

NLGLA MICHAEL GREENBERG WRITING COMPETITION

The Reality of Gender Ambiguity: A Road Toward Transgender* Health Care Inclusion

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* Transgender refers to a person who is born with the genetic traits of one sex but the internalized gender identity of another sex. It is used as an umbrella term to include transsexualism and other traits typically not associated with one’s assigned sex at birth. Lori Kohler, Primary Care for Transgender People 4 (Feb. 18, 2005), <http://www.ucsf.edu/paetc/resources/haetc05.ppt>.

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I. INTRODUCTION

The brotherhood of man will only become a reality when the consciousness of alien being corrects man's myopia, and he realizes that he has more in common with Eskimoes [sic] and Bengali beggars and black faggots than he has with the form of intelligent life on Solar System X.

—Germaine Greer¹

Philosophers, physicians, and psychiatrists, among other scholars, have exposed the reality of gender ambiguity. A human is not man or woman, but rather man and woman.² As early as the first century A.D., the ancient Greek physician Claudius Galenus of Pergamum, better known as Galen, believed there was no stable biological divide between male and female.³ This belief was present throughout the Middle Ages⁴ and Renaissance⁵ and continues into the twenty-first century. Nonetheless, the legal and medical professions continue to insist upon a two-sex structure of male and female.

This Article examines the extreme friction that exists between the legal and medical systems and our collective bodies. The former insist on maintaining a two-sex model of male and female; the latter do not. The polarized view of sex imposed by the legal and medical systems creates and perpetuates unhealthy conditions for transgender individuals—those who are born with the genetic traits of one sex but the internalized gender identity of another sex.⁶ These conditions manifest themselves in the realm of health care. All transgender people go through emotional, mental, physical, and spiritual transitions when coming to terms with their gender self-identification; these transitions demand proper health care.⁷ Yet, suitable transgender health care is largely unavailable.⁸

1. GERMAINE GREER, *THE FEMALE EUNUCH* 137 (Bantam Books 1972) (1971).

2. It was everyday thought for thousands of years that women were the same as men; the vagina was thought to be an interior penis, the labia as foreskin, the uterus as scrotum, and the ovaries as testicles. It was not until the late eighteenth century that society began to insist on fundamental differences between the male and female sexes. *See* THOMAS LAQUEUR, *MAKING SEX: BODY AND GENDER FROM THE GREEKS TO FREUD* 4-6 (1990); *see also* JOANNE MEYEROWITZ, *HOW SEX CHANGED: A HISTORY OF TRANSSEXUALITY IN THE UNITED STATES* 26 (2002).

3. ANNE FAUSTO-STERLING, *SEXING THE BODY: GENDER POLITICS AND THE CONSTRUCTION OF SEXUALITY* 33-34 (2000).

4. *See id.* at 34.

5. *See id.* at 35.

6. *See* Kohler, *supra* note *, at 4.

7. *See id.*

8. GAY & LESBIAN MED. ASS'N, *HEALTHY PEOPLE 2010: COMPANION DOCUMENT FOR LESBIAN, GAY, BISEXUAL, AND TRANSGENDER HEALTH* 51 (2001), <http://www.glma.org/policy/hp2010/PDF/HP2010CDLGBHealth.pdf>.

By recognizing and reconfiguring the current two-sex paradigm, the legal and medical professions can help the transgender community achieve health care inclusion. The restructuring begins by exposing the principle that gender is ambiguous. In order to understand the vast historical presence of gender ambiguity, Part I introduces several philosophers, physicians, and psychiatrists, among other scholars, who have exposed the reality of gender ambiguity. Part II presents the legal system's continued insistence on a two-sex division of male and female. The current legal approach to policing gender permeates beyond the courtroom; the binary approach to gender creates exclusion and discrimination for all transgender people. Part III addresses the discrimination transgender people confront when attempting to obtain proper health care. Part IV addresses the need for a legal response to the discrimination and exclusion experienced by the transgender community. Policy and law have a great impact on transgender health care inclusion. Finally, Part V contends that only by continuing to redefine gender will transgender people receive informed, unprejudiced health care. People straddle the male/female divide, yet the legal and medical professions continue to adhere to a polarized gendered system. This archetype needs to be questioned and deconstructed; this Article is a step toward exposing the reality of fluid gender identities and achieving transgender health care inclusion.

II. THE GENDER CONTINUUM: ALWAYS PRESENT, RARELY RECOGNIZED

It is obvious that sex is something more than what society designates, or what naming makes it.

—Jeffrey Weeks⁹

Increased knowledge of the reality and historical presence of gender ambiguity within the legal and medical fields will aid the transgender community in its pursuit of health care inclusion. Polarized perceptions of gender need to be broken down; gender is not so simplistic as to fit within two boxes: male and female.¹⁰ This Part explores several scholars who have challenged the male/female divide in an attempt to dispel binary gender divisions.

9. JEFFREY WEEKS, *SEXUALITY AND ITS DISCONTENTS: MEANINGS, MYTHS & MODERN SEXUALITIES* 122 (1985).

10. See FAUSTO-STERLING, *supra* note 3, at 8.

Countless legal and medical professionals fail to recognize the fluidity of gender.¹¹ Yet, the reality of gender ambiguity has been expressed for centuries. In the late 1800s, Viennese philosopher Otto Weininger argued that all individuals are *sexually intermediate*—partly male and partly female.¹² Eugen Steinach, a German physician and researcher who succeeded at transplanting male guinea pig sex glands into females and vice versa,¹³ wrote, “A one hundred percent man is as non-existent as a one hundred percent woman.”¹⁴ Even Sigmund Freud, who vigorously worked to repress women’s sexuality,¹⁵ wrote, “A certain degree of anatomical hermaphroditism really belongs to the normal. In no normally formed male or female are traces of the apparatus of the other sex lacking. . . .”¹⁶ Although his chief variation of interest was homosexuality, in 1941 psychiatrist George W. Henry wrote in *Sex Variants*, “It is scientifically inaccurate to classify persons as fully male or female.”¹⁷

Perhaps the most renowned advocate for the fluidity of gender was Magnus Hirschfeld, a gay Jewish endocrinologist and sexologist who led a vocal campaign for sexual emancipation in early twentieth century Germany.¹⁸ Hirschfeld opened the Institute for Sexual Science—the first institute dedicated to ending the legal intolerance experienced by homosexuals, transvestites, and transsexuals—in Berlin.¹⁹ He believed and avidly preached that “absolute representatives of their sex are . . . only abstractions, invented extremes.”²⁰ Along with others, Hirschfeld “worked to remove the legal and medical obstacles to sexual and gender variance, to enable homosexuals, crossdressers, and those who hoped to

11. See Norman Spack, *Transgenderism*, Lahey Clinic (2005), http://www.lahey.org/NewsPubs/Publications/Ethics/JournalFall2005/Journal_Fall2005_Feature.asp; see also Megan Bell, Note, *Transsexuals and the Law*, 98 NW. U.L. REV. 1709, 1752 (2004).

12. See CHANDAK SENGGOPTA, OTTO WEININGER: SEX, SCIENCE, AND SELF IN IMPERIAL VIENNA 69 (2000).

13. See Andrew Wikholm, 1912: Steinach Alters Sexuality with Hormones (1999), <http://www.gayhistory.com/rev2/factfiles/ff1912.htm>.

14. EUGEN STEINACH, SEX AND LIFE: FORTY YEARS OF BIOLOGICAL AND MEDICAL EXPERIMENTS 7 (McGrath Publ’g Co. 1970) (1940).

15. Freud claimed women who had clitoral orgasms were immature; to be truly mature, a woman must have only vaginal orgasms. ANNE KOEDT, THE MYTH OF THE VAGINAL ORGASM, IN FEMINISM IN OUR TIME: THE ESSENTIAL WRITINGS, WORLD WAR II TO THE PRESENT 336 (1994).

16. SIGMUND FREUD, THREE CONTRIBUTIONS TO THE THEORY OF SEX 7 (E.P. Dutton & Co. 1962) (1905).

17. GEORGE W. HENRY, SEX VARIANTS: A STUDY OF HOMOSEXUAL PATTERNS 1026 (1948).

18. See Inst. for Sexual Sci. (1919-1933), http://me.in-berlin.de/~magnus/v_institut_en.html (last visited Oct. 7, 2006).

19. See *id.*

20. MAGNUS HIRSCHFELD, TRANSVESTITES: THE EROTIC DRIVE TO CROSS DRESS 219-20 (Michael A. Lombardi-Nash trans., 1910).

change their sex to live their lives as they chose.”²¹ Unfortunately, at the dawn of the Second World War in 1933, the Nazis destroyed the Institute for Sexual Science and most of its contents.²²

Dr. Harry Benjamin, a colleague of Hirschfeld’s, was also interested in hormonal research and gender variance and built upon Hirschfeld’s work in the United States.²³ In 1949, Alfred Kinsey referred a patient, Val Barry (a pseudonym), to Benjamin, who was “desperate to change sex.”²⁴ Benjamin initially decided to treat the patient with estrogen²⁵ and, in the meantime, search for doctors in the United States to perform sexual reassignment surgery. In 1953, after Benjamin was unable to locate a surgeon in the United States, Barry went to Sweden where the surgery could be performed.²⁶ Following his interactions with this patient, Benjamin, along with David O. Cauldwell, coined and publicized the English term *transsexual*.²⁷

Perhaps Benjamin’s most famous patient was Christine Jorgensen, a male-to-female transsexual.²⁸ Jorgensen underwent sexual reassignment surgery in Denmark in November 1952 and returned to the United States in 1953 a media sensation.²⁹ After trying for more than twenty years to conform to the traditions of society, the reality of sexual ambiguity set Christine free.³⁰ Pre-op,³¹ Christine had an epiphany while reading *The Male Hormone* by Paul de Kruif; she came to comprehend the notion that would come to define her existence and challenge the entire country: “All human beings are both male and female.”³² Christine read:

Chemically, all of us are both man and woman because our bodies make both male and female hormones, and primarily it’s an excess of testosterone that makes us men, or an excess of female hormones that makes us women; and the chemical difference between testosterone and

21. MEYEROWITZ, *supra* note 2, at 21.

22. *See id.* at 20-21.

23. *See id.* at 41, 45.

24. *Id.* at 47.

25. *See id.*

26. *See id.* at 47-48.

27. *See id.* at 15.

28. *See id.* at 51, 133.

29. Susan Stryker, *Introduction* to CHRISTINE JORGENSEN, CHRISTINE JORGENSEN: A PERSONAL AUTOBIOGRAPHY, at v (Cleis Press 2000) (1967).

30. MEYEROWITZ, *supra* note 2, at 56.

31. Pre-op refers to a transgender person who has not had sexual reassignment surgery. Kohler, *supra* note *, at 5.

32. MEYEROWITZ, *supra* note 2, at 56.

estradiol is merely a matter of four atoms of hydrogen and one atom of carbon.³³

Christine “came to embody, literally, the fundamental question raised by sex-change surgery: what makes a woman a woman and a man a man?”³⁴

Anne Fausto-Sterling, a twenty-first century biologist and historian, challenges assumptions about gender and sexuality in her recently published book *Sexing the Body*.³⁵ Fausto-Sterling writes, “A body’s sex is simply too complex. There is no either/or. Rather, there are shades of difference. . . . [L]abeling someone a man or a woman is a social decision.”³⁶ The reality is: “Our bodies are too complex to provide clear-cut answers about sexual difference”;³⁷ we need to push for increased openness to fluid gender identities, especially in the legal and medical fields.

These scholars and pioneers should be commended for illuminating the reality of gender ambiguity. They tore down countless roadblocks for the transgender community, and for society as a whole. Despite their intelligence and determination to create positive change by redefining gender, discrimination against transgender people is ever present.³⁸ This is particularly true within the legal and medical professions.³⁹ Binary perceptions of gender flood these professions, creating discrimination for the transgender community.⁴⁰ By recognizing the historical presence of gender ambiguity and reconfiguring the current two-sex model, health disparities experienced by transgender people will decline.

III. WHO GAVE LEGAL PROFESSIONALS THE RIGHT TO BE THE GENDER POLICE?

[T]imes can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.

—*Lawrence v. Texas*⁴¹

33. JORGENSEN, *supra* note 29, at 71.

34. MEYEROWITZ, *supra* note 2, at 50.

35. See FAUSTO-STERLING, *supra* note 3.

36. *Id.* at 3.

37. *Id.* at 4.

38. For further discussion on the discrimination experienced by the transgender community, see *infra* Part IV.B.

39. See Spack, *supra* note 11; Bell, *supra* note 11, at 1709.

40. See Bell, *supra* note 11, at 1710.

41. 539 U.S. 558, 579 (2003).

“Legal definitions and assignment of sex/gender have powerful implications for individuals.”⁴² Despite this fact, the legal system continues to adhere to traditional notions of sex and gender, even though other discourses now acknowledge that these categories are not as straightforward as was previously assumed.⁴³ This lack of recognition serves to isolate the transgender community, especially in its attempts to receive *proper* health care.⁴⁴

Most recently, the courts have defined gender using the dictionary, God, and whether surgical intervention had taken place. The following cases illustrate these methodologies. Each Part also highlights the weaknesses within these approaches. The courts’ current binary approach to sex/gender needs to be deconstructed; “[t]he idea that there are only two sexes is an incorrigible proposition.”⁴⁵

A. *The “Dictionary” Approach*

The law necessitates two genders and strict adherence to them.⁴⁶ For instance, the legal history in the United States reveals that wearing items of clothing associated with the “other sex” in public was often illegal,⁴⁷ and anything seen as homosexuality was often persecuted.⁴⁸ Furthermore, in maintaining this paradigm, several courts have also

42. Bell, *supra* note 11, at 1720.

43. *See id.*

44. For further explanation of the isolation experienced by the transgender community in the realm of health care, see *infra* Part IV.

45. FAUSTO-STERLING, *supra* note 3, at 19.

46. *See id.* at 31.

47. *See* United States v. Modesto, 39 M.J. 1055, 1061 (A.C.M.R. 1994) (upholding the conviction of an officer charged with cross-dressing in public, which conduct dishonored and disgraced him personally and seriously comprised his standing as an officer).

48. As recently as 2003, the State of Texas had the power to control people’s destiny by making private sexual conduct a crime. In *Lawrence v. Texas*, the petitioners were arrested, held in custody overnight, charged, and convicted for failing to conform to societal standards. *See* 539 U.S. 558, 562 (2003). Their crime was described as “deviate sexual intercourse . . . with a member of the same sex.” *Id.* at 563. The Harris County Criminal Court convicted the petitioners, and the Court of Appeals for the Texas Fourteenth District affirmed the convictions. *See id.* Upon review, the Supreme Court of the United States held “that adults may choose to enter [into a] relationship in the confines of their homes and their own private lives and still retain their dignity as free persons.” *Id.* at 567. Preceding this decision, a Texas statute made it a crime for two persons of the same sex to engage in certain intimate sexual conduct. *See id.* at 563, 566. Fortunately, the court came to the conclusion that the Texas statute sought to deprive people of liberty and declared the statute inconsistent with the promise of the Constitution. *See id.* at 578. The court noted, “At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.” *Id.* at 574 (quoting *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 851 (1992)).

improperly interpreted and applied the dictionary as “black letter law.”⁴⁹ In *In re Estate of Gardiner*, the Kansas Supreme Court referred to *Webster’s New Twentieth Century Dictionary* when defining gender.⁵⁰ *Webster’s* defines “male” as “designating or of the sex that fertilizes the ovum and begets offspring: opposed to *female*.”⁵¹ Likewise, “female” is “designating or of the sex that produces ova and bears offspring: opposed to *male*.”⁵² While the court recognized that the everyday understanding of gender does not incorporate transsexuals,⁵³ it did not attempt to create inclusive definitions. Rather, the court adhered to dictionary definitions of male and female that serve to further exclude and isolate the transgender community.

The Ohio Supreme Court reapplied the dictionary method for determining gender in a 2003 decision, *In re Application of Marriage License for Nash*.⁵⁴ The court referred to *Webster’s II New College Dictionary*, stating, “[a] female is defined as ‘the sex that produces ova or bears young,’ while a male is defined as ‘the sex that has organs to produce spermatozoa for fertilizing ova.’”⁵⁵ Citing *In re Estate of Gardiner*, the court concluded that the everyday understanding of male and female did not encompass transsexuals.⁵⁶ Rather than advocating for gender inclusivity, the court maintained the gender divisions of male and female by applying dictionary definitions.⁵⁷

Although it is clear that people straddle the male/female divide,⁵⁸ the law continues to enforce binary perceptions of sex/gender. In enforcing this sharp distinction between male and female, the courts use illegitimate sources to create boundaries. Where do impotent men fit into these rigid sex/gender definitions? Where do sterile woman fit? Why does the legal profession insist on maintaining gender divisions? Why must the courts control bodies that blur gender borders? Sex/gender is not black and white; “the English language is rigid, and the

49. “Black letter law” typically refers to a published statute used to command, prohibit, or declare something.

50. See 42 P.3d 120, 135 (Kan. 2002) (citing WEBSTER’S NEW TWENTIETH CENTURY DICTIONARY (2d ed. 1970)).

51. *Id.*

52. *Id.*

53. *See id.*

54. See Nos. 2002-T-0149, 2002-T-0179, 2003 WL 23097095, at *6 (Ohio Ct. App. Dec. 31, 2003).

55. *Id.* (citing WEBSTER’S II NEW COLLEGE DICTIONARY (1999)).

56. *See id.* at *7.

57. *See id.*

58. *See generally supra* Part II.

thought patterns that form it are rigid, so that gender also becomes rigid. The whole concept of gender is more fluid in traditional life.”⁵⁹

B. *The “God” Method*

Although the phrase “separation of church and state” does not appear in the U.S. Constitution, the Establishment Clause of the First Amendment has been interpreted to mean that state and national governments should be kept separate from religious institutions.⁶⁰ Despite this ever-present interpretation,⁶¹ courts continue to merge church and state, specifically when determining one’s gender/sex.

In *Littleton v. Prange*, a Texas appellate court addressed the fundamental question: “When is a man a man, and when is a woman a woman?”⁶² The underlying question was, “can a physician change the gender of a person with a scalpel, drugs and counseling, or is a person’s gender immutably fixed by our Creator at birth?”⁶³ The court followed the English case of *Corbett v. Corbett*, which stated, “[T]he biological sexual constitution of an individual is fixed at birth (at the latest), and cannot be changed, either by the natural development of organs of the opposite sex, or by medical or surgical means.”⁶⁴ Even though the petitioner in *Littleton* underwent sexual reassignment surgery, hormone

59. LESLIE FEINBERG: MAKING HISTORY FROM JOAN OF ARC TO RUPAUL, *TRANSGENDER WARRIORS* 27 (1996).

60.

The “establishment of religion” clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect “a wall of separation between church and State.”

Everson v. Bd. of Educ., 330 U.S. 1, 15-16 (1946) (quoting *Reynolds v. United States*, 98 U.S. 145, 164 (1878)).

61. In 1948, *Illinois ex rel. McCollum v. Board of Education* banned religious instruction in public schools. 333 U.S. 203, 210 (1948). In 1962, *Engel v. Vitale* banned teacher-led prayer from public schools. 370 U.S. 421, 421 (1962). In 1989, *Allegheny County v. ACLU, Greater Pittsburgh Chapter* banned religious displays implying endorsement of one religion. 492 U.S. 573, 598-602 (1989). In 1992, *Lee v. Weisman* banned prayers given by clergy as a part of an official public school graduation ceremony. 505 U.S. 577, 599 (1992).

62. 9 S.W.3d 223, 223 (Tex. Crim. App. 1999).

63. *Id.* at 224.

64. *Id.* at 227 (quoting *Corbett v. Corbett*, [1970] 2 All E.R. 33, 47).

therapy, and legally changed her name,⁶⁵ because she was born with “the *normal* male genitalia: penis, scrotum and testicles,”⁶⁶ she was denied the status as a proper wrongful death beneficiary upon her husband’s death. The court held that one’s gender is immutably fixed by our Creator at birth; “There are some things we cannot will into being. They just are.”⁶⁷

In 2004, a Florida Court of Appeals applied the “God” method in *Kantaros v. Kantaras*.⁶⁸ When deciding whether the Florida statutes governing marriage authorized a postoperative transsexual to marry in the reassigned sex, the court agreed with other state courts in their understanding of male and female.⁶⁹ The court followed the “common meaning of male and female . . . to refer to immutable traits determined at birth.”⁷⁰

These courts believed the right to legally change sex would undermine the established system—polarized gender categories of masculinity and femininity.⁷¹ Then again, if sex is “immutably fixed by our Creator at birth,” why does society insist on fixing those who deviate from the norm at birth?⁷² Many medical professionals believe that all efforts should be made to deter sexual ambiguity.⁷³ Therefore, when a child is born with a “disorder of sex development”⁷⁴ early genital surgery is performed to turn the child into a proper male or female.⁷⁵ If sex is “immutably fixed by our Creator at birth”⁷⁶ as the courts explain, why is genital mutilation taking place before a human is of consensual age?⁷⁷

65. *See id.* at 224.

66. *Id.* (emphasis added).

67. *Id.* at 231.

68. 884 So. 2d 155 (Fla. App. 2004).

69. *See id.* at 161.

70. *Id.*

71. *See Littleton*, 9 S.W.3d at 231; *see also Kantaras*, 884 So. 2d at 161.

72. *Littleton*, 9 S.W.3d at 224.

73. *See* FAUSTO-STERLING, *supra* note 3, at 36-44. Furthermore, medical practice has been based upon the idea that sexual ambiguity is shameful and must be surgically erased. PAISLEY CURRAH & SHANNON MINTER, *TRANSGENDER EQUALITY: A HANDBOOK FOR ACTIVISTS AND POLICYMAKERS* 6 (2000), available at <http://thetaskforce.org/downloads/transeq.pdf>.

74. “Disorders of Sex Development” is being used interchangeably with “intersex.” For further information on the reasoning behind this terminology usage, see Intersex Soc’y of N. Am., *Why Is ISNA Using “DSD”?* (May 24, 2006), <http://www.isna.org/node/1066>.

75. *See* FAUSTO-STERLING, *supra* note 3, at 54.

76. *Littleton*, 9 S.W.3d at 224.

77. The Intersex Society of North America (ISNA) is working to deter performance of genital surgery on infants with ambiguous genitalia. The ISNA is “devoted to systemic change to end shame, secrecy, and unwanted genital surgeries for people born with an anatomy that someone decided is not standard for male or female.” *See* Intersex Soc’y of N. Am., <http://www.isna.org/> (last visited Oct. 7, 2006).

The occurrence and acceptance of genital surgery on infants to turn a child into a proper male or female illuminates the hypocrisy in the “God” method. Gender is not immutably fixed by our Creator at birth as male or female. The gender continuum is most obviously displayed by those born with ambiguous genitalia that do not fit within the male/female paradigm. Exposing the reality of gender ambiguity and breaking down binary perceptions of sex/gender in the judicial system will aid the transgender community in its pursuit of health care inclusion.

C. *The “SRS” Method*

Although erroneous in its own respect, the “Sexual Reassignment Surgery” (SRS) method is the most progressive of the given approaches. It recognizes that sex/gender is multidimensional, yet, ultimately, retreats to basing sex/gender on a single physical trait.

An appellate court in Maryland concluded in *In re Heilig* that gender is subject to modification or adjustment.⁷⁸ Three facts were presented:

- (1) gender itself is a fact that may be established by medical and other evidence, (2) it may be, or possibly may become, other than what is recorded on the person’s birth certificate, and (3) a person has a deep personal, social, and economic interest in having the official designation of his or her gender match what, in fact, it always was or possibly has become.⁷⁹

Heilig recognizes that several factors are relevant in the composition of one’s gender: internal morphologic sex, external morphologic sex, gonadal sex, chromosomal sex, hormonal sex, phenotypic sex, and personal sexual identity.⁸⁰ Despite this recognition, the court concluded that sexual reassignment surgery is a requirement when establishing the sex/gender of a transgendered person.⁸¹ Because the petitioner did not establish that she had sexual reassignment surgery, she was not entitled to a determination and declaration of her desired gender identity.⁸² Although, the court held, “in the interest of justice, [s]he should be permitted to offer further proof in this regard.”⁸³ The court reasoned:

[T]he requirement of surgery seems to lie in the assumption that, if the person has undergone sex reassignment surgery, the change has been effected, in that at least (1) the person’s external genitalia have been

78. 816 A.2d 68, 87 (Md. 2003).

79. *Id.* at 79.

80. *See id.* at 73.

81. *See id.* at 86.

82. *See id.* at 70.

83. *Id.*

brought into consistency with that indicative of the new gender and with other determinants of gender, and (2) the change is regarded as permanent and irreversible.⁸⁴

This decision leaves the question: if internal morphologic sex, external morphologic sex, gonadal sex, chromosomal sex, hormonal sex, phenotypic sex, and personal sexual identity define sex, how can a single variable determine who is a man and who is a woman? The courts should not force a transgender person to undergo sexual reassignment surgery so they can assume the gender they identify with. “There is no medical rationale for linking legal recognition of a transperson’s new sex to genital reconstructive surgery or any other specific treatment that is not medically appropriate or possible for all transsexual people.”⁸⁵

The court’s uninformed, binary perceptions of gender create unhealthy boundaries. Limiting gender to male or female—as defined by God, the dictionary, or sexual reassignment surgery—enhances discrimination toward transgender people by creating a thirdness that few comprehend or accept. The courts’ failure to recognize the reality of gender ambiguity furthers transgender health care exclusion. Society must break out of its binary way of looking at gender and realize that every human being lies on a spectrum. “[N]ature rarely deals with discrete categories. . . . The living world is a continuum in each and every one of its aspects.”⁸⁶

IV. TRANSGENDER HEALTH CARE BARRIERS

Given the individual’s right to define one’s own gender identity, and the right to change one’s own body as a means of expressing a self-defined gender identity, no individual should be denied access to competent medical or other professional care on the basis of the individual’s chromosomal sex, genitalia, assigned birth sex, or initial gender role.

Therefore, individuals shall not be denied the right to competent medical or other professional care when changing their bodies cosmetically, chemically, or surgically, on the basis of chromosomal sex, genitalia, assigned birth sex, or initial gender role.

—International Bill of Gender Rights⁸⁷

84. *Id.* at 87.

85. Charles Phahlane, *Transgender Group Calls for More Time To Consider ‘Inhumane’ Bill on Sex Status*, CAPE TIMES, Sept. 10, 2003, <http://www.capetimes.co.za/index.php?fSectionId=271&fArticleId=224963>.

86. ALFRED C. KINSEY ET AL., SEXUAL BEHAVIOR IN THE HUMAN MALE 639 (1948).

87. The Int’l Conference on Transgender Law and Employment Policy, Inc., *The International Bill of Gender Rights*, June 17, 1995, <http://www.pfc.org.uk/node/275>; see also FEINBERG, *supra* note 59, at 165-69.

The reality is, all too often transgender people are medically mistreated and find access to health care limited or blocked because they are living in a gender other than the one assigned at birth.⁸⁸ This discrimination is perpetuated by the law, which continues to enforce binary perceptions of male and female that fail to encompass the transgender community.⁸⁹ Perhaps, if the legal and medical professions came to comprehend the reality of gender ambiguity, the discrimination would come to an end.⁹⁰ This Part addresses the barriers that transgender people confront in their pursuit of proper health care. Part A addresses the pervasive ignorance and lack of knowledge of transgenderism, delving into the legal and medical fields' need to diagnose transgenderism as a mental disorder. Because transgender people fail to fit within the confines of acceptable definitions of male and female,⁹¹ their condition is pathologized, which perpetuates discrimination and violence. Part B follows with examples of the discrimination and violence experienced by the transgender community. Only through enlightening people about the reality of gender ambiguity will the current two-sex paradigm enforced by the courts be overhauled, thus creating inclusivity for the transgender community within the realm of health care.

A. *Pathologizing Transgenderism*

Oftentimes, “[o]nce the [transgendered] victims make it to the hospital, they are treated as ‘specimens’ and become the butt of jokes.”⁹² This discrimination and prejudice is maintained because we live within the “constraints of certain highly gendered regulatory schemas”⁹³ upheld and enforced by the legal and medical professions. Transgender people do not fit within these schemas and, therefore, confront hardships when seeking proper health care. The reality is: “all transgender people are medically underserved.”⁹⁴

Because there is little known about transgenderism and the etiology of transgenderism remains unknown, the psychiatric diagnosis continues to carry authority and is often vital for a transgender person’s ability to

88. Li Anne Taft, *Reflections on Transgendered Men and Women in the Islands*, 96 *TRANSGENDER TAPESTRY* 17 (2001).

89. *See generally supra* Part II.

90. *See generally supra* Part II.

91. *See generally supra* Part II.

92. Taft, *supra* note 88, at 17.

93. FAUSTO-STERLING, *supra* note 3, at 75 (quoting JUDITH BUTLER, *BODIES THAT MATTER*, at xi (1993)).

94. Kohler, *supra* note *, at 19.

receive medical care and coverage.⁹⁵ Many transgender people do not regard their behaviors and feelings as a disorder, and thus, tension and anxiety often arise within them when the medical profession attempts to diagnose their condition.⁹⁶ Although this medical recognition bestows many benefits upon the transgender community, such as medical grants for further research and insurance coverage, it also enhances the negative stigmatization of transgenderism.⁹⁷ Medical diagnosis proves to be pathologizing; it enhances the stigma that transgender people's condition is unhealthy and should be cured.⁹⁸

These convoluted, complex perceptions reveal that people, especially medical and legal professionals, need education on transgenderism and the reality of gender ambiguity. Indeed, one of the most significant barriers to adequate patient education for transgender persons is that most professionals lack knowledge about transgenderism.⁹⁹ Pathologizing transgender people's state-of-being as an unhealthy condition which can be cured perpetuates the stigma and discrimination they experience. Rather than attempting to cure transgender people, society, and the legal and medical professions in particular, need to be educated on the reality of gender ambiguity and work to deconstruct polarized perceptions of gender.

B. *Violence and Discrimination*

Inadequate health care is compounded by the fact that transgender people are particularly subject to discrimination and apt to be victimized by the public and professionals.¹⁰⁰ In fact, "[t]he first major study on

95. See THE HARRY BENJAMIN INTERNATIONAL GENDER DYSPHORIA ASSOCIATION'S STANDARDS OF CARE FOR GENDER IDENTITY DISORDERS, SIXTH VERSION 6 (Feb. 2001), <http://www.hbgda.org/Documents2/socv6.pdf>.

96. See John M. Ohle, Comment, *Constructing the Trannie: Transgender People and the Law*, 8 J. GENDER RACE & JUST. 237, 252 (2004).

97. See *id.*

98. See *id.*

99. See FAUSTO-STERLING, *supra* note 3, at 101.

100. Further highlighting the presence of transgender discrimination and violence, a 2005 report compiled by the National Coalition of Anti-Violence Programs provides a glimpse into the trends in violence against lesbian, gay, bisexual, and transgender (LGBT) individuals. See Nat'l Coal. of Anti-Violence Programs, *Anti-Lesbian, Gay, Bisexual, and Transgender Violence in 2004* (2005), http://www.ncavp.org/common/document_files/Reports/2004NationalHV%20Report.pdf.

It should be noted that accurate statistics are difficult to obtain because numerous transgendered people fail to report incidents. See Currah & Minter, *supra* note 73, at 65. Also affecting accurate statistics of transphobic violence, countless transgender incidents are miscategorized as sexual orientation, rather than gender expression. See *id.* at 8. While organizations under the umbrella term LGBT (lesbian, gay, bisexual, and transgender) are present across the nation, the T is often overlooked. Even the Federal Bureau of Investigation does not keep statistics on incidents targeting transgendered people; rather, transgender incidents are

violence and discrimination against transgender people in the United States found that 60 percent experienced some form of harassment and/or violence sometime during their lives, and 37 percent experienced some form of economic discrimination.”¹⁰¹ From 1995 to 2005, more than one person per month died due to transgender-based hate or prejudice.¹⁰² Often fear of violence and discrimination deter transgender people from seeking medical care.¹⁰³

The 2001 documentary *Southern Comfort* exposes the reality of health care discrimination.¹⁰⁴ In the film, Robert Eads, a female-to-male transsexual, was diagnosed with cervical and ovarian cancer after he was refused treatment by twenty doctors.¹⁰⁵ Robert faced sure death as a result of the doctors’ lack of comfort with his gender identity.¹⁰⁶ The film also introduces several of Robert’s transgender friends and their experiences with botched medical treatments and indifferent doctors.¹⁰⁷ The film portrays the ever-present transphobic mentality within the medical profession. All transgender people deserve unbiased, quality medical treatment.

Tyra Hunter’s death is yet another example of the medical community’s hostility toward transgendered people.¹⁰⁸ Hunter, a male-to-female transsexual, bled to death in 1995 after paramedics halted emergency medical treatment from her serious car crash injuries when they discovered her male genitalia.¹⁰⁹ While Tyra’s mother, Margie Hunter, won a wrongful death civil suit against the District of Columbia in 1998,¹¹⁰ her daughter cannot be replaced. A nationwide educational program focusing on the reality of gender ambiguity and the health care

indiscriminately placed within incidents based on sexual orientation. See Nat’l Coal. of Anti-Violence Programs, *supra*, at 24-25.

101. GAY & LESBIAN MED. ASS’N, *supra* note 8, at 391.

102. See Day of Remembrance, <http://www.gender.org/remember/day/what.html> (last visited Oct. 7, 2006).

103. See GAY & LESBIAN MED. ASS’N, *supra* note 8, at 211-14.

104. SOUTHERN COMFORT (HBO Theatrical Documentary Presentations 2001).

105. *Id.*

106. *Id.*; see also BBC, BBC Four Storyville: Southern Comfort (Sept. 28, 2006), http://www.bbc.co.uk/bbcfour/documentaries/storyville/index_southern_comfort.shtml; Elvis Mitchell, ‘*Southern Comfort*’: *Genders That Shift, but Friends Firm as Bedrock*, N.Y. TIMES, Feb. 21, 2001, at E3, available at <http://www.nytimes.com/2001/02/21/arts/21COMF.html?ex=1139893200&en=1ee8c4d1b02bb407&ei=5070>.

107. Mitchell, *supra* note 106.

108. See Rick Rosendall, President, Gay & Lesbian Activists Alliance, Inc., Victory in Tyra Hunter Case Statement (Dec. 11, 1998), <http://www.glaa.org/archive/1998/margiehunter1211.shtml>.

109. See *id.*; see also Taft, *supra* note 88, at 17.

110. Gay & Lesbian Activists Alliance, District Settles Hunter Lawsuit for \$1.75 Million (Aug. 10, 2000), <http://www.glaa.org/archive/2000/tyrasettlement0810.shtml>.

and medical service issues of transgender people is needed. We must deconstruct gender borders in order to assure that every citizen receives proper medical care.

Several things can be done to aid against the ignorance, discrimination, and violence experienced by the transgender community. Patients should not be expected to educate their health professionals about transgender issues. Medical professionals should routinely receive training in transgender health needs. Transsexual care is currently seldom taught in medical school, and medical and endocrinology textbooks are often outdated and misinform their readers.¹¹¹ Education for medical students on transgender health care should be mandatory and up to date. Furthermore, studies on the health needs of transgender people and the potential risks of treatment need to be addressed.¹¹² Additional research is vital to understand short-term and long-term health risks for transgender people.¹¹³ The discrimination and violence targeted at the transgender community must come to an end. All citizens deserve the right to proper medical treatment, regardless of their gender identity. If society broke down the current two-sex model enforced by the courts¹¹⁴ and came to comprehend the fluidity of gender,¹¹⁵ transgender people would receive improved medical care and, thus, live healthier lives.

V. DECONSTRUCTING THE PROBLEM: A CALL FOR A LEGAL RESPONSE

It is possible to envision a new ethic of medical treatment, one that permits ambiguity to thrive, rooted in a culture that has moved beyond gender hierarchies.

—Anne Fausto-Sterling¹¹⁶

The legal system's boundary construction shapes and confines people's rights and practices.¹¹⁷ Unfortunately, the law has remained

111. See R. NICK GORTON ET AL., *MEDICAL THERAPY & HEALTH MAINTENANCE FOR TRANSGENDER MEN: A GUIDE FOR HEALTH CARE PROVIDERS* 9 (2005), available at <http://www.nickgorton.org> (follow PDF hyperlink).

112. GAY & LESBIAN MED. ASS'N, *supra* note 8, at 184. An article recently appeared in the *New England Journal of Medicine* about improving health care for the gay and lesbian community, but the transgender community was excluded. Harvey J. Makadon, *Improving Health Care for the Lesbian and Gay Communities*, 354 *NEW ENG. J. OF MED.* 895-97 (2006).

113. For example, no research has been done on the nutritional and weight toll of a person transitioning to the opposite gender. See GAY & LESBIAN MED. ASS'N, *supra* note 8, at 246 (“[F]emale-to-male (FTM) transgender persons may be more likely to accept or attempt to achieve a higher BMI because it may seem more masculine in appearance. Likewise, male-to-female transgender persons may be more likely to diet or have higher rates of eating disorders to attain a more feminine appearance.”).

114. See generally *supra* Part II.

115. See generally *supra* Part II.

116. FAUSTO-STERLING, *supra* note 3, at 101.

stagnant and oblivious to the reality of gender ambiguity.¹¹⁸ As discussed in Part II, “[t]he legal system has followed [binary] definition[s] when deciding cases, interpreting law, and drafting legislation, leading to negative results for transsexual individuals who do not fit neatly within the rigid legal sex/gender regime.”¹¹⁹ Thus, the legal system itself can play a vital role in deconstructing the ignorance, discrimination, and violence experienced by the transgender community within the realm of health care. This Part addresses legal plans for reform to aid the transgender community in its pursuit of health care inclusion. Part A calls for insurance reform; transgender people should not be denied medical coverage because they fail to fit within the confines of acceptable definitions of male and female. Part B advocates for transinclusive definitions in nondiscrimination and hate crimes laws. The discrimination and violence experienced by the transgender community needs to come to an end. Finally, Part C calls for increased awareness and educational opportunities. Only through enlightening judges and legislators on the reality of gender ambiguity¹²⁰ will the current two-sex paradigm enforced by law be overhauled, thus creating inclusivity for the transgender community within the realm of health care.

A. *Insurance Reform*

Perhaps the most pressing need is for courts and governments to enact legal reform to aid the largely underinsured transgender community. The reality is that transgender people rank the highest among uninsured groups.¹²¹ Nearly half (forty-seven percent) of the transgender participants in the Washington Transgender Needs Assessment Survey, conducted between 1998 and 2000, did not have health insurance.¹²² A recent transgender study of Minnesota health seminar participants found that fifteen percent lacked health insurance.¹²³ More than half (fifty-two percent) of the transgender individuals surveyed in a 1997 San Francisco study lacked health insurance.¹²⁴ A

117. See Bell, *supra* note 11, at 1752.

118. See *id.*

119. *Id.*

120. See generally *supra* Part II.

121. See GAY & LESBIAN MED. ASS’N, *supra* note 8, at 50.

122. See JESSICA M. XAVIER, THE WASHINGTON TRANSGENDER NEEDS ASSESSMENT SURVEY (2000), <http://www.glaa.org/archive/2000/tgneedsassessment1112.shtml>.

123. See Jamie Feldman & Walter Bockting, *Transgender Health*, 86(7) MINN. MED. 1-2 (2003), <http://www.mmaonline.net/publications/MNMed2003/July/Feldman.html>.

124. See GAY & LESBIAN MED. ASS’N, *supra* note 8, at 50.

December 1999 survey by the New York City Department of Health found that twenty-one percent of transgender respondents had no health insurance.¹²⁵

Further compounding transgender people's health insurance situation, most private and public policies refuse to cover any medical procedure related to transgender care even if a transgender person does have health insurance.¹²⁶ Many policies specifically exclude elective procedures, especially ones that do not win the approval of mainstream doctors.¹²⁷ This dismal state of affairs needs to be addressed, beginning with judicial action.

Progress is in motion in select cities and states. The Superior Court of the State of California held in 2001 that state insurance for low income people could not deny treatment to transgender individuals and must cover medically necessary procedures, which include sexual reassignment surgery.¹²⁸ Additionally, in 2001, San Francisco became the first city to provide health care benefits to city workers undergoing sexual reassignment procedures, including hormone treatment, therapy, and surgical procedures.¹²⁹ More recently, in 2005, the California legislature passed AB1586, which prohibits insurance companies from discriminating against people on the basis of their gender status.¹³⁰ Under the new law, health insurance companies are not required to cover sex change procedures, rather they are not permitted to deny medical coverage based on one's transgender status.¹³¹ There is definitely a need for more reform, but AB1586 is a step in the right direction.

125. *See id.*

126. *See* Recommendations for Transgender Health Care 1, <http://www.transgenderlaw.org/resources/tlhealth.htm> (last visited Oct. 16, 2006); *see also* Zak Szymanski, *New Law Seeks To Level Insurance for TGs*, BAY AREA REPORTER, Jan. 19, 2006, at A1, *available at* <http://www.ebar.com/news/article.php?sec=news&article=492>.

127. *See* GAY & LESBIAN MED. ASS'N, *supra* note 8, at 54; *see also* MEYEROWITZ, *supra* note 2, at 141.

128. *See* Recommendations for Transgender Health Care, *supra* note 126. Sexual reassignment surgery was first held to be medically *necessary* by an appellate court in California in 1978. *J.D. v. Lackner*, 145 Cal. Rptr. 570, 572 (Cal. Ct. App. 1978). The court stated, "[T]he proposed [sexual reassignment] surgery is medically reasonable and necessary[,] and . . . there is no other effective treatment method." *Id.*

129. *See* Rachel Gordon, *Profile: Claire Skiffington, Changing Times Health Benefits for Sex-Change Surgery Will Help One City Administer on Journey to Life as a Woman*, S.F. CHRON. May 14, 2001, at A1, *available at* <http://www.ntac.org/news/01/05/18ca3.html>; *see also* Recommendations for Transgender Health Care, *supra* note 126.

130. *See* Szymanski, *supra* note 126.

131. *See id.*

B. Transinclusive Definitions in Nondiscrimination and Hate Crimes Laws

The transgender community has made great advances toward trans-equality; yet, the job is not done. On top of implementing legislation which requires health insurance companies to stop discriminating on the basis of gender identification or expression,¹³² transinclusive antidiscrimination and hate crime legal protections are needed nationwide given the violence and discrimination transgender people face on a daily basis.¹³³

Currently, thirty states and the District of Columbia have hate crime laws that protect people based on sexual orientation.¹³⁴ Of these, only ten include protections based on gender identity or expression.¹³⁵ The legal system needs to recognize that, ultimately, the social cost of exclusion is much greater in the long run than the cost of inclusion.¹³⁶

Anti-trans discrimination forces many trans people into a deadly cycle of poverty and unemployment. It prevents them from putting their abilities and skills to constructive uses, and often forces them into illegal activities in order to survive.¹³⁷

Policymakers across the country need to work to pass transinclusive legislation, because transgender rights are human rights.

In 1993, Minnesota became the first state to protect transgender people in the areas of housing, employment, and public accommodation.¹³⁸ In 1995, San Francisco became the first major city in the United States to prohibit discrimination on the basis of “gender identity,” following a hearing held by the Human Rights Commission.¹³⁹ More recently, in December of 2006, New Jersey became the ninth state to include gender identity in its nondiscrimination law.¹⁴⁰ The bill explicitly

132. See Recommendations for Transgender Health Care, *supra* note 126.

133. For further discussion on the violence and discrimination experienced by the transgender community, see generally Part IV.B.

134. See Nat’l Ctr. for Transgender Equal., Existing Statewide Hate Crime Laws as of June 2006 (June 2006) <http://www.nctequality.org/Resources/hatecrimesmap06-06.pdf>.

135. See *id.*; see also Transgender Law & Policy Inst., Hate Crime Laws, <http://www.transgenderlaw.org/news.htm> (last visited Oct. 8, 2006).

136. See Currah & Minter, *supra* note 73, at 12.

137. *Id.*

138. Minnesota Human Rights Act, M.S.A. § 363A.01-363A.41 (2004).

139. City and County of S.F. Human Rights Comm’n, *Compliance Guidelines To Prohibit Gender Identity Discrimination* (Dec. 10, 2003), http://www.ci.sf.ca.us/site/sfhumanrights_page.asp?id=6274.

140. Peter Cassels, *Transgender People Face ID Dilemma*, EDGE BOSTON, Jan. 4, 2007, <http://www.edgeboston.com/index.php?ci=108&ch=news&sc=glbt&sc2=features&sc3=&id=3533>.

prohibits acts of prejudice against individuals on the basis of gender identity or expression.¹⁴¹

Even though several states and cities across the country are implementing transgender-inclusive antidiscrimination laws,¹⁴² transgender people remain excluded from nearly every antidiscrimination bill.¹⁴³ Discrimination against transgender people remains ever present. Transgender-inclusive antidiscrimination laws need to be passed in every city, county, and state across the nation. All people need to recognize that great gender diversity exists and that gender is malleable. People should not be denied access to protection against discrimination and violence, or access to proper health care, simply because they do not fit within a stereotypical gender role.

C. *Increased Awareness*

Judges and legislators are slowly becoming aware of the reality of transgender health care exclusion, as Democratic National Committee Chairman Howard Dean displayed. In his March 2006 statement for National LGBT Health Awareness Week, he stated:

National LGBT Health Awareness Week serves as a valuable reminder of the importance of focusing on the unique health challenges confronting America's gay, lesbian, bisexual and transgender communities. America needs a health care system that works for everyone, including the LGBT community. . . . No American should be denied health care by prejudice.¹⁴⁴

As Dean suggests, the stigma surrounding transgenderism needs to be deconstructed in order to achieve health care inclusion for the transgender community. The first step toward inclusion is recognition of the current two-gendered paradigm in the judicial system, and then working to break it down. The legal system needs to embrace the reality

141. WASH. REV. CODE ANN. § 49.60.040 (West 2002 & Supp. 2007).

142. On January 1, 2006, new antidiscrimination laws went into effect in Maine, California, and Illinois. These victories extend the rights of transgender people in all three states in new ways. The California laws include a measure banning discrimination by health care companies and service provider plans. While in Maine and Illinois, gender identity and expression have been added to the antidiscrimination laws. A local antidiscrimination ordinance was also passed in Northampton, Massachusetts. See Nat'l Ctr. for Transgender Equal., *New Laws Take Effect January 1*, <http://www.nctequality.org/janlaws.asp> (last visited Oct. 8, 2006).

For an updated list of explicitly transgender-inclusive antidiscrimination laws, see Transgender Law & Policy Inst., *Non-Discrimination Laws*, <http://transgenderlaw.org/ndlaws/index.htm> (last visited Apr. 25, 2007); Nat'l Gay & Lesbian Task Force, *The Issues: Transgender Issues*, <http://thetaskforce.org/issues/transgender> (last visited Apr. 25, 2007).

143. See GAY & LESBIAN MED. ASS'N, *supra* note 8, at 384.

144. Howard Dean, Chairman, Democratic Nat'l Comm., *Statement on LGBT Health Awareness Week* (Mar. 15, 2006), http://www.democrats.org/a/2006/03/dean_statement_15.php.

of gender ambiguity. Deconstruction of binary perceptions of gender would result in inclusion for the transgender community in all walks of life, especially in health care where it is needed most. After all, “access to quality health care and related services is important in order to eliminate health disparities and increase the quality and years of healthy life for all persons in the United States.”¹⁴⁵ The judicial system plays a huge role in deconstructing the stigma surrounding transgenderism and, thus, aiding the transgender community in their pursuit of healthy lives.

VI. CONCLUSION

If you . . . cannot follow your heart—you cannot respect the response of your own honest body in the world—then how much of what kind of freedom does any one of us possess?

Or, conversely, if your heart and your honest body can be controlled by the state, or controlled by community taboo, are you not then, and in that case, no more than a slave ruled by outside force?

—June Jordan¹⁴⁶

Should physicians, judges, or anyone else be permitted to reinforce binary perceptions of gender? Why not permit people to decide whether they want to live as men, women, or somewhere in between?¹⁴⁷ Why not allow people to change their bodies as they desire?¹⁴⁸ Do we possess a right to gender self-identification?

The laws may be changing;¹⁴⁹ nevertheless, the transgender community still faces many obstacles on its way toward achieving health care inclusion and equality. While the pioneers—Magnus Hirschfield and Harry Benjamin to name a few—made great strides toward transgender inclusion, society continues to enforce unhealthy stereotypes. Health insurance companies continue to discriminate on the basis of gender identity.¹⁵⁰ People who defy gender roles are all too often vilified as immature, disgusting, and sinful.¹⁵¹ People remain intimidated and frightened by those who behave and appear in ways not associated with their assigned gender at birth.¹⁵² Only by educating the masses on the reality of sexual ambiguity, and teaching people that such fears are

145. GAY & LESBIAN MED. ASS'N, *supra* note 8, at 34.

146. June Jordan, *A New Politics of Sexuality*, in *WORDS ON FIRE: AN ANTHOLOGY OF AFRICAN-AMERICAN FEMINIST THOUGHT* 409 (Beverly Guy-Sheftall ed., 1995).

147. *See* MEYEROWITZ, *supra* note 2, at 131.

148. *Id.*

149. *See generally supra* Part V.

150. *See generally supra* Part IV.A.

151. *See* FEINBERG, *supra* note 59, at 3-9.

152. *See generally supra* Part IV.B.

not grounded in reality, will the transgender community achieve health care inclusion.

Frederick Douglas once stated, “If there is no struggle, there is no progress.”¹⁵³ The polarized view of gender will not crumble without a struggle. Transgendered people continue to be subjected to health care exclusion, discrimination, and violence on a daily basis. Dedicated individuals must continue the battle. Until all citizens can openly express their gender identities without facing harsh reactions, the fight for transgender inclusion will continue. Roadblocks can be broken down, as the strong-willed transgender community continually displays. Only by continuing to redefine, reexamine, and reinvent gender will we all truly be free.

153. EVAN WOLFSON, *WHY MARRIAGE MATTERS—AMERICA, EQUALITY, AND GAY PEOPLE’S RIGHT TO MARRY* 49 (2004).