectly functional—that's a value judgment masquerading as medical fact.

Saying that the intersexed comprise just a negligible fraction, doesn't help us either. It just takes us out of the land of Fact and Nature, plopping us squarely in the squishy realm of Probabilities and Chance. Deciphering this begins to look suspiciously more like cultural judgment than the cold eye of Impartial Science.<sup>125</sup>

Intersex cannot be explained satisfactorily under the essentialist theory, revealing inner contradictions in the theoretical framework. It is therefore necessary to view intersexed organs as a medical anomaly to be corrected, the same as the existence of an extra finger or toe. This theory leads to the routine practice of surgically "correcting" their "abnormal" genitalia. The Intersex Society of North America calls this "intersex genital mutilation," estimating that five intersexed infants are operated on each day.<sup>126</sup> Significant stories have been told of the psychological pain which has been caused later in life because of these procedures.<sup>127</sup> The Intersex Society protests this "intersex genital mutilation" and is attempting to have medical organizations change their practices, despite

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124. Alice Domurat Dreger, "Ambiguous Sex"—or Ambivalent Medicine? *Ethical Issues in the Treatment of Intersexuality*, HASTINGS CENTER REP., May-June 1998 at 24-26 (1998) (citations omitted). For statistical information on the frequency of biological conditions which may lead to a classification of intersexuality see Melanie Blackless et al., *How Sexually Dimorphic Are We? Review and Synthesis*, 12 AM. J. HUM. BIOLOGY 151 (2000). Please note that the frequency of some of these conditions, such as congenital adrenal hyperplasia, differs for different populations.

125. WILCHINS, *supra* note 27, at 50.

126. *See id.*

127. *See id.* *See also* FEINBERG, *TRANSLIBERATION*, *supra* note †, at 7-8 and 90-91; "Intersexed Voices," at <http://www.sonic.net/~cisae/real.html>.

stubborn resistance.<sup>128</sup> But perhaps it is first the theory, rather than the practices, which needs changing, because it is the essentialist theory which requires the practice of intersex genital mutilation.<sup>129</sup> Without this essentialist theory, there would be no need for intersex genital mutilation. Aside from the alleged “biological” facts, is the essentialists’ Procrustean formula socially and legally satisfactory? As Wilchins says:

Sex! is a cultural command that all bodies understand and recognize themselves in a specific way, an identification of our bodies that we are forced to carry around and produce on demand. To participate in society, we must be sexed.

We see this with perfect clarity in the case of the intersexed, the original lost brigade in any discussion of binary sex. Intersexuals are not permitted to live without a sex. Even if they resist, society inevitably forces one on them. The machinery of sex gets very upset when you try to live outside of it.<sup>130</sup>

Essentialists cannot have it both ways. If essentialists are prepared to say that “sex” is “ambiguous” in the case of intersexed infants, so that “genitalia” must be “corrected,” it must be conceded that “sex” is not necessarily congruent with “gender,” that physical sex as a binary system is itself in question. Why cannot the same be said of consenting adults who, despite everything in our culture pulling the opposite direction, have concluded after serious reflection, often after years of attempting to avoid the obvious conclusion, that their gender is at variance with their sex? What about children who insist continually that they are of a different sex and refuse all attempts to conform them to the heteronormative standard?

But the biologic essentialists could shift the terms of the argument yet again, to say that, despite the dictionary definitions showing two connotations, despite mental health professionals who use eight or more

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128. See <http://www.isna.org>. See also Kenneth Kipnis & Milton Diamond, *Pediatric Ethics and the Surgical Assignment of Sex* (1998), available at <http://www.afn.org/~sfcommed/pedethics.htm>.

129. By comparison, there has been great controversy in America about the African practice of female genital mutilation, but there has been relatively little coverage of the controversy about American intersex genital mutilation. See [http://www.religioustolerance.org/fem\\_cira.htm](http://www.religioustolerance.org/fem_cira.htm) (“Cheryl Chase, founder of the *Intersex Society of North America* commented: ‘Africans have their cultural reasons for trimming girls’ clitorises, and we have our cultural reasons for trimming girls’ clitorises. It’s a lot easier to see what’s irrational in another culture than it is to see it in our own.’ . . . . Some pediatricians defend the practice of infant genital surgery.” Dr. Anthony A. Caldamone, head of pediatric urology at Hasbro Children’s Hospital in Providence, RI, said: “I don’t think it’s an option for nothing to be done. I don’t think parents can be told, this is a normal girl, and then have to be faced with what looks like an enlarged clitoris, or a penis, every time they change the diaper. We try to normalize the genitals to the gender to reduce psychosocial and functional problems later in life.”).

130. WILCHINS, *supra* note 27, at 56.

factors to determine gender, despite the chromosomal variations inherent in human genetics in the intersexed, the only determinant that really matters is some “biological” characteristic more fundamental than “sex,” one which determines “sex.”<sup>131</sup> There is, however, no scientific support for such a position. To the contrary, an eleven-year study at the Netherlands Institute for Brain Research in Amsterdam showed that, upon autopsy, brains of male to female transsexual people had differences in brain structure that only occur in fetal and neo-natal development.<sup>132</sup> The studies showed that the central subdivision of the bed nucleus of the stria terminalis, known as “BSTc,” which plays a pivotal role in sexual behavior, was much smaller than a typical male and was approximately the same size as would be expected of a typical woman.<sup>133</sup>

The essentialist argument also submerges the fundamental social, cultural and psychological differences between “men” and “women,” and the fact that four of the five “biological” determinants of gender can be medically altered. What is such an argument left with when our facility with genetics has advanced to the point where chromosomal structure can be altered and new body parts regenerated? The constant shifting required to maintain the essentialist view not only indicates that

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131. See, e.g., *Corbett v. Corbett*, [1971] P. 83, [1970] 2 All E.R. 33, [1970] 2 WLR 1306, wherein a British court addressed the issue of whether a transsexual could marry, reviewing criteria including (i) Chromosomal factors; (ii) Gonadal factors (i.e., the presence or absence of testes or ovaries); (iii) Genital factors (including internal sex organs); (iv) Psychological factors; (v) Hormonal factors or secondary sexual characteristics (such as distribution of hair, breast development, physique, etc., which are thought to reflect the balance between the male and female sex hormones in the body), [1970] 2 All ER at 44. However, the court adopted a reductive view of females, focusing on chromosomes and reproduction, thus holding that these define a “woman” for purposes of marriage. *But cf.* *M.T. v. J.T.*, 355 A. 2d 204 (N.J. Super. Ct. App. Div. 1976) (concluding a wife was entitled to the protection of divorce laws despite her transsexuality).

132. See F. Kruijver, et al., *Male-to-Female Transsexuals Have Female Neuron Numbers in a Limbic Nucleus*, 85 THE JOURNAL OF CLINICAL ENDOCRINOLOGY & METABOLISM 2034 (2000). See also JOANN McNAMARA, EMPLOYMENT DISCRIMINATION AND THE TRANSEXUAL 3 (1995), available at <http://www.willamette.edu/~rrunkel/gwr/mcnamara> (citing Josie Glausiusz, *Transsexual Brains*, 1995: The Year in Science, DISCOVER MAG. 83, Jan. 1996). “Dr. Swaab (the author of the study) has stated that his research ‘shows that transsexuals are right. Their sex was judged in the wrong way at the moment of birth because people look only to the sex organs and not to the brain.’” Although the study involved people who had been castrated and had taken sex hormones, the researcher concluded that these procedures did not affect the size of the brain region because of animal studies which indicated that the size of the nucleus cannot be changed in adulthood using sex hormones. A study of the brains of men who had their testes removed as a treatment for prostate cancer showed that these nontranssexuals had a BSTc in the normal male size range, and a study comparing pre- and post-menopausal women’s brains showed that the drop in estrogen levels following menopause did not change the size of the BSTc structure. See also Christine Gorman, *Trapped in the Body of a Man*, TIME MAG., Nov. 13, 1995.

133. See Gorman, *supra* note 132.

there is something more at work here than meets the eye, but also validates the theorists' view that "sex" is a discursive category and not a natural fact.

As one judge put it:

Prior to my participation in this case, I would have had no doubt that the question of sex was a very straightforward matter of whether you are male or female . . . . After listening to the evidence in this case, it is clear to me that there is no settled definition in the medical community as to what we mean by sex."<sup>134</sup>

However, the Seventh Circuit reversed the decision, stating that "[w]e do not *believe* that the interpretation of the word 'sex' as used in the statute is a mere matter of expert medical testimony or the credibility of witnesses produced in court."<sup>135</sup> Here we see yet another shifting, from "science" back to "belief." Additionally, the initial determination is given to an expert, i.e., the doctor who certifies the sex of the child at birth, so why shouldn't another expert be listened to? The court did not address that question.

The essentialist argument is akin to the argument that pornography cannot be precisely defined, but "I know it when I see it." In any event, the law must be concerned with not only scientific facts but also social policy. The question is whether we should subordinate the transsexual claim to self-determination and self-identification for reasons of social policy. If so, in service of what principle or ideal? One researcher stated the issue as follows:

If psychology, medicine and the law agree to the desires of patients, regardless of their reservations, and support the patients to live in accordance to their self-image as a member of the opposite sex, then they contribute—however limited—to a changing process that results in a human being who was born as a boy or a girl to live as an adult as a female or a male. As a rule, this is a difficult process full of conflicts that burden the patient enough. It is our task to make this destiny as bearable as possible. The surgical operations are—if done appropriately—just a few of many steps in a changing process requiring and containing many interior or exterior changes. The patients will adapt to the results of the treatment better the more their intents [sic] to face this conflict find support. Under retrospective biographical aspects, it may be true that a human does not fundamentally change—regardless of any operations. Even though a new human being has not been created, there has been change, along with many new experiences. To treat patients first psychiatrically, hormonally and

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134. *Ulane v. Eastern Airlines*, 581 F. Supp. 821, 823 (N.D. Ill. 1983), *rev'd*, 742 F.2d 1081 (7th Cir. 1984).

135. *Ulane*, 742 F. 2d at 1086 (emphasis added).

then surgically and then to inform them, as Randell did, that they are only castrated males and females, is considered by us inappropriate and hardly conducive.<sup>136</sup>

Based on all of the foregoing, to reflect our reality at the dawn of the twenty-first century, the law must, taking into account the welfare of its transsexual citizens, recognize that physical sex and psychological gender, once assumed to be part and parcel, are divisible and separable.

### III. CONSTITUTIONAL DIMENSIONS OF THE CASTE SYSTEM

Given that physical sex and psychological gender are divisible and separable, individuals may determine that their gender differs from their sex sufficiently enough that they identify as a member of the opposite sex. Does such an individual have a right to such self-determination and self-identification, or is this determination solely within the power of the government?

#### A. *The Right to Privacy Is the Right to a "Private Life": Self-Determination*

Each state has a gender classification scheme for deciding who is entitled to the status and privilege of being legally recognized as a male and who is entitled to the status and privilege of being legally recognized as a female. This occurs at birth pursuant to public health statutes mandating determination of sex by the attending physician.<sup>137</sup> The states' authority to do so lies in the states' police power, preserved by our federal Constitution, to regulate health, safety, and morality, which includes anything not specifically delegated to the federal government or otherwise prohibited by that Constitution.<sup>138</sup>

A concomitant to the statutory assignation of sex is the common-law notion subscribed to by most courts, that such assignation, as a record of historical fact, may not be changed. However, some states have enacted statutes which explicitly permit transsexual people to change their assignation. Other states refuse to permit such a change.

Most courts have held that evidence of an incorrect assignation of gender cannot be taken into account legally, no matter how clear or persuasive it might appear to the court. The states' classification scheme, in their view, prevents it.<sup>139</sup> Is this a recognition of change in "sex" or

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136. PFÄFFLIN & JUNGE, *supra* note 46, at 9.

137. *See, e.g.*, Mass. Gen. Laws ch 46 §§ 3, 3B.

138. *See, e.g.*, *Munn v. State of Illinois*, 94 U.S. 113, 124 (1876).

139. *See, e.g.*, *In re Ladrach*, 513 N.E.2d 828 (1987). *But cf.* *Darnell v. Lloyd*, 395 F. Supp. 1210 (D. Conn. 1975) (remanding the issue of whether a post-operative transsexual could

“gender?” Since the assignation is given at birth, when an astute practiced observer cannot tell the difference between a male and female infant without reference to genitalia, the original assignation must be one of physical sex. Strictly speaking, then, some say the assignation of physical sex should not be changed unless physical sex is changed through sex reassignment surgery. And indeed, of those states which do permit gender reclassification, some do so only if there has been sex reassignment surgery, thus excluding preoperative transsexual people from gender reclassification.

Many would agree that gender classification should be irrelevant for most purposes. Today, most of us believe (and more importantly, the legal system says) that the ability to be a lawyer or a police officer should be judged on ability, and not on gender classification. Why should it be important to society whether I am masculine or feminine, or call myself male or female?

However, gender is neither socially nor legally irrelevant for many purposes, including, for example, compulsory military service, the right to marry, and same-sex athletics. The government exercises the right to determine your gender and its uses. Yet transsexual people insist that they have the need and the right to determine their own gender. No law forbids transsexual people from expressing their gender freely. But government record-keeping practices threaten transsexual people with disclosure of this sensitive private information and the risk of ridicule, harassment and physical danger for which there is no remedy. This is where the rubber meets the road—where the heteronormative standard, enshrined as State power, collides with our right to our own private identity.

The existence and scope of any right to privacy has long been and continues to be controversial, just as transsexuality is controversial. Professor Laurence Tribe has noted the efforts of commentators “to identify the single core common to all of what passes under the privacy label,” which is “autonomy with respect to the most personal of life choices.”<sup>140</sup> Certainly, gender and sex are the most personal and private of matters.

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obtain a change of birth certificate). The court in *Darnell* noted that a failure to do so might be impermissible, in part, because it could infringe on the petitioner’s fundamental right to marry. As one commentator noted, to prohibit the transsexual from marrying in his or her new sex “might deprive the sexually reassigned individual of the ability to maintain a legal heterosexual relationship, forcing the transsexual to choose between celibacy and illegality.” Note, *Transsexuals in Limbo: The Search for a Legal Definition of Sex*, 31 MD. L. REV. 236, 247 (1971).

140. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1302 (2d ed. 1988) (citations omitted).

In 1928, Justice Brandeis defined the right of privacy as “the right to be let alone—the most comprehensive of rights and the right most valued by civilized men,”<sup>141</sup> but the first recognition by the U.S. Supreme Court of the theoretical construct of a constitutional “right to privacy” did not emerge until 1965, in *Griswold v. Connecticut*.<sup>142</sup> The case involved a Connecticut statute that forbid the use of contraceptives as well as counseling and assisting others in their use, and made violators subject to fines and imprisonment for not more than one year. The Court held that the United States Constitution contains an implicit right to privacy that the statute contravened. Two Justices vigorously dissented. Justice Black in his dissent scathingly derided the majority opinion’s assertion of a “right to privacy:”

The Court talks about a constitutional “right of privacy” as though there is some constitutional provision or provisions forbidding any law ever to be passed which might abridge the “privacy” of individuals. But there is not. . . . I like my privacy as well as the next one but I am nevertheless compelled to admit that government has a right to invade it unless prohibited by some specific constitutional provision.<sup>143</sup>

The majority disagreed, installing the idea of a constitutional right to privacy in constitutional doctrine. Nonetheless, Justice Black’s opinion points to a tension between the right to privacy and State power that still exists today. The opinion of the Court by Justice Douglas stated that it was not the Court’s purpose to determine the wisdom, need or propriety of the law. But Justice Douglas nonetheless justified the intervention because “[t]his law, however, operates directly on an intimate relation of husband and wife and their physician’s role in one aspect of that relation.”<sup>144</sup> He went on to review various cases which demonstrated that specific guarantees in the Bill of Rights “have penumbras, formed by emanations from those guarantees that help give them life and substance,” stating that the marital relationship lay within the “zone of privacy” created by those guarantees, and that the right of privacy in a marital relationship is older than the Bill of Rights.<sup>145</sup>

The idea of “privacy” and “private” life is not a reference to the closet. It does not countenance the specious argument that privacy refers to whatever a citizen wants to do with the shades drawn. To define privacy so narrowly is nothing more than to define a right to be ashamed.

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141. *Olmstead v. U.S.*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

142. 381 U.S. 479 (1965).

143. *Id.* at 508-10 (1965) (Black, J., dissenting).

144. *Id.* at 482.

145. *Id.* at 484.

Furthermore, there are many things we are not permitted to do even behind closed doors.

Privacy does not reside in our actions, but in our selves. A “private” life refers to the idea that each of us has our own individual, i.e., private, self, which we are allowed to create as we will, within the strictures of proper government power, and which the public polity has no right to deny us.

Cases since 1965 have further defined the scope of protected privacy rights to extend to matters outside of marital privacy. The Court invalidated a statute which prohibited distribution of contraceptives to unmarried persons,<sup>146</sup> invalidated a law prohibiting a woman’s right to choose to have an abortion,<sup>147</sup> and invalidated a law which prohibited sale of contraceptives to underage persons.<sup>148</sup>

The Supreme Court halted the steady spread of protected privacy rights in *Bowers v. Hardwick*, wherein it held that the state may proscribe homosexual sodomy.<sup>149</sup> *Bowers* could also appear to mean that there is no constitutional protection for transsexual people. However, *Bowers* has no specific application to gender identity itself. Transsexuality is unlike homosexual sex in that it does not raise the issue of state regulation of sexual activity. Nor is any issue of sexuality whatsoever raised by legal questions regarding transsexuality. While many people conflate gender and sexual orientation, the two are separate. Thus, the moral element of sexual activity which the state may regulate is absent.

There is, as has been consistently pointed out by conservatives, no right to privacy mentioned specifically in the Constitution. Nonetheless, it is part of our constitutional jurisprudence. For the same reason, the argument that transsexuality was unknown to the framers of the Constitution, and that it therefore cannot be protected by that Constitution is untenable. It is unlikely that the founders of our American government anticipated many of the dramatic changes in society over the past 250 years. We no longer allow slavery, we permit all races and genders to vote, our society is permeated by radio, television, cell phones, modern medicine and psychiatry, bikinis, libertine sexual mores, feminism, gay rights, and divorce. These ideas would have been radical and incomprehensible, just as it may be difficult

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146. See *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

147. See *Roe v. Wade*, 410 U.S. 113 (1973).

148. See *Carey v. Population Servs. Int’l*, 431 U.S. 678 (1977).

149. 478 U.S. 186 (1986). Clearly, the Court was deciding more than the case before it and intended to halt the spread of protected privacy rights, stating “[t]he case also calls for some judgment about the limits of the Court’s role in carrying out its constitutional mandate.” *Id.* at 190.



to understand the idea that a person born female may seek to be socially and legally recognized as a male. Yet our society and our legal system has accommodated, more or less, all of these other developments. The right to self-determination, the autonomy of private lives, was not intended to be limited to that self envisaged by a slave-owning, land-holding white male in a pre-industrial agrarian civilization 250 years ago.

*B. The Right to Privacy Is a Right to Keep Sensitive Private Information Private: Self-Identification*

The right to privacy also has been evoked in the context of protecting sensitive private information. In 1976, the Court first explicitly recognized that state possession of sensitive personal information raised constitutional privacy concerns, but upheld the regulations.<sup>150</sup> In 1977, the Court again addressed the issue, and again upheld the regulations, but more particularly delineated two types of privacy concerns receiving constitutional protection.<sup>151</sup>

The Court observed that the cases sometimes characterized as protecting “privacy” have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions.<sup>152</sup>

The Court also noted Professor Kurland’s formulation, thus: “The second is the right of an individual not to have his private affairs made public by the government. The third is the right of an individual to be free in action, thought, experience, and belief from governmental compulsion.”<sup>153</sup>

On a number of occasions, the Court has held that State intrusions into sensitive private information violated the right to privacy. In 1982, the Court addressed a state statute requiring that political parties disclose names and addresses of campaign contributors and campaign

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150. See *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976). The State required that records of abortions be kept. The Court discussed the constitutional right to privacy, upholding the regulations as “reasonably directed to the preservation of maternal health and that properly respect a patient’s confidentiality and privacy.” *Id.* at 80. The Court held that the regulations’ confidentiality requirements and reasonable seven-year period of record retention sufficiently protected privacy.

151. See *Whalen v. Roe*, 429 U.S. 589 (1977). The Court found that the state’s compilation of a database of Schedule II drug prescription users did not pose a “sufficiently grievous” threat to their “interest in the nondisclosure of private information and also their interest in making important decisions independently to invalidate it.” *Id.* at 600. The Court found that neither the risk of public disclosure nor an asserted “chilling effect” on those who might avoid treatment was shown. See *id.*

152. See *id.* at 599-600.

153. *Id.* at 599 n.24 (quoting *The Private I*, U. CHI. MAG. 8 (Autumn 1976)).

disbursements.<sup>154</sup> The Socialist Workers '74 Campaign Committee objected, alleging protected privacy concerns.

The Court previously upheld campaign reporting requirements against the claim that they infringed First Amendment rights of association in *Buckley v. Valeo*.<sup>155</sup> While the Court had held in *Buckley* that the government interests in enhancement of voter knowledge, deterrence of corruption, and enforcement of contribution limitations were sufficient to overcome the First Amendment challenge, it nevertheless recognized that in certain circumstances the government's interests are diminished in the case of minor parties. In *Brown*, the Court held that the Socialist Workers Party should be exempted from the reporting requirements because it presented evidence meeting the standard set forth in *Buckley*: "a reasonable probability that the compelled disclosure of a party's contributors' names will subject them to threats, harassment or reprisals from either Government officials or private parties."<sup>156</sup> The Court did not require strict proof of injury, stating that even a showing of threats against others with similar views would suffice.

In 1984, the Court recognized that the privacy interest in private information limited state discovery statutes, and that judges are justified in issuing protective orders prohibiting the publication of discovery material despite an asserted First Amendment right to publish.<sup>157</sup> The Court stated:

It is clear from experience that pretrial discovery by depositions and interrogatories has a significant potential for abuse. . . . [D]iscovery also may seriously implicate privacy interests of litigants and third parties. The Rules do not distinguish between public and private information. . . . There is an opportunity, therefore, for litigants to obtain—incidentally or purposefully—information that not only is irrelevant but if publicly released could be damaging to reputation and privacy. The government clearly has a substantial interest in preventing this sort of abuse of its processes.<sup>158</sup>

In 1986, the Court invalidated state intrusion into sensitive private information regarding abortion.<sup>159</sup> The Court distinguished *Danforth*, noting that in *Danforth* the regulations furthered important health-related concerns. Conversely, the required reports in *Thornburgh* containing

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154. See *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87 (1982).

155. 424 U.S. 1 (1976).

156. *Id.* at 74.

157. See *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984).

158. *Id.* at 34-35 (citations omitted).

159. See *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747 (1986).

personal information of abortion recipients were available to the public. While the woman's name was not required, the amount and detail of the information made identification possible. There was no limitation on the use of the information by the State or the public. The Court found that "[t]he decision to terminate a pregnancy is an intensely private one that must be protected in a way that assures anonymity."<sup>160</sup> The Court quoted Justice Stevens' concurring opinion in its judgment of *Bellotti v. Baird*: "It is inherent in the right to make the abortion decision that the right may be exercised without public scrutiny and in defiance of the contrary opinion of the sovereign or other third parties."<sup>161</sup>

The *Thornburgh* court noted "that the Court consistently has refused to allow government to chill the exercise of constitutional rights by requiring disclosure of protected, but sometimes unpopular, activities."<sup>162</sup> The cases cited by the *Thornburgh* court imply that where state intrusion into sensitive private matters will allow disclosure of information which may lead to harassment or danger, a privacy right is implicated. It is important to remember that the publication of information lawfully obtained from public records may neither be prevented nor prosecuted.<sup>163</sup>

The constitutional right to privacy issue in regard to transsexuality arises from the existence of state records from which transsexuality can be determined and forcibly disclosed. The existence of the records poses some risk of disclosure,<sup>164</sup> but more significantly, the disclosure of the information is compelled whenever such records are required for identification. This system perpetuates the heteronormative standard, by requiring transsexual people to remain invisible and to avoid challenging the system, and thus subjects them to a risk of discrimination, harassment, and physical danger. These severe consequences create a chilling effect on self-identification, the free expression of our private, individual, selves, and our gender identity.<sup>165</sup>

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160. *Id.* at 766.

161. 443 U.S. 622, 655 (1979)

162. *Id.* at 655 (citations omitted).

163. *See Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975); *Fla. Star v. B.J.F.*, 491 U.S. 524 (1989). *See also Landmark Communications Inc. v. Virginia*, 435 U.S. 829 (1978); *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97 (1979).

164. *See, e.g., Report No. 96-S-40, State of New York, Office of State Comptroller, Division of Management Audit*, at 6-11 (1997) (acknowledging the processing of 70,000 birth record requests in 1995 without verification of identity, and mandating corrective procedures), *available at* <http://nysosc3.osc.state.ny.us/audits/allaudits/093097/96s40.htm>.

165. Some commentators have suggested that the right to privacy could include the right to live a certain lifestyle. "The concept of 'lifestyle' might include freedom to live, dress, or act in a manner that is inconsistent with any number of state laws ranging from mandatory education requirements to single family zoning regulations." RONALD D. ROTUNDA & JOHN E. NOWAK,

C. *The Differences Between the Sexes Do Not Require Governmental Interference with Self-Determination and Self-Identification*

It might be argued, nonetheless, that there are “real” differences between the sexes which require a gender classification system based on presumptive gender, permitting subordination of individual privacy interests. The Equal Protection Clause speaks to classification schemes. It subjects differential treatment of persons similarly situated to court scrutiny. The mere fact of classification will not void legislation, but only where the classification is found to constitute “invidious discrimination.”<sup>166</sup> However, when government acts on the basis of a suspect classification or with regard to fundamental rights, the Court exercises “strict scrutiny.”

Classifications by gender are considered quasi-suspect, and receive heightened scrutiny. Such classifications “must serve important governmental objectives and must be substantially related to achievement of those objectives.”<sup>167</sup> Older notions of the role of men and women in society are not a permissible basis for differentiation between men and women.<sup>168</sup> Administrative convenience is an insufficiently important objective to justify gender-based classifications.<sup>169</sup> If the assumptions which underlie the classification system are gender-stereotypes, then the classification scheme must fall.

Equal protection also speaks to classifications which affect fundamental rights. When a fundamental right is affected, government classifications which adversely affect them must be justified by a showing of “a compelling interest necessitating the classification and by a showing that the distinctions are required to further the governmental purpose.”<sup>170</sup> The right to privacy in sensitive personal information is a fundamental right. Compelled disclosure of transsexuality, causing a substantial risk of harm, invokes this fundamental right for both preoperative and postoperative transsexual people.

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TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE (3d ed. 1999), Sec. 18.30, p. 646 (citations omitted).

166. See *Ferguson v. Skrupa*, 372 U.S. 726, 732 (1963); *Williamson v. Lee Optical Inc.*, 348 U.S. 483, 489 (1955).

167. *Craig v. Boren*, 429 U.S. 190, 197 (1976).

168. See *Stanton v. Stanton*, 421 U.S. 7 (1975) (invalidating a differential age-of-majority statute).

169. See, e.g., *Reed v. Reed*, 404 U.S. 71 (1971) (holding that favoring men in the selection of estate administrators violates equal protection); *Stanley v. Illinois*, 405 U.S. 645 (1972) (invalidating a statute declaring the children of unmarried fathers state wards upon the death of the mother); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (invalidating a statute declaring that spouses of female service members are not dependents).

170. *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621, 627 (1969). See *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969).

If the presumptive gender classification systems of those states which do not permit gender reclassification do not reflect a valid “difference in fact,” then there must be a “compelling governmental interest” necessitating the immutable classification, and it must be “required to further the governmental purpose.”<sup>171</sup>

The argument that the presumptive gender classification system “realistically reflects the fact that the sexes are not similarly situated in certain circumstances . . .”<sup>172</sup> ignores the difference between “sex” and “gender.” One who was identified as female at birth, but who has a male self-image, male behavior, a male presentation, and male genitalia, and functions and is accepted day-to-day as a male, is not “different in fact” in any valid physical, psychological, social, or cultural way from any other male. To presume the contrary is to give voice to heteronormative prejudice rather than evidence.

Furthermore, the argument is undercut by the radically different gender classification schemes employed by the states. Some states implicitly recognize the separation between “sex” and “gender,” permitting gender change on all government documents, while others permit a change on some documents, but not others (such as allowing it on a drivers’ license but not on a birth certificate), and some allow no changes.<sup>173</sup> One state, Rhode Island, places no gender on any birth certificate. Thus, there are no generally accepted criteria for a legal determination of gender reclassification. To argue that a presumptive classification scheme, which rigidly ties “gender” to “sex,” is required by some “real” difference between a transsexual man (ftm) and a man born as a male, is belied by the lack of uniformity among state gender classification schemes. Such an argument also incorrectly implies that “transsexual” is a standardless, arbitrary category. But mental health professionals who deal with gender-variant people routinely assess such characteristics in diagnosing transsexuality. They recognize “gender” as a combination of physical and psychological characteristics. These criteria can be used as the legal basis for gender reclassification, undermining the argument that “real” differences require denial of the transsexual claim to such reclassification.

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171. While one lower court denied equal protection claims raised by a transsexual person, the court was addressing the claim that transsexuality creates a suspect class for purposes of employment discrimination. See *Holloway*, 566 F.2d at 659. By contrast, the issue being raised in this Article is whether transsexual people have the right to change a presumptive gender assignment which is asserted to be incorrect.

172. *Michael M. v. Sonoma County Superior Court*, 450 U.S. 464, 469 (1981).

173. See BERGSTEDT, *supra* note 32, at 38-57.

There are several elements in determining transsexuality, and the DSM IV sets forth diagnostic criteria which permit clinicians to make a finding of transsexuality.<sup>174</sup> Brown and Rounsley assert that there are at least eight factors to be considered in determining gender, five biological and three social and psychological. “The biological determinants are *chromosomes, hormones, gonads* (glands that produce sex hormones), *internal sexual and reproductive organs* and *external sex organs*. The social and psychological determinants are *gender of rearing, gender role, and gender identity*.”<sup>175</sup> A diagnosis of transsexuality is made based on these factors. The DSM IV attempts to guide professionals in making a differential diagnosis of transsexuality by the following criteria:

Diagnostic Criteria for Gender Identity Disorder

a. A Strong and Persistent Cross-Gender Identification (Not Merely a Desire for Any Perceived Cultural Advantages of Being the Other Sex)

In adolescents and adults, the disturbance is manifested by symptoms such as a stated desire to be the other sex, frequent passing as the other sex, desire to live or be treated as the other sex, or the conviction that he or she has the typical feelings and reactions of the other sex.

b. Persistent Discomfort With His or Her Sex or Sense of Inappropriateness in the Gender Role of That Sex

In adolescents and adults, the disturbance is manifested by symptoms such as preoccupation with getting rid of primary and secondary sex characteristics (e.g., request for hormones, surgery, or other procedures to physically alter sexual characteristics to simulate the other sex) or belief that he or she was born the wrong sex.

c. The Disturbance Is Not Concurrent With a Physical Intersex Condition

d. The disturbance causes clinically significant distress or impairment in social, occupational, or other important areas of functioning.<sup>176</sup>

Thus, there are criteria to the medical determination of transsexuality that can be used in connection with a legal determination of gender reclassification. The argument that recognition of the transsexual claim will fall afoul of the “real” difference between the sexes because it will destroy all standards is belied by these standards upon which medical professionals rely daily.

The next, and more difficult issue, is whether the distinction often made between preoperative and postoperative transsexual people is appropriate. Although viewing transsexual people as a single monolithic group is more convenient, this characterization is more a product of

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174. See BROWN & ROUNSLEY, *supra* note 3, at 7.

175. *Id.* at 20.

176. DSM IV, *supra* note 9, at 537-38.

ignorance and prejudice than of any real homogeneity. Mental health professionals necessarily diagnose transsexuality prior to surgery. The medical determination of transsexuality necessarily comes before sex reassignment surgery, and is a necessary prerequisite for medical intervention and surgery. If surgery is unnecessary to the determination, why is it required by some states prior to allowing reclassification of gender?

Some states require sex reassignment surgery prior to making any changes to government documents, whereas others do not.<sup>177</sup> Furthermore, in those states which require sex reassignment surgery, it is not always clear what surgical procedures are necessary to satisfy the requirement. For example, female to male transsexual people may undergo hysterectomy, salpingo-oophorectomy, vaginectomy, metoidioplasty, scrotoplasty, urethroplasty, placement of testicular prostheses, and phalloplasty, but each operation may be considered “sex reassignment” surgery. Male to female transsexual people may undergo orchiectomy, penectomy, vaginoplasty, clitoroplasty and labiaplasty each of which may be considered “sex reassignment” surgeries. This brings us back to the question of whether the category of “transsexual” is an artificial, standardless category which cannot be considered equivalent to the “natural” categories of “man” and “woman” “man” and “woman” we can “see,” but who is “really” a transsexual? Don’t we need to “see” that physical change on the body to say for sure? Doesn’t “trans-”sexual” imply one who has already crossed between sexes?

As discussed previously in this Article, the answer must be in the negative. The category “transsexual” is as “real” as the category of “real” women, which is to say both have certain elements of artificiality. The term “transsexual” was generated by a physician trying to understand a little studied and poorly known psychological phenomenon, not a sociologist, a political scientist, or a transsexual person.<sup>178</sup> His

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177. See, e.g., *Application of Anonymous*, 587 N.Y.S.2d 548 (Civ. Ct. 1992); *In re Anonymous*, 293 N.Y.S.2d 834 (Civ. Ct. 1968). See also Bergstedt, *supra* note 32.

178. There is some controversy as to when and by whom the terms describing transsexuality were coined. See BROWN & ROUNSLEY, *supra* note 3, at 28 (crediting the term to Dr. D. O. Cauldwell in 1949); *but cf.*, PFÄFFLIN & JUNGE, *supra* note 46, at 7. (“The corresponding phenomena were summarized under the term transvestitism, termed by Hirschfeld (1910), to separate and define properties of certain clinical developments summarized until the end of the last century under the term homosexuality, Hirschfeld (1923) first mentioned “psychic transsexualism” in passing, but it was not accepted. Even though transsexualism literature mentions it until today, with the exception of Seidel (1969), Eicher (1984) and recently Sigusch (1991a, b), it is not true that the originator of this term is Cauldwell (1949), but Hirschfeld (1923). With the works of Benjamin (1953; 1964 a, b, c; 1966; 1967; 1969) as well as the popularization of the clinical history of the former American soldier Christine Jorgensen (Hamburger, et al.,

purpose in naming was to produce a subject for medical treatment, named in terms which distinguished the subject from other subjects of medical study. Over time, the term has been narrowed and laden with social baggage. Thus, someone who is labeled a “transsexual” is viewed in a certain way socially, medically, and legally and is confined to a strait-jacket of meaning. However, as Butler points out, citing Foucault,

juridical [systems] of power *produce* the subjects they subsequently come to represent . . . . [T]he juridical formulation of language and politics that represents women as ‘the subject’ of feminism is itself a discursive formation and effect of a given version of representational politics . . . . This becomes politically problematic if that system can be shown to produce gendered subjects along a differential axis of domination or to produce subjects who are presumed to be masculine.<sup>179</sup>

The term “transsexual” clearly refers to one who has changed physical sex by surgical means, so-called “post-operative” transsexual people. But it is also clearly used in both the scientific and lay communities to refer to one who has not, but desires to and possibly intends to change sex, so-called preoperative and nonoperative transsexual people. Thus, the linguistic basis of the legal limitation of “transsexual” status to post-operative transsexual people is questionable.

The link that remains consistent throughout all of these formulations is that, regardless of medical intervention status, mtf “transsexuals” identify themselves as “women” and ftm “transsexuals” identify themselves as “men.” The irrelevance of medical intervention is buttressed by the understanding that the categories of “women” and “men” are themselves, as pointed out by Butler, discursively produced. Just as it would be ridiculous to produce a panel of judges to attempt to universally agree upon who is a “woman” or more of a “woman,” it would be equally useless to produce such a panel for transsexual people. This, of course, does not stop people from trying, and this results in a myriad of beauty pageants with their narrow definition of “women” as well as the attempt by some feminists to limit their causes to “womyn-born-womyn only.” But such attempts are closer to caste divisions than true science.

A transsexual who in all respects is indistinguishable from the opposite birth sex might nonetheless be seen by some as fooling him/herself if s/he were indistinguishable from an effeminate gay man from San Francisco, or a masculine woman from Appalachia. This is not

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1953; Jorgensen, 1967), the term transsexualism was established in everyday language as well as in professional literature.”).

179. BUTLER, GENDER, *supra* note 12, at 2.



because a feminine man is not a man, or that a masculine woman is not a woman, but rather because we have strait-jacketed “transsexual” into a sort of caricature stereotype of gender, based on the caricature stereotypes we have in our heads filed under “man” and “woman.” Anyone claiming to be a “transsexual” who does not fit this strait-jacket receives no credence.<sup>180</sup> At the same time, some condemn transsexual people for perpetuating gender stereotypes.<sup>181</sup> In fact, it is the restrictive, predefined notions of the categories “transsexual,” “man,” and “woman” that need reassessment.

There are many markers of gender, and of these, genitalia is the least significant for purposes of daily functioning in society. Our perception of gender (“gender attribution”) is based on a conglomeration of numerous factors, including but not limited to visual cues such as gait, body and facial characteristics, body language, and dress; auditory cues such as voice and vocabulary; and cultural cues such as interpersonal style, profession, job title, social status, and economic status. If there is a greater number of factors associated with femininity, we see a female, if there is a greater number of factors indicating masculinity, we see a male. However, a transsexual may appear completely integrated into their new sex role while still in the midst of various sex reassignment procedures, which may take years to complete.

If the basic defining element of transsexuality is that physical sex and psychological gender identity are not congruent, then distinguishing between pre-operative and post-operative transsexual people is irrational because both are of the same gender. Gender does not change upon sex reassignment surgery. Since pre-operative transsexual people have a right to pursue sex reassignment surgery by living in the opposite sex role for a substantial period of time,<sup>182</sup> to deny them the opportunity to live and work in that role with proper documentation is to deny them the right to privacy that is extended to post-operative transsexual people in some states. The medical diagnosis of transsexuality, of course, must necessarily precede sex reassignment surgery. Sex reassignment surgery, however, does not necessarily immediately follow since an extensive course of medication and therapy is required. Also, the surgery is expensive, costing approximately \$15,000-\$30,000 for male-to-female

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180. See, e.g., STRINGER, *supra* note 57, at 19; Wilchins, *supra* note 27, at 162-63 (detailing the story of seeing a film and assuming he was an unsuccessful mtf preoperative transsexual).

181. See RAYMOND, *supra* note 113.

182. See, e.g., Doe v. McConn, 489 F. Supp. 76, 79 (S.D. Tex. 1980) (holding an ordinance invalid for imposing fines on a person while in preparation for sex reassignment surgery); *Wilson*, 389 N.E.2d at 522.

surgery, and approximately \$100,000-\$150,000 for female-to-male surgery.<sup>183</sup> Female-to-male sex reassignment surgery is not only more expensive but also requires three separate procedures, frequent scarring, and less than satisfactory results.<sup>184</sup> Furthermore, the surgical procedure only changes sexual characteristics which very few people, other than intimates, will see.

If surgery is “necessary” both to obtain proper identification and to correct the “condition,” why is transsexuality not covered by disability statutes and its concomitant surgical procedures considered unnecessary “cosmetic surgery” by public and private medical insurance? Transsexual people usually have to work for years in a pre-operative state to earn enough money to obtain the surgery. Thus, the denial of gender reclassification requires transsexual people to exist for years in a pre-operative state and yet denies them the right to change gender classification in that state, which mostly, if not uniformly, condemns them to employment discrimination and therefore often the most menial jobs. This makes little sense. Either the surgery is not medically “necessary,” in which case the requirement should be eliminated for gender re-classification, or it is medically “necessary” and it should be provided like any other medical need.

Regarding this issue of medical “necessity,” Foucault noted that when subjects involving sexuality are repressed socially, power shifts to authorities which regulate and promulgate the appropriate ways in which such subjects are to be treated.<sup>185</sup> This causes a “medicalization” of the subject. This is true of transsexuality, and explains much regarding the insistence by some legal authorities that transsexual people submit to surgical procedures in order to obtain government legitimization of their gender. This “medicalization” of transsexuality is understandable because it is more comfortable to accord gender reclassification in response to a medical “condition,” but this approach is in response to and dictated by biologic essentialism. This makes sex reassignment surgery the sole determinant for gender reclassification and makes “surgical intervention,” however that may be variously defined, an artificial lodestar, which obscures the fundamental separation of “sex,” “gender” and “genitalia.”<sup>186</sup>

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183. See Post-Operative Transsexual Survey Results, at [http://www.pacificnet.net/~mwallace/post\\_op\\_survey.970302\\_1.html](http://www.pacificnet.net/~mwallace/post_op_survey.970302_1.html) (Mar. 2, 1997).

184. See BROWN & ROUNSLEY, *supra* note 3, at 10.

185. See MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY: AN INTRODUCTION* (1978) (analyzing and criticizing the traditional notions of sexuality in a historical context).

186. See generally, Keller, *Operations*, *supra* note 4, at 333 (citations omitted). See also GORDENE OLGA MACKENZIE, *TRANSGENDER NATION* (1994) (arguing that the demand for sexual reassignment surgery as a response to “gender dysphoria” is culturally contingent); Phyllis R.

Allowing transsexual people to reclassify their gender undoubtedly raises administrative problems for the legal system. There are legal relations which intimately depend on gender. However, it is no answer to say that administrative convenience is superior to personhood, that since we cannot fit these transsexual people into our pet theory of gender, they must accommodate their identity to our simpler, administratively easier, and more personally comfortable notions of reality.

Those states which now permit changing gender classification have determined that such administrative problems should not prevent changing gender classification. Furthermore, it is not even necessary to have gender information on birth certificates, as demonstrated by Rhode Island, which does not put gender information on its birth certificates. As Leslie Feinberg notes, at one time it was required to indicate one's race on most government and institutional forms, and such information was mandatory until the civil rights movement challenged the racist underpinnings. Then the "race" box became optional and what once seemed necessary for identification was exposed as unnecessary and demeaning.<sup>187</sup>

When these administrative issues are confronted, it appears that the states which allow gender reclassification have either dealt with them, or they are not, in fact, real issues. For example, only males may be legally subject to compulsory military service.<sup>188</sup> Are we to allow conscription of female-to-male transsexual people? Of course, transsexuality is a disqualification for the military, so this is not even an issue. Courts have addressed questions about transsexual marriage and resolved them.<sup>189</sup> The same has been done with regard to athletics.<sup>190</sup> Thus, the argument that gender reclassification presents insurmountable administrative obstacles to equal protection is neither a compelling state interest nor can it validly be maintained that a presumptive gender classification is required.

The experience of those states which permit gender reclassification shows that it can be done without affronting some "real" difference

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Frye, *Genital Surgery NOT Required for Legal Change of Sex: Freedom From the "Have-To" of the Scalpel*, 3 NAT'L J. SEXUAL ORIENTATION L. 31, at <http://ibiblio.unc.edu/gaylaw>; Susan Etta Keller, *Crisis of Authority: Medical Rhetoric and Transsexual Identity*, 11 YALE J.L. & FEMINISM 51(1999)).

187. See FEINBERG, *TRANSLIBERATION*, *supra* note †, at 20-21.

188. See *Rostker v. Goldberg*, 453 U.S. 57 (1981) (upholding compulsory military conscription for males only).

189. See, e.g., *M.T. v. J.T.*, 355 A.2d 204 (N.J. Super. Ct. App. Div. 1976); *Anonymous v. Anonymous*, 325 N.Y.S. 2d 499 (Sup. Ct. 1971); *B v. B*, 355 N.Y.S.2d 712 (Sup. Ct. 1974); *Ladrach*, 513 N.E.2d at 828.

190. See, e.g., *Richards v. United State Tennis Ass'n*, 400 N.Y.S.2d 267 (Sup. Ct. 1977).

between men and women. “Sex” and “gender” can be distinguished both theoretically and practically. However, the current patchwork of statutes, regulations and cases in the various states, permitting some post-operative transsexual peoples’ to change their gender classification on some documents but not others, and denying the right to pre-operative transsexual people, denies transsexual people’ right to privacy and equal protection. The opposition to gender reclassification reflects prejudice which exposes transsexual people to discrimination, harassment, and physical danger.

The denial of personhood and humanity to transsexual people is depersonalization and dehumanization. Where does that road lead? As Wilchins says:

Ideas have effects. It is clear that as transgendered men and women, we face two kinds of violence each day. One is the larger violence, that perpetrated by straight society on our bodies. It has taken from us people like Brandon Teena and Marsha P. Johnson. We recall that before he was shot in the back of the head, Brandon was repeatedly raped by two men bent on demonstrating to his girlfriend that he was “really a woman.” Ideas have effects.<sup>191</sup>

#### IV. CONCLUSION: SCRAPPING THE CASTE SYSTEM—A NEW LEGAL THEORY OF GENDER

Transsexual people are contending with a heteronormative caste system which creates unacknowledged incongruity in both life and law. These incongruities remain unacknowledged because the heteronormative standard is such a part of the fabric of ourselves and our society that it is obvious. Some of these heteronormative principles might be phrased as follows:

- Government and institutional officials accept the heteronormative presumption that physical sex and psychological gender identity must necessarily be congruent, despite the reality of transsexual citizens.
- Transsexual people, who make a contrary claim, are therefore as a group deluded, mentally unstable, and/or sexual perverts.
- Acknowledging the transsexual claim is impossible, not because of conclusive scientific evidence against it, but because it is a personally uncomfortable subject for most people, including judges and other governmental and institutional personnel. It

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191. WILCHINS, *supra* note 27, at 61-62.

assaults our notions of identity, sex and gender, including our personal perception of ourselves.<sup>192</sup>

- The state may recognize change of physical sex, but this may or may not be given any effect by other government and institutional officials.
- The state has every right to use record keeping practices which hold over the head of transsexual people the danger of being exposed at any time.
- Transsexual people, by flouting the heteronormative standard, bring upon themselves ridicule, physical danger, and discrimination in many areas including but not limited to employment, housing, medical services, and access to public accommodations.
- The tendency and purpose of the system is to perpetuate the heteronormative standard, to encourage transsexual people to remain invisible, and to avoid challenge to the heteronormative claim that physical sex and psychological gender identity must necessarily be congruent.

The effect of these heteronormative principles is to create a type of caste system which places transsexual people in a disempowered position in society. Everyone “knows” that physical sex and psychological gender identity must necessarily be congruent, except transsexual people, who have turned their lives upside down because it is not true for them. The perpetuation of this heteronormative system continues effortlessly because these principles are unstated, unexamined, and not experienced by nontranssexual people, but rather are part of our perception of ourselves as gendered beings. Attempting to argue against this system runs into powerful opposition that is illogical, angrily emotional, and deeply personal.

There is something else at work here than simple logic applied to objective facts. There is an incongruity to the essentialist argument which defies logic.<sup>193</sup> It is a poor argument, because its proponents must

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192. “[A]lways implicated in the question ‘Who or what is s/he?’ is the question ‘Who or what am I?’” France, *supra* note 21, at 1, 51.

193. This stubbornness in holding that gender equals sex is reminiscent of a famous movie scene from *FIVE EASY PIECES* (1970), available at <http://www.filmsite.org/five.html>, where a waitress stubbornly refuses to serve a customer, Dupeau, (Jack Nicholson) a plain omelet with tomatoes instead of potatoes. The dialogue highlights the incongruousness of stubbornly sticking to mindless rules:

Waitress: No substitutions.  
 Dupeau: What do you mean? You don’t have any tomatoes?  
 Waitress: Only what’s on the menu. You can have a number two—a plain omelet. It comes with cottage fries and rolls.

continuously change their position in order to preserve it. It is more of a normative principle. This heteronormativity requires that transsexual people be seen as outside the system, as freaks, not even human.<sup>194</sup> Butler explains it this way:

In this sense, the matrix of gender relations is prior to the emergence of the “human.” Consider the medical interpellation which (the recent emergence of the sonogram notwithstanding) shifts an infant from an “it” to a “she” or a “he” and in that naming, the girl is “girled,” brought into the domain of language and kinship through the interpellation of gender. . . . Such attributions or interpellations contribute to that field of discourse and power that orchestrates, delimits and sustains that which qualifies as “the human.” We see this most clearly in the examples of those abjected beings who do not appear properly gendered; it is their very humanness that comes into question.<sup>195</sup>

Professor Keller reached the same conclusion: transsexual people are “abjected,” i.e., seen as less than human.<sup>196</sup> The law denies their right to a private self, their very existence, to determine their own identities and to identify themselves to the world as they will, enshrining heteronormativity as government policy expressed in law. This is incongruent with our constitutional principles of privacy and equality.

But why is this heteronormative gender caste system in place, if not for reasons of “biology?” And what is to replace it? Here I hypothesize—the actual reason itself does not matter; the important thing to understand is that it is *not* based on biology, but on something else. As

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Dupeau: Yeah, I know what it comes with. But it’s not what I want. (He orders the same items again. She responds that they don’t make side orders of toast.) What do you mean you don’t make side orders of toast? You make sandwiches, don’t you?  
 Waitress: Would you like to talk to the manager?  
 Dupeau: . . . You’ve got bread and a toaster of some kind?  
 Waitress: I don’t make the rules.  
 Dupeau (telling her he will make it as easy as he can for her by ordering a chicken salad sandwich.) I’d like an omelet, plain, and a chicken salad sandwich on wheat toast, no mayonnaise, no butter, no lettuce. And a cup of coffee . . . Now all you have to do is hold the chicken, bring me the toast, give me a check for the chicken salad sandwich, and you haven’t broken any rules.  
 Waitress (spitefully): You want me to *hold* the chicken, uh?  
 Dupeau: I want you to hold it between your knees.  
 Waitress (turning and telling him to look at the sign which says, “No Substitutions.” She tells him he will have to leave.) I’m not taking any more of that smartness and sarcasm.  
 Dupeau: You see this sign? (He sweeps all the water glasses and menus off the table.)

194. See Keller, *Operations*, *supra* note 4, at 373-75 (discussing the judicial treatment of transsexuals).

195. BUTLER, *BODIES*, *supra* note 118, at 133.

196. See Keller, *Operations*, *supra* note 4, at 372-75.

Foucault and Butler have pointed out, the juridical systems such as heteronormativity represent power and control. They define congruity, but at the expense of placing certain people beyond the pale. In the past, the number of people who were thus excluded was perhaps miniscule; or perhaps the threat of exclusion kept it small. It is not so today, nor has any other government so committed itself, staked its very existence, on constitutional principles of privacy and equality as has our American government. But this threatens the heteronormative standard, which is power to define our place in the hierarchy, to control those below us, and to be controlled by those above us. To step out of the hierarchy is to lose power and control, to lose congruity. To separate sex and gender is to disassemble the coiled binary structure from which our power, control, and sense of congruity derives. To give credence to transsexual claims and remove their “otherness,” to proclaim their differentness a part of our common humanity, is to invite into the heteronormative structure the seeds of its own destruction. Why should we do that? Why fix what is not broken?

It is broken. Transsexual people know something that others do not know: the paradox at the heart of transsexuality. Sometimes, one must give up superficial congruity in order to gain a deeper, underlying congruity that really matters. If you can give up superficial congruity, then you can learn who you are. But if you hold on tightly to your little piece of power, control, and superficial congruity, and the system that holds it and you in place, you are not free. There should be no need for transsexual people to “prove” beyond doubt to skeptical and disapproving legal officials that they are “scientifically” entitled to their claims of personhood and humanity. Audre Lorde, in her essay “The Master’s Tools Will Never Dismantle the Master’s House,” radically challenges how white people learn about racism, or how men learn about women: “Women of today are still being called upon to stretch across the gap of male ignorance and to educate men as to our existence and our needs. This is an old and primary tool of all oppressors to keep the oppressed occupied with the master’s concerns.”<sup>197</sup>

There is a substantial and growing body of evidence supporting the theory that physical sex and psychological gender are not always congruent. The transsexual citizens of our country, a substantial number of them, have turned their lives upside down because there is an incongruity between their physical sex and psychological gender. Our law must reflect that reality. The failure of the law to accord any meaning to the transsexual peoples’ claim is a theoretical model which

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197. See AUDRE LORDE, *SISTER OUTSIDER: ESSAYS AND SPEECHES* 113 (1984).

denies their personhood, their essential humanity. There is an incongruity between that failure and our claim that there are inalienable rights, among which are life, liberty, and the pursuit of happiness.<sup>198</sup>

I end with the words of Wilchins: “Now look around you at the transexual and transgendered faces here tonight, at the dignity and survival written in these faces. Let me assure you: We are more complex than your theories, more creative than your dogma, and much more stubborn and rude and resourceful than your politics.”<sup>199</sup>

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198. As Jonathan Ned Katz noted in *THE INVENTION OF HETEROSEXUALITY*, *supra* note 1, at 190: “Of those three ‘traditional values,’ the happiness pursuit is ‘the real joker in the deck’—in the words of Gore Vidal. The pursuit of happiness, Vidal adds, ‘was a revolutionary concept in 1776. It still is.’”

199. WILCHINS, *supra* note 27, at 62.