

# GENDER IDENTITY DEFINES SEX: UPDATING THE LAW TO REFLECT MODERN MEDICAL SCIENCE IS KEY TO TRANSGENDER RIGHTS

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## INTRODUCTION

At twenty-three I decided to live my life as a woman, full-time, in every way. A lot of people ask me, ‘What it is like?’ That’s like trying to ask me to describe air. It just *is* for me. I can’t really describe it to you because for me, it just is. But without it, I’m not me.

—Donisha McShan, Lambda Legal client

In October 2013, Donisha McShan, an African-American transgender<sup>1</sup> woman, was paroled to a halfway house in Marion, Illinois, to complete a

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1. “Transgender” is used in this Article to describe people whose gender identity (one’s inner sense of being male, female, or a non-binary gender) differs from the assignment of gender at birth. While often seen as a separate identity, the term “transsexual” is used interchangeably throughout to reflect the conflation of the terms in U.S. case law. Some of the issues discussed herein may apply to people who are gender-nonconforming; however, this Article specifically addresses the gap in the law’s understanding of core gender *identity*, as opposed to *expression*. A person’s gender identity, like other factors of sex discussed below, may fall along a spectrum and may not fit neatly into the current legal binary of male or female. *See, e.g.*, AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 451–53 (5th ed. 2013) [hereinafter DSM-5] (defining gender identity to include identities other than male or female, and specifying diagnostic criteria for gender dysphoria to include such identities); WORLD PROF’L ASS’N FOR TRANSGENDER HEALTH, STANDARDS OF CARE FOR THE HEALTH OF TRANSEXUAL, TRANSGENDER, AND GENDER NON-CONFORMING PEOPLE 1–2 (Eli Coleman et al. eds., 7th ed. 2012) [hereinafter WPATH STANDARDS OF CARE], available at [http://admin.associationonline.com/uploaded\\_files/140/files/Standards%20of%20Care,%20V7%20Full%20Book.pdf](http://admin.associationonline.com/uploaded_files/140/files/Standards%20of%20Care,%20V7%20Full%20Book.pdf) (noting that one purpose of WPATH is to promote health and “[h]ealth is promoted through public policies and legal reforms”). This Article discusses what occurs when a transgender person faces a binary legal system that makes a determination of which “box” a person must fill, and argues that core self-identity must be respected and affirmed by the law.

federal prison sentence and be treated for substance abuse.<sup>2</sup> Upon arrival, she informed the facility that she is a transgender woman, but the facility proceeded to assign her to a room shared with four men in the male-only unit, rather than the female or co-ed units that were available.<sup>3</sup> Staff insisted on addressing her with male pronouns despite her protest, and forbade her from bringing feminine items into the facility.<sup>4</sup> They searched her living area several times and confiscated items that they considered LGBT-related<sup>5</sup> or “remotely feminine.”<sup>6</sup> During one search, a staff member told Ms. McShan, “in front of other residents, that she was a man and was not allowed to have feminine items. Staff members even threatened to send [her] back to prison if she did not comply and live as [a] male.”<sup>7</sup>

Ms. McShan contacted Lambda Legal’s National Legal Help Desk, and Lambda Legal submitted a demand letter to the facility outlining its obligations under state and federal law.<sup>8</sup> The facility immediately took steps to rectify the situation by apologizing to Ms. McShan, moving her out of the room with men, referring to her using appropriate pronouns, and returning her personal items.<sup>9</sup>

In a video about her experience, Ms. McShan said:

They took all of my makeup, my favorite clothes, jewelry, bangles, earrings, necklaces, they even took my shower cap because it was pink. But the worst thing they took was my right to be myself. To have an advocacy group not only say that Donisha is right, but to say we stand behind her, it made me feel like I’m finally being heard. It was like I have been living my life on mute, singing, screaming, and yelling and somebody finally pressed the mute button and someone heard me.<sup>10</sup>

Ms. McShan’s experience of being stripped of her dignity because individuals or state actors did not acknowledge or respect her gender identity is not uncommon; the experience she had of receiving an apology and validation is. At the root of the widespread discrimination, harassment,

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2. Donisha McShan, *In My Own Words: Donisha McShan*, LAMBDA LEGAL (June 10, 2014), [http://www.lambdalegal.org/blog/20140610\\_donisha-mcshan-in-my-own-words](http://www.lambdalegal.org/blog/20140610_donisha-mcshan-in-my-own-words).

3. *Id.*

4. *Id.*

5. “LGBT” is short for “Lesbian, Gay, Bisexual, or Transgender.”

6. McShan, *supra* note 2.

7. I BELIEVE IN ME: FIGHTING FOR TRANS RIGHTS IN PRISON (Lambda Legal 2014), *available at* [http://www.lambdalegal.org/blog/20140904\\_lambda-legal-donisha-mcshan-celebrate-video](http://www.lambdalegal.org/blog/20140904_lambda-legal-donisha-mcshan-celebrate-video).

8. McShan, *supra* note 2.

9. *Id.*

10. I BELIEVE IN ME: FIGHTING FOR TRANS RIGHTS IN PRISON, *supra* note 7.

and violence—both systemic<sup>11</sup> and individual<sup>12</sup>—that transgender people face is a lack of understanding or affirmation that transgender people are who they say they are. It can be difficult for many cisgender<sup>13</sup> people to grasp the struggles transgender people face. Widespread misunderstanding continues to exist even despite the recent increase in transgender visibility in the media.<sup>14</sup>

Justice for transgender people is linked to the validation of self-identity—you are who you know yourself to be. The source of much transphobia is “a fear of difference”:<sup>15</sup> cisgender people and bodies are considered the “norm” from which transgender people differ, and there is a notion that transgender people are fraudulently being individuals they “biologically” are not. Transgender people are viewed as violating a “natural” or inherent boundary of fixed, binary sex.<sup>16</sup> This simplistic understanding of sex, as two fixed binary categories, is medically, scientifically, and factually inaccurate, but still broadly enforced by

11. For a discussion of the harms of systemic racism, see DOMINIQUE APOLLON ET AL., MOVING THE RACE CONVERSATION FORWARD: HOW THE MEDIA COVERS RACISM, AND OTHER BARRIERS TO PRODUCTIVE RACIAL DISCOURSE, PART 1, at 3 (2014), available at <https://www.raceforward.org/research/reports/moving-race-conversation-forward>. See also *Systems of Inequality: Criminal Justice*, SYLVIA RIVERA LAW PROJECT, [http://srlp.org/files/disproportionate\\_incarceration.pdf](http://srlp.org/files/disproportionate_incarceration.pdf) (last visited Apr. 13, 2015) (illustrating how “systems of inequality” intersect and produce a higher than average risk of “imprisonment, police harassment, and violence for low income trans people”); *Systems of Inequality: Poverty and Homelessness*, SYLVIA RIVERA LAW PROJECT, [http://srlp.org/files/disproportionate\\_poverty.pdf](http://srlp.org/files/disproportionate_poverty.pdf) (last visited Apr. 13, 2015) (diagraming “how various factors combine into an interlocking system that keep many trans and gender non-conforming people in situations that are vulnerable and unequal”).

12. See, e.g., JAIME M. GRANT ET AL., NAT’L CTR. FOR TRANSGENDER EQUALITY & NAT’L GAY & LESBIAN TASK FORCE, INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 8 (2011), available at [http://www.thetaskforce.org/downloads/reports/reports/ntds\\_full.pdf](http://www.thetaskforce.org/downloads/reports/reports/ntds_full.pdf) (explaining how transgender and gender-nonconforming people are “discriminate[d] against, ridicule[d], and abuse[d]” within families, schools, the workplace, and healthcare settings).

13. “Cisgender” is used in this Article to describe people whose gender identity (one’s inner sense of being male, female, or a nonbinary gender) corresponds with their assigned gender at birth. E.g., Order Granting in Part and Denying in Part Motion to Dismiss and Denying Motion to Stay Discovery, at 19 n.8, *Norsworthy v. Beard* (N.D. Cal. 2014) (No. 14-cv-00695-JST), available at <http://transgenderlawcenter.org/wp-content/uploads/2014/12/Norsworthy-MTD-Order1.pdf> (“Cisgender is a term describing individuals whose gender corresponds with the legal sex that they were assigned at birth.” (emphasis omitted) (quoting Olga Tomchin, *Bodies and Bureaucracy: Legal Sex Classification and Marriage-Based Immigration for Trans\* People*, 101 CALIF. L. REV. 813, 816 n.12 (2013))).

14. See, e.g., Katy Steinmetz, *America’s Transition*, TIME, June 9, 2014, at 38 (discussing issues faced by the transgender community and featuring an interview with actress, Laverne Cox).

15. Jamison Green, “*If I Follow the Rules, Will You Make Me a Man?*”: *Patterns in Transsexual Validation*, 34 U. LA VERNE L. REV. 23, 29 (2012).

16. Cf. *id.*, at 29–30 (“Transsexual people are easy scapegoats for fears about violated boundaries.”).

courts.<sup>17</sup> For transgender people to be recognized as full human beings under the law, the legal system must make room for the existence of transgender people—not as boundary-crossers but as people claiming their birthright as part of a natural variation of human sexual development.<sup>18</sup>

This Article argues that the key to progress in transgender rights is for the courts to gain a clear understanding of who transgender people are using the latest medical science, which recognizes: (1) that sex is multi-faceted, and (2) that of the multiple factors determining sex, gender identity must be given the most weight because it is, in fact, “biological” and considered the primary determinant of an individual’s sex. Without a proper understanding of sex and the role that gender identity plays in determining sex, courts will continue to strip transgender people of their dignity and personhood under the law.

In my experience as a transgender civil rights litigator, I have witnessed the deep confusion that courts, the general public, and even the LGBT community itself, have faced in understanding transgender people.<sup>19</sup> This persistent gap in understanding exists in spite of decades of brilliant legal and medical scholarship from pioneers in the field. This Article highlights the work of these leading scholars in an effort to limn common themes surrounding the need for a proper understanding of the importance of gender identity and its role in sex determinations, and to demonstrate the weight of medical and legal authority that lends support. This Article also addresses the need for a more balanced approach to transgender rights work to afford greater dignity to transgender litigants. As one of very few openly transgender attorneys, I find it necessary to amplify the humanity of transgender litigants to bring a range of transgender voices to shape this doctrine. In this Article, I also call upon my colleagues in the field to question how to frame the language in these cases so it fosters more respectful ways to talk about transgender people’s experiences, lives, and bodies.

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17. See Julie Greenberg, *The Roads Less Traveled: The Problem with Binary Sex Categories*, in *TRANSGENDER RIGHTS* 51, 51–52 (Paisley Currah et al. eds., 2006) [hereinafter Greenberg, *Roads Less Traveled*].

18. Cf. Rachael Wallbank, *Re Kevin In Perspective*, 9 *DEAKIN L. REV.* 461, 468 (2004) (“As we permit transsexualism to be perceived in our culture as a natural aspect of human diversity . . . increasing numbers of people with transsexualism of all ages . . . are seeking to pursue their legal and human rights in respect of issues relating to education, relationships, wills, estates, discrimination and identity.”).

19. For example, the “Genderbread Person” graphic that inaccurately separates gender identity from “biological sex” is still widely used in the LGBT community as a training tool. See, e.g., Sam Killermann, *The Genderbread Person v2.0*, IT’S PRONOUNCED METROSEXUAL, <http://itspronouncedmetrosexual.com/2012/03/the-genderbread-person-v2-0/> (last visited Apr. 14, 2015).

Part I provides an overview of the lived experiences of transgender people and the widespread injustice that many systematically face. It also details the medical community's understanding of, and support for, gender transition, and the pathways for recognition and affirmation of identity available through legal-name and gender-marker changes. Part II describes the legal horrors that transgender people have historically faced in the marriage/custody and discrimination contexts where courts have relied upon inconsistent and outdated methods of determining sex. In addition, Part II considers the limits to using Title VII sex stereotyping and conversion theories given judicial misunderstanding of gender identity as somehow separate from "biological sex." Part III gives an overview of the etiology of sex and the medical community's recognition of gender identity's biological root and its primacy in determinations of sex. It also highlights the success of the use of such evidence in the exemplary Australian *In re Kevin* case, where a court provided legal latitude when viewing transsexualism through an intersex lens. Part IV argues that the recent gains in transgender rights, particularly in the contexts of Title IX of the federal Civil Rights Act of 1964 and state discrimination, hinge on the courts' understanding gender identity as biological and as the primary determinant of sex, and notes how the latest transgender policy work reflects this trend. Finally, Part V analyzes the ways that courts often reinforce a cisgender norm and instead offers a critical approach to transgender legal work that assumes all bodies deserve the same recognition, respect, dignity, and privacy.

## I. UNDERSTANDING "TRANSGENDER"

### A. *An Overview of Transgender People's Lived Experience*

Transgender people are an at-risk population. The statistics on discrimination, economic and health disparities, and violence<sup>20</sup> and suicide

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20. Transgender women of color, in particular, are being murdered at an epidemic rate. *E.g.*, Mary Emily O'Hara, *Trans Women of Color Face an Epidemic of Violence and Murder*, VICE (Nov. 20, 2014), <http://www.vice.com/read/trans-women-of-color-face-an-epidemic-of-violence-and-murder-673> (reporting 226 documented murders of transgender people, mostly women of color, globally between October 2013 and September 2014); *see also* NAT'L COAL. OF ANTI-VIOLENCE PROGRAMS (NCAVP), LESBIAN, GAY, BISEXUAL, TRANSGENDER, QUEER, AND HIV-AFFECTED HATE VIOLENCE IN 2012, at 8 (2013), *available at* [http://www.avp.org/storage/documents/ncavp\\_2012\\_hvreport\\_final.pdf](http://www.avp.org/storage/documents/ncavp_2012_hvreport_final.pdf) ("[A]nti-LGBTQ and HIV-affected hate violence disproportionately impacts LGBTQ and HIV-affected communities of color, transgender people, and transgender people of color."). The "Stop Trans Murder" campaign aims to bring attention to the high rates of violence against transgender people, particularly transgender women of color. NAT'L LGBTQ TASK FORCE, *Stop Trans Murders*, <http://stoptransmurders.org/> (last updated 2015). In addition to demanding immediate investigations and

speak volumes to the rampant transphobia in the United States. The largest survey to date of transgender-identified people,<sup>21</sup> *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey* (“NTDS Survey”), is illustrative.<sup>22</sup> Respondents—individuals who identified as transgender and gender-nonconforming—were four times more likely to have a household income of less than \$10,000 a year.<sup>23</sup> Unemployment for survey respondents was twice the national unemployment rate, while transgender people of color experienced unemployment at four times the national rate.<sup>24</sup> In addition to unemployment, these individuals “experienced debilitating negative outcomes,” including close to twice the rate of work in underground economies (e.g., sex work or selling drugs), twice the rate of homelessness, 85% more incarceration, and greater negative health outcomes (e.g., almost double the HIV infection rate and nearly double the rate of misusing alcohol or drugs) compared to those who were employed.<sup>25</sup> Respondents who were employed also reported overwhelming negative experiences: 90% reported enduring harassment, mistreatment, or discrimination on the job.<sup>26</sup> Additionally, 53% of all respondents reported verbal harassment or disrespect in a place of public accommodation, including hotels, restaurants, buses, airports, and government agencies.<sup>27</sup> Perhaps most significantly:

A staggering 41% of respondents reported attempting suicide compared to 1.6% of the general population, with rates rising for those who lost a job due to bias (55%), were harassed/bullied in school (51%), had low household income, or were the victim of physical assault (61%) or sexual assault (64%).<sup>28</sup>

In the first-ever national survey to examine refusals of care and other barriers to health care confronting LGBT people and those living with HIV,

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accurate reporting of facts and pronouns, this campaign is also demanding that state and local community ordinances provide protection for transgender people when it comes to violent crimes. *Id.*

21. 6,450 transgender and gender-nonconforming individuals participated in the survey. GRANT ET AL., *supra* note 12, at 2.

22. *See generally* GRANT ET AL., *supra* note 12.

23. *Id.* at 2.

24. *Id.* at 3. The survey also revealed that, while “[d]iscrimination was pervasive throughout the entire sample, . . . the combination of anti-transgender bias and persistent, structural racism was especially devastating. People of color in general fare worse than white participants across the board, with African-American transgender respondents faring far worse than all others in many areas examined.” *Id.* at 2.

25. *Id.* at 3.

26. *Id.*

27. *Id.* at 5.

28. *Id.* at 2.

*When Health Care Isn't Caring*, transgender and gender-nonconforming respondents reported the highest rates of experiencing: refusals of care (nearly 27%), harsh language (nearly 21%), and even physical abuse (nearly 8%).<sup>29</sup> Transgender respondents who were also people of color, older, immigrants, and/or low-income experienced even greater discrimination in health care settings than people who did not have compounded vulnerabilities.<sup>30</sup> Particularly alarming is the pervasive exclusion in public and private health insurance for health care related to gender transition<sup>31</sup> in spite of overwhelming evidence that such health care is medically necessary and cost-effective.<sup>32</sup>

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29. LAMBDA LEGAL, *WHEN HEALTH CARE ISN'T CARING: LAMBDA LEGAL'S SURVEY ON DISCRIMINATION AGAINST LGBT PEOPLE AND PEOPLE LIVING WITH HIV 10-11* (2010) [hereinafter LAMBDA LEGAL, *HEALTH CARE*], available at [http://www.lambdalegal.org/sites/default/files/publications/downloads/whcic-report\\_when-health-care-isnt-caring.pdf](http://www.lambdalegal.org/sites/default/files/publications/downloads/whcic-report_when-health-care-isnt-caring.pdf); cf. *Transgender Rights Toolkit: A Legal Guide for Trans People and Their Advocates: Transition-Related Health Care*, LAMBDA LEGAL, [http://www.lambdalegal.org/sites/default/files/publications/downloads/trt\\_transition-related-health-care\\_3.pdf](http://www.lambdalegal.org/sites/default/files/publications/downloads/trt_transition-related-health-care_3.pdf) (last visited Apr. 14, 2015) [hereinafter *Transition-Related Health Care*] (explaining the medical community's framework for understanding transition-related care).

30. LAMBDA LEGAL, *HEALTH CARE*, *supra* note 29, at 11-12.

31. A number of Fortune 500 companies now have inclusive insurance, Human Rights Campaign Found., *Corporate Equality Index 2015: Rating American Workplaces on Lesbian, Gay, Bisexual and Transgender Equality 3* (2014), available at <http://www.hrc.org/campaigns/corporate-equality-index>, but the majority of public and private insurance companies still have discriminatory exclusions. E.g., *Transgender Rights Toolkit: A Legal Guide for Trans People and Their Advocates: Overcoming Health Care Discrimination*, Lambda Legal, [http://www.lambdalegal.org/publications/trt\\_overcoming-health-care-discrimination](http://www.lambdalegal.org/publications/trt_overcoming-health-care-discrimination) (last visited Apr. 18, 2015) [hereinafter *Overcoming Health Care Discrimination*]; *Transition-Related Health Care*, *supra* note 29.

32. *Transition-Related Health Care*, *supra* note 30; see also NCD140.3 Transsexual Surgery, Docket No. A-13-87, Decision No. 2576, at 1 (Dep't of Health & Human Servs., Appellate Div. May 30, 2014), available at <http://www.hhs.gov/dab/decisions/dabdecisions/dab2576.pdf> (“[D]enying Medicare coverage of all transsexual surgery as a treatment for transsexualism is not valid . . . [and] is no longer reasonable.”); AM. MED. ASS'N HOUSE OF DELEGATES, RESOLUTION: 122: REMOVING FINANCIAL BARRIERS TO CARE FOR TRANSGENDER PATIENTS 1-2 (2008) [hereinafter *AMA RESOLUTION: 122*], available at [http://www.tgender.net/taw/ama\\_resolutions.pdf](http://www.tgender.net/taw/ama_resolutions.pdf) (“An established body of medical research demonstrates the effectiveness and medical necessity of mental health care, hormone therapy and sex reassignment surgery as forms of therapeutic treatment for many people diagnosed with GID . . . [Therefore,] . . . the American Medical Association support[s] public and private health insurance coverage for treatment of gender identity disorder.”); JODY L. HERMAN, WILLIAMS INSTITUTE, COSTS AND BENEFITS OF PROVIDING TRANSITION-RELATED HEALTH CARE COVERAGE IN EMPLOYEE HEALTH BENEFITS PLANS: FINDINGS FROM A SURVEY OF EMPLOYERS 2 (Sept. 2013), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Herman-Cost-Benefit-of-Trans-Health-Benefits-Sept-2013.pdf> (“Employers report very low costs, if any, from adding transition-related coverage to their health benefits plans or from actual utilization of the benefit after it has been added – with many employers reporting no costs at all.”); LAMBDA LEGAL, PROFESSIONAL ORGANIZATIONS STATEMENTS SUPPORTING TRANSGENDER PEOPLE IN HEALTH CARE (2013) [hereinafter *PROFESSIONAL STATEMENTS*], available at [http://www.lambdalegal.org/sites/default/files/publications/downloads/fs\\_professional-org-statements-supporting-trans-health\\_4.pdf](http://www.lambdalegal.org/sites/default/files/publications/downloads/fs_professional-org-statements-supporting-trans-health_4.pdf) (collecting medical associations' policy statements opposing discriminatory healthcare practices and exclusions from services related to gender transition); *WPATH Clarification on Medical Necessity of Treatment*,

In short, transphobia is rampant, and its consequences are dire. As the NTDS Survey found,

[n]early every system and institution in the United States [subjects transgender individuals] to . . . mistreatment ranging from commonplace disrespect to outright violence, abuse and the denial of human dignity. The consequences of these widespread injustices are human and real, ranging from unemployment and homelessness to illness and death.<sup>33</sup>

Given these realities, one might logically question whether anyone would *choose* to endure these hardships, that is, whether being transgender were not some core aspect of self that could not be denied. To understand the existence of transgender people, it is helpful to understand gender identity, as well as the current treatment model and medical support for gender transition.

### B. Gender Transition

As the American Academy of Pediatrics and others argued in their *Doe v. Clenchy* amicus brief (“*Clenchy Amicus*”), gender identity refers to every “person’s basic sense of [gender],” and is a “deeply felt, core component of a person’s identity.”<sup>34</sup> Gender identity “has a strong biological and genetic component”<sup>35</sup> and “is the most important determinant of a person’s sex.”<sup>36</sup> Everyone has a gender identity—not just transgender

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*Sex Reassignment, and Insurance Coverage for Transgender and Transsexual People Worldwide*, WORLD PROF’L ASS’N FOR TRANSGENDER HEALTH (June 17, 2008), [http://www.wpath.org/site\\_page.cfm?pk\\_association\\_webpage\\_menu=1352&pk\\_association\\_webpage=3947](http://www.wpath.org/site_page.cfm?pk_association_webpage_menu=1352&pk_association_webpage=3947) (“The medical procedures attendant to sex reassignment are not ‘cosmetic’ or ‘elective’ or for the mere convenience of the patient. These reconstructive procedures are not optional in any meaningful sense, but are understood to be medically necessary for the treatment of the diagnosed condition.”).

33. GRANT ET AL., *supra* note 12, at 8.

34. See Brief for Me. Chapter of the Am. Acad. of Pediatrics *et al.* as Amici Curiae Supporting Appellants at 5–6, *Doe v. Clenchy*, 2014 ME 11, 86 A.3d 600 (No. PEN-12-582), 2013 WL 8349676 [hereinafter *Clenchy Amicus*] (citing AM. PSYCHOLOGICAL ASS’N, ANSWERS TO YOUR QUESTIONS ABOUT TRANSGENDER PEOPLE, GENDER IDENTITY, AND GENDER EXPRESSION (2014), available at <http://www.apa.org/topics/lgbt/transgender.pdf>).

35. *Id.* at 6.

36. *Id.* at 8; see, e.g., *Brown v. Zavaras*, 63 F.3d 967, 971 (10th Cir. 1995) (stating that research concluding gender identity may be biological suggests reevaluating whether transgender people are a protected class for purposes of the Equal Protection Clause); *In re Heilig*, 816 A.2d 68, 73 (Md. 2003) (listing seven medically recognized factors composing a person’s gender, including “personal sexual identity” (citing Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 ARIZ. L. REV. 265, 278 (1999) [hereinafter Greenberg, *Defining Male and Female*]; *In re Estate of Gardiner*, 22 P.3d 1086 (2001); *Maffei v. Kolaeton Indus., Inc.*, 626 N.Y.S.2d

people.<sup>37</sup> Gender identity may be congruent or incongruent with the doctor's determination of sex made at the time of birth,<sup>38</sup> which is currently based on the appearance of genitals.<sup>39</sup> Being transgender is a matter of natural diversity and part of a "culturally-diverse human phenomenon [that] should not be judged as inherently pathological or negative."<sup>40</sup>

Some people experience discomfort or distress caused by the discrepancy between their gender identity and sex assigned at birth.<sup>41</sup> This distress may reach a clinical level where it may support a formal diagnosis of gender dysphoria, a serious medical condition.<sup>42</sup> Gender dysphoria<sup>43</sup> is

391 (Sup. Ct. 1995)); *In re Lovo-Lara*, 23 I&N Dec. 746, 747, 752 (BIA 2005), available at <http://www.justice.gov/eoir/vll/intdec/vol23/3512%20.pdf> (explaining that "[a]ccording to medical experts" there are eight criteria which determine an individual's sex, including "sexual identity"); *Schroer v. Billington*, 424 F. Supp. 2d 203, 211–13 (D.D.C. 2006) (recognizing that scientific observation may confirm that "sex is not a cut-and-dried matter of chromosomes" but rather consists of "different components of biological sexuality" (quoting *Ulane v. E. Airlines, Inc.* 581 F. Supp. 821, 825 (N.D. Ill. 1983)); Julie A. Greenberg & Marybeth Herald, *You Can't Take it With You: Constitutional Consequences of Interstate Gender Identity Rulings*, 80 WASH. L. REV. 819, 825–26 (2005) (discussing eight factors that contribute to a person's sex, including gender identity); Norman P. Spack, *An Endocrine Perspective on the Care of Transgender Adolescents*, 13 J. GAY & LESBIAN MENTAL HEALTH 309, 312–13 (2009) (explaining that surgeons have little to do with the transition process aside from plastic surgery "because the individual has already assigned his or her own gender and sex"). Part III will discuss the details of all the components of sex.

37. *Cf. supra* note 1.

38. *See supra* note 1.

39. Assignments of sex at birth have not always been based on genital appearance. *See* discussion *infra* Part III.B.

40. WPATH STANDARDS OF CARE, *supra* note 1, at 4 (quoting Press Release, World Prof'l Ass'n of Transgender Health (May 26, 2010), available at [http://www.wpath.org/uploaded\\_files/140/files/de-psychopathologisation%205-26-10%20on%20letterhead.pdf](http://www.wpath.org/uploaded_files/140/files/de-psychopathologisation%205-26-10%20on%20letterhead.pdf)).

41. Norman M. Fisk, Editorial, *Gender Dysphoria Syndrome—The Conceptualization That Liberalizes Indications for Total Gender Reorientation and Implies a Broadly Based Multi-Dimensional Rehabilitative Regimen*, 120 W.J. MED. 386, 387–88 (1974), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1130142/pdf/westjmed00309-0060.pdf>; *see also* Gail Knudson et al., *Recommendations for Revision of the DSM Diagnoses of Gender Identity Disorders: Consensus Statement of the World Professional Association for Transgender Health*, 12 INT'L J. TRANSGENDERISM 115, 116 (2010) (noting "any diagnosis should be based on the experience of distress resulting from an individual's gender identity conflict").

42. *See e.g.*, *Fields v. Smith*, 712 F. Supp. 2d 830, 862 (E.D. Wis. 2010), *aff'd*, 653 F.3d 550 (7th Cir. 2011) (holding that gender dysphoria was "a severe medical condition" for purposes of establishing liability under the Eighth Amendment); DSM-5, *supra* note 1, at 451–53 ("[Gender dysphoria] causes clinically significant distress or impairment in social, occupational, or other important areas of functioning."); WORLD HEALTH ORG., *International Classification of Diseases and Related Health Problems* (2007), available at <http://apps.who.int/classifications/apps/icd/icd10online2007/index.htm?gf60.htm> (categorizing "gender identity disorder" and "transsexualism" as "disorders of adult personality and behavior" which are disorders that "represent extreme or significant deviations from the way in which the average individual in a given culture perceives, thinks, feels and, particularly, relates to others"). The classification of gender dysphoria as a mental health diagnosis rather than a medical diagnosis is currently under review given that treatment focuses solely on addressing the body to match the brain sex. The American Psychiatric Association recently took steps to address the stigma of the

recognized by all major medical and mental health organizations, including the American Psychiatric Association,<sup>44</sup> the World Health Organization,<sup>45</sup> the American Medical Association,<sup>46</sup> the Endocrine Society,<sup>47</sup> the American Academy of Family Physicians,<sup>48</sup> the American College of Obstetricians

former classification of “Gender Identity Disorder” by re-designating the diagnosis as “Gender Dysphoria” in the May 2013 release of the DSM’s Fifth Edition. AM. PSYCHIATRIC ASS’N, GENDER DYSPHORIA 1–2 (2013), available at [www.dsm5.org/Documents/Gender%20Dysphoria%20Fact%20Sheet.pdf](http://www.dsm5.org/Documents/Gender%20Dysphoria%20Fact%20Sheet.pdf) (describing the importance of changing “disorder” to “dysphoria” in the DSM). For more information on the current movement to the medical framework, see generally KELLEY WINTERS, GENDER MADNESS IN AMERICAN PSYCHIATRY: ESSAYS FROM THE STRUGGLE FOR DIGNITY (2008) (describing the current movement to remove or modify Gender Identity Disorder from DSM-5), and GLOBAL ACTION FOR TRANS EQUALITY, IT’S TIME FOR REFORM: TRANS\* HEALTH ISSUES IN THE INTERNATIONAL CLASSIFICATIONS OF DISEASES 14–16 (2011), available at <http://globaltransaction.files.wordpress.com/2012/05/its-time-for-reform.pdf> (summarizing experts’ discussion regarding need to move transsexualism from category of “mental and behavioural disorders”).

43. Or its equivalent under a different name, e.g. “gender identity disorder” or “transsexualism.”

44. DSM-5, *supra* note 1, at 451–52; cf. Jack Drescher & Ellen Haller, Am. Psychiatric Ass’n, Position Statement on Access To Care for Transgender and Gender Variant Individuals (2012) (discussing how including “the [Gender Identity Disorder] diagnosis in the DSM has not served its intended purpose of creating greater access to care”).

45. WORLD HEALTH ORG., *supra* note 42 (recognizing “transsexualism,” which is characterized “by a sense of discomfort with, or inappropriateness of, one’s anatomic sex,” and “gender identity disorder of childhood,” which is “characterized by a persistent and intense distress about assigned sex”). The World Health Organization recently proposed removing the “gender identity disorders” category from “mental and behavioural disorders” in its *International Classification of Diseases* and replacing it with a “gender incongruence” category. *A Step in the Right Direction: WHO Proposes to Remove F64 “Gender Identity Disorders” From the Mental and Behavioral Disorders*, TRANSGENDER EUROPE (Aug. 22, 2014), available at <http://tgeu.org/who-publishes-icd-11-beta>.

46. See Brief for Medical and Mental Health Professionals: American Medical Association, et al. as Amici Curiae Supporting Appellees at 1, *Fields v. Smith*, 653 F.3d 550 (7th Cir. 2011) (Nos. 10-2339, 10-2466), available at [http://www.lambdalegal.org/in-court/legal-docs/fields\\_wi\\_20101009\\_amicus-brief-mental-health-professionals](http://www.lambdalegal.org/in-court/legal-docs/fields_wi_20101009_amicus-brief-mental-health-professionals) [http://www.lambdalegal.org/in-court/legal-docs/fields\\_wi\\_20101009\\_amicus-brief-mental-health-professionals](http://www.lambdalegal.org/in-court/legal-docs/fields_wi_20101009_amicus-brief-mental-health-professionals) (“The AMA has recognized [Gender Identity Disorder (“GID”)] as a serious medical condition that can cause intense emotional pain and suffering, and when not properly treated, result in clinically significant psychological distress, dysfunction, debilitating depression, and, for some, self-mutilation, thoughts and attempts of suicide, and death. Based on medical research, the AMA has found that hormone therapy and [sex reassignment surgery (“SRS”)] are medically necessary and effective therapeutic treatments for many people diagnosed with GID.”).

47. See WYLIE C. HEMBREE ET AL., ENDOCRINE SOC’Y, ENDOCRINE TREATMENT OF TRANSEXUAL PERSONS: AN ENDOCRINE SOCIETY CLINICAL PRACTICE GUIDELINE 7 (2009), available at <https://www.endocrine.org/~media/endsociety/Files/Publications/Clinical%20Practice%20Guidelines/Endocrine-Treatment-of-Transsexual-Persons.pdf> (defining and discussing “gender dysphoria”).

48. See, e.g., AM. ACADEMY OF FAMILY PHYSICIANS, RESOLUTION NO. 1004 (May 3, 2012), available at [http://www.aafp.org/dam/AAFP/documents/about\\_us/special\\_constituencies/2012RCAR\\_Advocacy.pdf](http://www.aafp.org/dam/AAFP/documents/about_us/special_constituencies/2012RCAR_Advocacy.pdf) (“Gender Identity Disorder is a medically recognized condition.”); Madeline B. Deutsch & Jamie L. Feldman, *Updated Recommendations from the World Profession Association for Transgender Health Standards of Care*, 87 AM. FAM. PHYSICIAN 92, 93 (2013), available at

and Gynecologists,<sup>49</sup> and the American Psychological Association.<sup>50</sup> The availability of a diagnostic classification serves to facilitate appropriate treatment, which alters the mutable primary and secondary sex characteristics to match the core self-identity, rather than alter the fixed, core gender identity.<sup>51</sup>

The World Professional Association for Transgender Health (“WPATH”), the leading medical authority on gender dysphoria, has developed Standards of Care (“SOC”) for the treatment of the condition.<sup>52</sup> These standards have been recognized as authoritative by every major medical and mental health association<sup>53</sup> and by the courts that have considered them.<sup>54</sup>

<http://www.aafp.org/afp/2013/0115/p89.pdf> (discussing WPATH Standards of Care and gender dysphoria); *cf.* *FAQ On Access to Transition-Related Care*, LAMBDA LEGAL, <http://www.lambdalegal.org/know-your-rights/transgender/transition-related-care-faq> (last visited Apr. 14, 2015) (stating that American Academy of Family Physicians and other organizations have issued policy statements declaring sex reassignment surgery and/or hormone therapy “medically necessary” for individuals with gender dysphoria).

49. *See* AM. COLLEGE OF OBSTETRICIANS & GYNECOLOGISTS, COMMITTEE OPINION, NUMBER 512: HEALTH CARE FOR TRANSGENDER INDIVIDUALS 1–3 (2011), *available at* <http://www.acog.org/-/media/Committee-Opinions/Committee-on-Health-Care-for-Underserved-Women/co512.pdf?dmc=1&ts=20141202T1553397149> (discussing gender identity disorder).

50. *Cf.* Barry S. Anton, *Proceedings of the American Psychological Association for the Legislative Year 2008*, 64 AM. PSYCHOL. 372 (2009), *available at* <http://www.apa.org/about/policy/transgender.aspx> (“Discrimination and prejudice against people based on their actual or perceived gender identity or expression detrimentally affects psychological, physical, social, and economic well-being.”); *Answers to Your Questions About Transgender People, Gender Identity, and Gender Expression*, AM. PSYCHOLOGICAL ASS’N (2015), <http://www.apa.org/topics/lgbt/transgender.aspx> (discussing how DSM-5 recognizes “gender dysphoria” but the diagnosis is controversial). For a summary of major medical and mental health organizations’ positions statements on the importance of access to medical and mental health care for transgender people, see PROFESSIONAL STATEMENTS, *supra* note 33.

51. WPATH, STANDARDS OF CARE, *supra* note 1, at 5–6; *see also* Greenberg & Herald, *supra* note 36, at 884 (“Medical and psychological experts believe that the body’s sexual attributes can be altered to conform to a person’s ‘brain’ sex; conversely, no effective treatment exists to alter the ‘brain’ sex so that it conforms to anatomical sex.”).

52. WPATH, STANDARDS OF CARE, *supra* note 1, at 1.

53. *See, e.g.*, PROFESSIONAL STATEMENTS, *supra* note 32, at 3 (noting that the American College of Nurse-Midwives endorses the 2011 WPATH Standards of Care); Anton, *supra* note 50, at 372 (noting that the American Psychological Association is “in a position to influence policies and practices in institutional settings, particularly regarding implementation of the [WPATH] Standards of Care”); AMA RESOLUTION: 122, *supra* note 32, at 1 (noting that WPATH “has established internationally accepted Standards of Care”).

54. *See, e.g.*, *De’lonta v. Johnson*, 708 F.3d 520, 522–23 (4th Cir. 2013) (“The [WPATH] Standards of Care . . . are the generally accepted protocols for the treatment of GID.”); *Fields v. Smith*, 712 F. Supp. 2d 830, 844 (E.D. Wis. 2010); *Glenn v. Brumby*, 724 F. Supp. 2d 1284, 1289 & n.4 (N.D. Ga. 2010) (discussing WPATH Standards of Care and finding “sufficient evidence that statements of WPATH are accepted in the medical community”).

Gender identity is also referred to as the “brain sex” because it is hard-wired in the brain.<sup>55</sup> As S.J. Langer explains in his article, *Our Body Project: From Mourning to Creating the Transgender Body*, from a clinical perspective, gender dysphoria is less a “belief” or “desire for the opposite sex genitals and secondary sex characteristics” and more a “sensation” and “self-knowledge” for “what one never had but should have had.”<sup>56</sup> Rachael Wallbank explains it well in her article “Re Kevin *In Perspective*”:

The needs for *sex affirmation* and *sex affirmation treatment* by a person with transsexualism are not instances of desire or predilection, but rather are so compelling that the need to bring harmony between the life of sexual experience and the person’s brain sex means that people who experience transsexualism are prepared to risk everything, including their livelihood, their family connections and their health, by undergoing *sex affirmation treatment* in order to bring that harmony about . . . .<sup>57</sup>

Langer describes how scientific research shows a connection between gender dysphoria and the phenomenon of phantom limbs, where the brain recognizes a sensation from a body part that has been lost due to surgery, accident, or birth defect:

The person feels what is missing or what feels like a superfluous and distressing addition. There is an experience of something that was lost, be it genitals or chest or hips or a clumsy addition that does not belong. The physical presence is missing and the necessity of that part of the body is mourned, which has also been characterized as dysphoria.<sup>58</sup>

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55. See, e.g., Wallbank, *supra* note 18, at 461–62, 467, 493 (explaining that “brain sex” is an individual’s “innate sexual identity” and expert opinion concludes that “biological sex is multi-dimensional” and “ultimately determined by the sexual differentiation of the human body part rather than by body parts”); William Reiner, *To be Male or Female —That Is the Question*, 151 ARCHIVES PEDIATRIC & ADOLESCENT MED. 224, 225 (1997) (“[T]he organ that appears to be critical to psychosexual development and adaptation is not the external genitalia, but the brain.”).

56. S.J. Langer, *Our Body Project: From Mourning to Creating the Transgender Body*, 15 INT’L J. TRANSGENDERISM 66, 68 (2014), available at [https://www.academia.edu/6938485/Our\\_Body\\_Project\\_From\\_Mourning\\_to\\_Creating\\_the\\_Transgender\\_Body](https://www.academia.edu/6938485/Our_Body_Project_From_Mourning_to_Creating_the_Transgender_Body).

57. Wallbank, *supra* note 18, at 482.

58. Langer, *supra* note 58, at 68.

Thus, the goal of gender-affirming treatment is “congruence, not aesthetics.”<sup>59</sup> There is no “cure” and “[n]either counseling nor medication will lead a person to conclude that he actually identifies as the gender assigned to him at birth.”<sup>60</sup> Gender identity “is not subject to voluntary control, and cannot be changed by therapy or other means.”<sup>61</sup> Rather, the internationally recognized treatment protocol for gender transition is focused on affirming people in their true sex—their gender identity—socially, medically, and legally.<sup>62</sup> As the *Clenchy* Amicus states:

The medical treatment does not make a woman into a man or a man into a woman. A transgender man is already a man because that is his gender identity, and a transgender woman is already a woman because that is her gender identity. Instead, medical treatment helps transgender people have bodies that reflect their identity as male or female.<sup>63</sup>

“Treatment is individualized” and may include medical interventions, such as hormone therapy or surgeries, depending on a person’s level of

59. *Id.* at 70; cf. *O’Donnabhain v. Comm’r of Internal Revenue*, 134 T.C. 34, 99–100 (2010) (Holmes, J., concurring) (“Hormones and SRS are, I would hold as a general matter in such cases, directed at treating GID in this sense and do not so much improve appearance as create a new one.”).

60. Greenberg & Herald, *supra* note 36, at 868. “Although psychotherapy may help the transsexual deal with the psychological difficulties of transsexualism, courts have recognized that psychotherapy is not a ‘cure’ for transsexualism. Because transsexualism is universally recognized as inherent, rather than chosen, psychotherapy will never succeed in ‘curing’ the patient: . . . Consequently, it has been found that attempts to treat the true adult transsexual psychotherapeutically have consistently met with failure.” *Id.* at 868 n.286 (quoting *In re Heilig*, 816 A.2d 68, 78 (Md. 2003)). For scientific support that gender identity likely has a neurological basis, see generally Frank P.M. Kruijver et al., *Male to Female Transsexuals Have Female Neuron Numbers in the Limbic Nucleus*, 85 J. CLINICAL ENDOCRINOLOGY & METABOLISM 2034 (2000) (“[T]he present study . . . provides unequivocal new data supporting the view that transsexualism may reflect a form of brain hermaphroditism such that this limbic nucleus *itself* is structurally sexually differentiated opposite to the transsexual’s genetic and genital sex.”), and Jiang-Ning Zhou et al., *A Sex Difference in the Human Brain and Its Relation to Transsexuality*, 378 NATURE 68 (1995) (“Our study . . . show[s] a female brain structure in genetically male transsexuals and supports the hypothesis that gender identity develops as a result of an interaction between the developing brain and sex hormones.”).

61. See *Clenchy* Amicus, *supra* note 34, at 8–9; see also *supra* note 1 (explaining that a person’s gender identity may include identities other than male or female).

62. See WPATH, STANDARDS OF CARE, *supra* note 1, at 3 (stating a “core principle[.]” of WPATH Standards of Care is to “provide care . . . that affirms patients’ gender identities”); *Clenchy* Amicus, *supra* note 34, at 8–9 (“The purpose of treatment is to alter the body to match the identity that already exists and to support the person’s ability to live fully in that identity.”); Spack, *supra* note 36, at 312–13 (“When speaking professionally about the process of changing a patient’s gender, . . . I like the term *affirmed* rather than *trans* because a person cannot really transition to something he already is.”).

63. *Clenchy* Amicus, *supra* note 34, at 9.

distress.<sup>64</sup> Many transgender people in need of medically necessary care are unable to access it due to ongoing discriminatory exclusions in health insurance coverage.<sup>65</sup> Others may not require certain medical steps as part of their “appropriate clinical treatment.”<sup>66</sup> For them, the most critical aspect to transition is living in accordance with their gender identity in all aspects of life.<sup>67</sup>

As the *Clenchy* Amicus points out, “current medical standards support the full [social] integration and inclusion of transgender [people] . . . based on their gender identity,”<sup>68</sup> not based on any medical hurdles that could be a part of gender transition.<sup>69</sup> “[T]here is no scientific or medical basis for withholding full recognition” of a transgender person in their affirmed gender or not treating them as a “full” or “real” girl or boy, or man or woman.<sup>70</sup> Indeed, preventing a transgender person from living consistently with their gender identity can have drastic consequences, including higher rates of depression, suicidality, and substance abuse.<sup>71</sup> When children are

64. WPATH STANDARDS OF CARE, *supra* note 1, at 5; *see also* Fields v. Smith, 653 F.3d 550, 553–54 (7th Cir. 2011) (discussing various treatment options for gender identity disorder).

65. *Transition-Related Health Care*, *supra* note 29; *But see* NCD 140.3, Transsexual Surgery, Docket No. A-13-87, Decision No. 2576, at 24 (Dep’t of Health & Human Serv., Appellate Div. May 30, 2014), available at <http://www.hhs.gov/dab/decisions/dabdecisions/dab2576.pdf> (“[T]he alleged ‘experimental’ nature of transsexual surgery as a basis for noncoverage of all transsexual surgery is not reasonable in light of the unchallenged new evidence and contributes to our conclusion that the [National Coverage Determination denying Medicare coverage of all transsexual surgery as a treatment for transsexualism] is not valid.”).

66. *See* WPATH STANDARDS OF CARE, *supra* note 1, at 8–9 (explaining that some individuals do not require hormone therapy or surgery to address gender dysphoria). For a general discussion of the “appropriate clinical treatment” standard being adopted by state and federal agencies for gender-marker changes, *see* Lisa Mottet, *Modernizing State Vital Statistics Statutes and Policies to Ensure Accurate Gender Markers on Birth Certificates: A Good Government Approach to Recognizing the Lives of Transgender People*, 19 MICH. J. GENDER & L. 373, 383 (2013), available at <http://repository.law.umich.edu/cgi/viewcontent.cgi?article=1027&context=mjgl>.

67. *See* WPATH STANDARDS OF CARE, *supra* note 1, at 8–9 (discussing the individualized nature of treatment); *see also* *Clenchy* Amicus, *supra* note 34, at 8–10 (“[T]he physical interventions that transgender people may undergo—such as hormone blockers, cross-hormone therapy, and sex-reassignment surgeries—simply help a transgender person live congruently with his or her gender identity . . . .”); Langer, *supra* note 56, at 67 (“In treatment, the trans[gender] person must connect with the painful aspects of the body in order to fully realize what changes are necessary to create a more livable existence.”).

68. *Clenchy* Amicus, *supra* note 34, at 10.

69. *Cf.* WORLD PROF’L ASS’N FOR TRANSGENDER HEALTH, WPATH STATEMENT ON LEGAL RECOGNITION OF GENDER IDENTITY (Jan. 19, 2015), available at [http://www.wpath.org/uploaded\\_files/140/files/WPATH%20Statement%20on%20Legal%20Recognition%20of%20Gender%20Identity%201-19-15.pdf](http://www.wpath.org/uploaded_files/140/files/WPATH%20Statement%20on%20Legal%20Recognition%20of%20Gender%20Identity%201-19-15.pdf) (“No particular medical, surgical, or mental health treatment or diagnosis is an adequate marker for anyone’s gender identity, so these should not be requirements for legal gender change.”).

70. *Clenchy* Amicus, *supra* note 34, at 9.

71. *See id.* at 7, 10 (discussing how efforts to alter a child’s gender identity “often caused significant harm” and individuals who are unable to live consistent with their gender identity experience

“not . . . able to live consistently with their gender identity, ‘many gender dysphoric adolescents are considerably depressed, anxious, or both. Many engage in self-harming behavior and report suicidal ideation and attempts.’”<sup>72</sup> Shame can be a common experience for a transgender or gender-nonconforming child,<sup>73</sup> and parental support can be key:

Parental efforts to support and affirm a child’s gender expression are among the most important protective factors for supporting the child’s long term health. In contrast, parental or caregiver behaviors such as pressuring a child to be more or less masculine or feminine, or telling a child that how he or she acts or looks will shame or embarrass the family, significantly increase the child’s risk for depression, substance abuse, unprotected sex, and suicidality in adulthood.<sup>74</sup>

The role of treatment, therefore, is to “undo . . . negative mirroring” and to “believe and affirm” the transgender person.<sup>75</sup> Because medical treatment standards for gender transition call for this validation of the core gender identity, it can be crucial for transgender people to find ways to be legally recognized as who they are, particularly with regard to identity documents (“IDs”).

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damage to their mental health and well-being); *see, e.g., id.* at 10; STATE OF CALIFORNIA, DEP’T OF INSURANCE, REG-2011-00023, ECONOMIC IMPACT ASSESSMENT: GENDER NONDISCRIMINATION IN HEALTH INSURANCE (2012), *available at* <http://transgenderlawcenter.org/archives/5616> (last visited Apr. 14, 2015).

72. *Clenchy Amicus, supra* note 34 (quoting Laura Edwards-Leeper & Norman P. Spack, *Psychological Evaluation and Medical Treatment of Transgender Youth in an Interdisciplinary “Gender Management Service” (GeMS) in a Major Pediatric Center*, 59 J. HOMOSEXUALITY 321, 326 (2012)).

73. *See Langer, supra* note 56, at 67 (quoting Lone Frølund, *Early Shame and Mirroring*, 20 SCANDINAVIAN PSYCHOANALYTIC REV. 35, 37 (1997)).

74. *Clenchy Amicus, supra* note 34 at 16, (citing Caitlin Ryan, *Supportive Families, Healthy Children: Helping Families with Lesbian, Gay, Bisexual and Transgender Children*, FAMILY ACCEPTANCE PROJECT (2009), *available at* <https://sait.usc.edu/lgbt/files/Supportive%20Families%20Healthy%20Children.pdf>); *cf.* Arnold H. Grossman & Anthony R. D’Augelli, *Transgender Youth and Life-Threatening Behaviors*, 37 SUICIDE & LIFE-THREATENING BEHAV. 527, 534–35 (2007), *available at* <http://transformingfamily.org/pdfs/Transgender%20Youth%20and%20Life%20Threatening%20Behaviors.pdf> (finding transgender youth face highest rates of suicide risk of all LGBT youth).

75. *Langer, supra* note 56, at 67; *see also* Robert Wallace & Hershel Russell, *Attachment and Shame in Gender-Nonconforming Children and Their Families: Toward a Theoretical Framework for Evaluating Clinical Interventions*, 14 INT’L. J. TRANSGENDERISM 113, 113–14 (2013) (“[S]trategies that affirm rather than redirect gender behavior are more consistent with an attachment-based approach.”).

*C. Recognition of Identity Through Legal-Name and Gender-Marker Changes*

IDs that accurately reflect who a transgender person is can be critical to transgender people's safety and well-being.<sup>76</sup> As Lisa Mottet points out in her article, *Modernizing State Vital Statistics Statutes and Policies to Ensure Accurate Gender Markers on Birth Certificates: A Good Government Approach to Recognizing the Lives of Transgender People*, accurate IDs provide official recognition in social and legal settings, and can help reduce pervasive violence, harassment, and discrimination.<sup>77</sup> Many transgender people consider changing their name and gender-marker designation as the first and most critical step to being legally validated in their correct gender.

The United States has generally recognized the existence of transgender people by providing legal mechanisms for people to update their gender markers on state and federal documents.<sup>78</sup> The rules for changing gender-marker designations, however, are complex and vary across jurisdictions and administrative bodies, making it challenging, and sometimes impossible,<sup>79</sup> for many transgender people to have updated and consistent IDs.<sup>80</sup> Many people are only able to change their gender marker on certain IDs—like passports and driver's licenses—but not others—like

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76. For an overview on the processes for changing various IDs, see LAMBDA LEGAL, *Know Your Rights: FAQ About Identity Documents*, <http://www.lambdalegal.org/know-your-rights/transgender/identity-document-faq> (last visited Apr. 14, 2015).

77. See generally Mottet, *supra* note 66, at 393–99 (discussing how transgender people with IDs that do not match their gender identity are more likely to face hiring discrimination, police harassment, and health care discrimination, as well as more likely to have limited opportunities to marry or attend sex-segregated colleges). According to the NTDS Survey, only 21% of respondents were able to update all of their IDs to reflect who they are. GRANT ET AL., *supra* note 12, at 139. Those without accurate IDs reported being harassed (40%), attacked or assaulted (3%), or asked to leave an establishment (15%). *Id.* at 153.

78. See Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731, 734 (2008), available at <http://www.deanspade.net/wp-content/uploads/2010/07/documenting.pdf> (“Recognizing the social and economic difficulties faced by those whose lived expression of gender does not match their identity documentation, state and federal agencies have over time created a variety of policies aimed at allowing gender marker change on documents commonly used to verify identity.”).

79. One state—Tennessee—even has a statute that expressly forbids recognition of gender reclassification on birth certificates. TENN. CODE ANN. § 68-3-203(d) (2011). Ohio, Idaho, and Puerto Rico have court orders that prevent transgender people born in those jurisdictions from correcting their birth certificates. Mottet, *supra* note 66, at 382 nn. 21–23.

80. For an overview of state-by-state requirements for changing sex designations on birth certificates, see *Changing Birth Certificate Sex Designations: State-by-State Guidelines*, LAMBDA LEGAL, <http://www.lambdalegal.org/know-your-rights/transgender/changing-birth-certificate-sex-designations> (last updated Feb. 3, 2015) [hereinafter *State-by-State Guidelines*]. For a recent overview of the various rules for changing gender markers and the detrimental effects of complex and differing methods to alter gender identification, see generally Mottet, *supra* note 66, at 428–35.

Medicaid cards or birth certificates—depending on rules tied to their place of residence, where they were born, and what medical treatment their transition has required and has been available to them.<sup>81</sup> For example, the majority of states still have outdated surgical requirements for birth certificate corrections or amendments.<sup>82</sup> These requirements not only contradict contemporary medical standards,<sup>83</sup> but also bar many transgender people from obtaining proper identification because the majority of public and private health insurance plans maintain discriminatory exclusions for such care, or because those specific treatments are not considered medically necessary for the individualized treatment.<sup>84</sup>

In the past five years, the federal government and a handful of states have taken steps to modernize requirements for gender-marker changes on official documents, recognizing that requiring surgery contradicts current medical understanding of gender transition.<sup>85</sup> In June 2010, the U.S. Department of State updated its policy with regard to passports and Consular Reports of Birth Abroad of U.S. Citizens to require “appropriate clinical treatment for gender transition,” to better reflect the individualized treatment protocols in the WPATH SOC.<sup>86</sup> The U.S. Department of Veterans Affairs,<sup>87</sup> the Office of Personnel Management,<sup>88</sup> and the Social

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81. See *Transgender Rights Toolkit: A Legal Guide for Trans People and Their Advocates: Identity Documents*, LAMBDA LEGAL, [http://www.lambdalegal.org/sites/default/files/publications/downloads/trt\\_transgender\\_id\\_1.pdf](http://www.lambdalegal.org/sites/default/files/publications/downloads/trt_transgender_id_1.pdf) (last visited Apr. 14, 2015) [hereinafter *Identity Documents*].

82. See *State-by-State Guidelines*, *supra* note 80.

83. See, e.g., *AMA Calls for Modernizing Birth Certificate Policies*, AMA NEWS ROOM (June 9, 2014), <http://www.ama-assn.org/ama/pub/news/news/2014/2014-06-09-modernizing-birth-certificate-policies.page> (reporting on American Medical Association’s new policy which supports eliminating the surgical requirement for changing birth certificates).

84. See GRANT ET AL., *supra* note 12, at 77, 84 (reporting that majority of respondents had not had genital surgery “despite being desired by most respondents”); *Overcoming Health Care Discrimination*, *supra* note 31 (“[M]ost insurance companies refuse to cover transition-related health care even when a doctor considers it medically necessary.”); Mottet, *supra* note 66, at 407–09 (explaining reasons why surgeries are not common); Spade, *supra* note 78, at 753–54 (explaining the high rates of health care discrimination and lack of health care access for transgender individuals).

85. Mottet, *supra* note 66, at 400–05.

86. *Id.* at 404 (quoting U.S. DEP’T OF ST., 7 FOREIGN AFF. MANUAL 1320 app. M(b) (2011), available at <http://www.state.gov/documents/organization/143160.pdf> (internal quotation marks omitted)).

87. *Veterans Administration Makes Important Clarification on Records Policy*, CTR. FOR TRANSGENDER EQUAL. BLOG (March 2, 2012, 4:28 PM) <http://transgenderequality.wordpress.com/2012/03/02/veterans-administration-makes-important-clarification-on-records-policy/>.

88. OFFICE OF PERS. MGMT., THE GUIDE TO PERSONNEL RECORDKEEPING: HOW TO RECONSTRUCT A PERSONNEL FILE 4-6 (June 1, 2011), available at <https://www.opm.gov/policy-data-oversight/data-analysis-documentation/personnel-documentation/personnel-recordkeeping/recguide2011.pdf>.

Security Administration followed suit.<sup>89</sup> Washington, Oregon, California, Vermont,<sup>90</sup> the District of Columbia,<sup>91</sup> New York State,<sup>92</sup> and New York City<sup>93</sup> no longer require surgery, and New Jersey has a bill pending.<sup>94</sup> Some changes have been in response to successful litigation by transgender people challenging the constitutionality of denying a gender-marker change.<sup>95</sup> While the United States is not even close to following the lead of countries like Argentina that allow transgender people to self-attest to who they are without any third-party validation,<sup>96</sup> some U.S. jurisdictions are taking steps to remove gender markers completely from IDs to lessen the risk of inviting “gender-policing” by third parties.<sup>97</sup>

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89. SOC. SEC. ADMIN., RM 10212.200 CHANGING NUMIDENT DATA FOR REASONS OTHER THAN NAME CHANGE (June 6, 2013), available at <https://secure.ssa.gov/poms.nsf/lnx/0110212200>. The Department of Defense remains the sole federal agency to maintain a surgical requirement for gender-marker changes. Autumn Sandeen, *Changing My Documented Gender with the Department of Defense*, LGBT WEEKLY (May 16, 2013), <http://lgbtweekly.com/2013/05/16/changing-my-documented-gender-with-the-department-of-defense/>.

90. Mottet, *supra* note 66, at 402–04.

91. JaParker Deoni Jones Birth Certificate Equality Amendment Act of 2013, D.C. Act 20-153 § 11(a) (2013) (to be codified at D.C. Code § 7-210.01).

92. Letter from Guy Warner, Dir. Bureau of Vital Records, N.Y. State Dep’t of Health, Overview of New York State Birth Certificate Amendment Process, available at <http://www.empirejustice.org/assets/pdf/policy-advocacy/doh-bc.pdf> (last visited Apr. 14, 2015); see also Julia A. Sáenz, *LGBT Policy Update—June 2014*, EMPIRE JUSTICE CTR. (June 26, 2014), <http://www.empirejustice.org/policy-advocacy/legislative-updates/lgbt-policy-update-june-2014.html> (discussing how New York changed its gender-marker policies in 2014).

93. NYC, NEW YORK, NYC COUNCIL CODE ch. 1, § 17-761 (2014), available at <http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=1937607&GUID=DA36C81B-7498-49EB-9581-A785349F4C2F&Options=&Search>; Parker Marie Molloy, *Trans New Yorkers Celebrate Birth Certificate News*, ADVOCATE.COM (June 5, 2014 9:42 AM), <http://www.advocate.com/politics/transgender/2014/06/05/trans-new-yorkers-celebrate-birth-certificate-news>.

94. Assembly No. 4907, 215th Leg., An Act Concerning Amended Certificates of Birth and Amending P.L. 1984, c. 191 (N.J.) (introduced May 6, 2013).

95. See, e.g., K.L. v. Alaska, Dep’t of Admin., Div. of Motor Vehicles, Case No. 3AN-11-05431 CI, 2012 WL 2685183, at \*3, \*8 (Alaska Super. Ct. Mar. 12, 2012) (holding that lack of a valid policy for changing the sex designation on a driver’s license violated the state constitutional privacy rights of a transgender individual); cf. Mottet, *supra* note 66, at 423 (arguing that transgender people deserve heightened or strict scrutiny in equal protection analysis). An Oregon law allows sex designation on birth certificates to be changed “if the court determines that the individual has undergone surgical, hormonal or other treatment appropriate for that individual for the purpose of gender transition and that sexual reassignment has been completed.” OR. REV. STAT. § 33.460 (2013), available at [https://www.oregonlegislature.gov/bills\\_laws/lawsstatutes/2013ors033.html](https://www.oregonlegislature.gov/bills_laws/lawsstatutes/2013ors033.html).

96. Mottet, *supra* note 66, at 385–86 (citing Regime for Recognition and Respect for Gender Identity, Law No. 26743, 32,404 B.O. 1, 2 (Arg.) (2012)); *Identity Documents*, *supra* note 81.

97. Mottet, *supra* note 66, at 395–96, 402–05. Reliance on gender markers often sets up degrading and discriminatory interactions where third parties have license to inspect IDs for their own personal opinion about whether a person is “male or female” enough. Given that many people do not fit neatly into the gender stereotypes of the binary system reflected on IDs, many people—transgender or not—experience daily struggles. See GRANT ET AL., *supra* note 12, at 24 (reporting 14% of survey respondents identified as gender non-conforming). While the United States does not provide a third

Transgender people who are able to meet the federal, state, and administrative authorities' varying standards to correct or amend their gender markers often expect this will be a "legal magic wand," providing affirmation, recognition, and safety from challenges to their identity.<sup>98</sup> However, one's "legal sex" is still debated in legal proceedings requiring determinations of sex.<sup>99</sup> A court order that states the sex that has been corrected to match gender identity will be given the most deference in legal proceedings and is thus the most protective step a transgender person can take. However, court orders are difficult to obtain for people who cannot afford an attorney, and they raise privacy issues.<sup>100</sup> Also, judges who are unfamiliar with transgender people or the need for legal avenues they are pursuing frequently deny requests.<sup>101</sup> And, like birth certificate amendments or corrections, court orders are not always given deference by courts across state lines.<sup>102</sup> Thus, in spite of taking all medically indicated steps for

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gender option, there are a growing number of examples where the gender marker has been removed and other information is used, such as the SEPTA passes in Philadelphia, *SEPTA Fare Increases Take Effect Monday, July 1*, SE. PA. TRANSP. AUTH. (June 27, 2013), <http://www.septa.org/media/releases/2013/06-27.html> ("Gender stickers [have been] eliminated on all passes for transit and Regional Rail."), and the New York City municipal ID. NYC, NEW YORK, NYC COUNCIL CODE ch. 1, § 17-761 (2014), available at <http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=1937607&GUID=DA36C81B-7498-49EB-9581-A785349F4C2F&Options=&Search> (establishing that municipal IDs do not require a gender marker).

98. See Spade, *supra* note 78, at 734 ("Many people are under the impression that everyone has a clear 'legal gender' on record with the government, and that changing 'legal gender' involves presenting some kind of evidence to a specific agency or institution in order to make a decisive and clear change to the new category.").

99. See Jill Weiss, *Transgender Identity, Textualism, and the Supreme Court: What is the "Plain Meaning" of "Sex" in Title VII of the Civil Rights Act of 1964?*, 18 TEMP. POL. & CIV. RTS. L. REV. 573, 590–91 (2009) ("No court in the United States has ever ruled that a person became legally male or legally female for all purposes. Thus, it cannot be said [at this time] in any meaningful way that 'I am now legally male,' or 'I am now legally female.' One can truthfully say that a birth certificate, driver's license, or passport says 'M' or 'F,' but that is not the same thing. One can, at most, say that 'for X purpose, I am now legally male.' Statements such as 'I am now legally male' are a statement of opinion, rather than a statement of law.").

100. See Mottet, *supra* note 66, at 431–33.

101. See, e.g., *In re* Petition for Change of Birth Certificate, 22 N.E.3d 707, 707 (Ind. Ct. App. 2014) (discussing trial court decision denying individual's petition to change his legal gender "based upon a[n erroneous] perceived lack of authority"); *In re* Harvey, No. CV-2011-1075, slip op. at 1, 5, 6 (Dist. Ct. Okla. Sept. 2, 2011) (denying a petition for a court order changing a transgender woman's name based on a finding that a name change would be "fraudulent" because the individual would still have male DNA even after undergoing sex-change surgery), *rev'd* 293 P.3d 224 (Ct. App. Okla. 2012). Lambda Legal receives frequent calls from attorneys who have been denied motions to change gender markers by judges who rely on their own medical, scientific, or religious opinion that is not informed by contemporary medical standards or the law.

102. See Greenberg & Herald, *supra* note 36, at 843–55 (discussing how the refusal to acknowledge amendments to birth certificates from other states violates the Full Faith and Credit clause).

transition to affirm one's true self—including living in accordance with one's gender identity in all areas of life—and in spite of taking all legal steps possible to have one's gender identity recognized by the state and federal government, a transgender person in the United States can still face the “legal horror”<sup>103</sup> of a court refusing to acknowledge or validate who they are.<sup>104</sup>

## II. LEGAL HORRORS: TRANSGENDER PEOPLE AS NON-HUMAN IN THE EYES OF THE LAW

This section will provide an overview of the “legal horrors” that transgender people have historically faced when courts are uneducated or resistant to understanding sex, instead relying upon outdated and, at times, punishingly creative methods of determining sex. Transgender litigants have paid the ultimate price, particularly in the marriage, custody, and discrimination contexts.

In his article, “*If I Follow the Rules, Will You Make Me a Man?*”: *Patterns in Transsexual Validation*, Dr. Jamison Green, the current President of WPATH, details the ways the legal system has always limited who was considered a “person” in the eyes of the law.<sup>105</sup>

For centuries, rights, privileges, and status could accrue only to male bodies (in some cases in British, European, and American societies, only to Caucasian, light-skinned, male bodies.) [sic] Women and non-white men were chattels, servants, or little more

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103. The term “horror” has often been used to describe cisgender people's reactions to transgender people. *See, e.g.*, Green, *supra* note 15, at 28 (discussing the so-called “moral and scientific horror of gender-variance”); *id.* at 71 (“The horror of transvestism . . .” (quoting RICHARD A. POSNER, *SEX AND REASON* 25–26 (1992))); *id.* at 72 (“[T]he presence of judicial horror at the thought of castration and [the appearance of] the image of a female father [thrust] into social consciousness.” (alteration in original) (quoting Richard F. Storrow, *Naming the Grotesque Body in the “Nascent Jurisprudence of Transsexualism,”* 4 MICH. J. GENDER & L. 275, 279 (1997)) (internal quotation marks omitted)); *see also* Alex Sharpe, *Transgender Marriage and the Legal Obligation to Disclose Gender History*, 75 MOD. L. REV. 33, 42 (2012) (“This idea of transgender bodies, and particularly sexual congress with them, as evoking legal horror is an important one in understanding the gender history provision.”). Here, I attempt to reclaim the term by using it to describe *transgender* people's experience of the legal system, particularly, the horror that transgender people face when the law strips them of their dignity and legal personhood.

104. For example, in *In re Estate of Gardiner*, J'Noel Gardiner's birth certificate, driver's license, passport, health documents, and records at two universities indicated that she was a female, yet the Kansas Supreme Court determined, for purposes of marriage, she was male. *In re Estate of Gardiner*, 42 P.3d 120, 123, 137 (Kan. 2002).

105. *See* Green, *supra* note 15, at 27 (discussing the history of laws “designed to control behavior” which had the effect of “criminaliz[ing] or circumscrib[ing] certain people”).

than beasts of burden, and were frequently regarded as lacking the capacity to reason, even lacking souls.<sup>106</sup>

Dr. Green notes that to be a “person” in the eyes of the law, to obtain the rights, privilege, and status afforded by the law, transgender people must fall into one of the two categories of the legal binary gender system: male or female.<sup>107</sup>

[A]s is apparent in the case law evolution, there have been exceptional barriers to transsexual people who attempt to exercise their civil rights and responsibilities simply because their transsexual status renders them suspect, or outside the law to the extent that their altered or different bodies make them seem less than human.<sup>108</sup>

As Professors Julie Greenberg and Marybeth Herald note in their article, *You Can't Take it With You: Constitutional Consequences of Interstate Gender Identity Rulings*, in limiting determinations of sex to these two categories, the U.S. judiciary is out-of-step with the latest medical understanding of sex and lags behind other countries in acknowledging and implementing a non-binary system.<sup>109</sup> The courts have looked to history and precedent and have generally ignored or rejected the scientific information found in medical testimony that other countries have been acknowledging for years.<sup>110</sup> “Medical testimony [is] crucial in shedding light” on the range

106. *Id.* at 24. “The Eugenics movement in Britain and in the U[nited] S[tates], as well as American miscegenation laws, attest to this.” *Id.* at 24 n.4.

107. *See id.* at 23 (“The status of transsexual people in the law has been dictated historically by a taxonomy of binary sex and gender which posits only male and females as valid and essential physical constructs, with specific social roles.”).

108. *Id.* at 32.

109. Greenberg & Herald, *supra* note 36, at 832–33, 838–39 (“Most jurisdictions outside of the United States have rejected the outdated tests used in earlier judicial decisions and have focused on the scientific literature and the importance of brain sex to the development of *gender identity*.”) (emphasis added); see Roy Austin, *Response to We the People Petition on Non-Binary Genders*, WE THE PEOPLE (last visited Apr. 14, 2015), <https://petitions.whitehouse.gov/response/response-we-people-petition-non-binary-genders> (declining to legally recognize genders outside of male-female binary and explaining that “proposals to change when and how gender is listed on official documents should be considered on a case-by-case basis by the affected federal and state agencies”). Many countries and cultures recognize more than two genders, for example, India, Pakistan, Nepal, New Zealand, Australia, Bangladesh, and Germany, Valentine Pasquosoone, *7 Countries Giving Transgender People Fundamental Rights the United States Still Won't*, IDENTITIES.MIC (Apr. 9, 2014), <http://mic.com/articles/87149/7-countries-giving-transgender-people-fundamental-rights-the-u-s-still-won-t>, and some Native American cultures. Walter L Williams, *The “Two Spirit” People of Indigenous North America*, THE GUARDIAN (Oct. 11, 2010), <http://www.theguardian.com/music/2010/oct/11/two-spirit-people-north-america>.

110. *See* Greenberg & Herald, *supra* note 36, at 833 (discussing how state courts have relied on dictionaries, “references to God, and references to older decisions that do not reflect the current

of human variation in sex and the fact that the transgender and intersex<sup>111</sup> experience is part of human variation.<sup>112</sup> However, “a need for consistency, in conjunction with law’s requirement to look to precedent and statutes for guidance, can compel judges to reduce complexity and even reject inconvenient new information.”<sup>113</sup> As Dr. Green states, the result is that in the United States, “trans litigants remain at the mercy of individual judges who are free to exercise their personal biases as they interpret whatever laws they can find to apply to the facts at hand.”<sup>114</sup>

Even as they make strides inside mainstream culture,<sup>115</sup> transgender people remain “strangers to the law.”<sup>116</sup> When seeking legal recognition in the courts, transgender people “face the possibility of a systematic obliteration of their personal identity,”<sup>117</sup> what Professor Taylor Flynn labels, “a legal shredding of self.”<sup>118</sup> Transgender people have been dehumanized, have had core, intimate aspects of their selves legally erased and their bodies publicly dissected for purported function and

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[scientific] understanding of sexual differentiation”); Green, *supra* note 15, at 32–33 (discussing legal “barriers” to transsexual people as evidenced in the case law).

111. See *Intersex*, COLLINS ENGLISH DICTIONARY, <http://www.collinsdictionary.com/dictionary/english/intersex> (last visited Apr. 14, 2015) (defining “intersex” as “the condition of having characteristics intermediate between those of a male and a female”); see also *What Is Intersex?*, INTERSEX SOC’Y OF N. AM., [http://www.isna.org/faq/what\\_is\\_intersex](http://www.isna.org/faq/what_is_intersex) (last visited Apr. 14, 2015) (defining “intersex” as a condition “in which a person is born with a reproductive or sexual anatomy that doesn’t seem to fit the typical definitions of female or male”). The term “Disorder of Sexual Development” (“DSD”) also describes the conditions of genital ambiguity and has been used increasingly in medical and academic literature for scientific and ethical reasons. Joel Hutcheson et al., *Disorders of Sexual Development*, MEDSCAPE, <http://emedicine.medscape.com/article/1015520-overview#showall> (last updated Nov. 12, 2014). This Article, however, exclusively uses the term “intersex” to describe this phenomenon.

112. Green, *supra* note 15, at 64.

113. *Id.* at 61; see *In re Marriage of Kantaras v. Kantaras*, Case No. 98-5375CA, at 535 (Fla. Cir. Ct. Feb. 21, 2003), available at <http://www.transgenderlaw.org/cases/kantarasopinion.pdf>.

114. Green, *supra* note 15, at 64–65; see, e.g., *In re Harvey*, No. CV-2011-1075, slip op. at 1, 5, 6 (Dist. Ct. Okla. Sept. 2, 2011) (denying name change for transgender woman based on a finding that a name change would be “fraudulent” because the individual would still have male DNA even after undergoing sex-change surgery).

115. See, e.g., Katy Steinmetz, *Laverne Cox Talks to TIME About the Transgender Movement*, TIME (May 29, 2014), <http://time.com/132769/transgender-orange-is-the-new-black-laverne-cox-interview/>.

116. Abigail W. Lloyd, *Defining the Human: Are Transgender People Strangers to the Law?*, 20 BERKELEY J. GENDER L. & JUST. 150, 150 (2005); see, e.g., Green, *supra* note 15, at 56 (“The words “sex,” “male,” and “female” in everyday understanding do not encompass transsexuals.” (quoting *In re Estate of Gardiner*, 42 P.3d 120, 135 (Kan. 2002))).

117. Taylor Flynn, *The Ties that (Don’t) Bind: Transgender Family Law and the Unmaking of Families*, in TRANSSEXUAL RIGHTS 32, 32 (Paisley Currah et al. eds., 2006).

118. *Id.*

appearance.<sup>119</sup> Transgender people have been judged defiant and worthy of punishment,<sup>120</sup> immoral,<sup>121</sup> fraudulent,<sup>122</sup> mentally ill,<sup>123</sup> delusional,<sup>124</sup> medically wrong,<sup>125</sup> or imaginary/nonexistent.<sup>126</sup> Behind the “legal

119. *See id.* at 37 (“In determining legal sex, courts typically use an approach that I call a ‘body-parts’ checklist: the court meticulously scrutinizes a litigant’s sexual anatomy and compares its various features to a presumed norm.”); Green, *supra* note 15, at 64–65 (explaining that in American cases courts “expose the genitals, surgical status, or sexual capacity of . . . transsexual subjects).

120. *See, e.g.,* Cynthia Lee & Peter Kwan, *The Trans Panic Defense: Masculinity, Heteronormativity, and the Murder of Transgender Women*, 66 HASTINGS L.J. 77, 83–84, 111–13 (2014) (discussing how defendants who murder transgender women and assert a “trans panic” defense might have been motivated by “extreme discomfort with gender nonconformity” and murdered the victim as punishment for “transgress[ing] gender norms”).

121. *See, e.g.,* Oiler v. Winn-Dixie La., Inc., No. Civ. A. 00-3114, 2002 WL 31098541, at \*5 (E.D. La. Sept. 16, 2002) (“The plaintiff was terminated because he is a man with a sexual or gender identity disorder who, in order to publicly disguise himself as a woman, wears women’s clothing, shoes, underwear, breast prostheses, wigs, make-up, and nail polish, pretends to be a woman, and publicly identifies himself as a woman named ‘Donna.’”). *But see* Doe v. McConn, 489 F. Supp. 76, 79 (S.D. Tex. 1980) (holding city ordinance, which made it “unlawful for any person to appear on any public street, sidewalk, alley, or other public thoroughfare dressed with the designed intent to disguise his or her true sex as that of the opposite sex” and did not allow an “exception or defense under the ordinance for transsexuals, including those under a doctor’s care,” was unconstitutional).

122. Greenberg & Herald, *supra* note 36, at 867–68 (discussing cases denying petitions to change sex on IDs because of fraud concerns); Flynn, *supra* note 117, at 41 (discussing fraud as grounds for divorce in trans marriage cases where it is claimed that individuals “defrauded their spouses as to their ‘real’ sex”); *see, e.g., In re Harvey*, No. CV-2011-1075, slip op. at 6 (Dist. Ct. Okla. Sept. 2, 2011) (“[B]ased on . . . the DNA evidence, a sex change cannot make a man a woman or a woman a man . . . . To grant a name change in this case would be to assist that which is fraudulent.”), *rev’d* 293 P.3d 224 (Ct. App. Okla. 2012).

123. *See* Greenberg & Herald, *supra* note 36, at 865–66 (explaining how states have justified refusing to treat transgender individuals “as their self-identified sex” citing a “desire to discourage ‘psychologically ill persons’ from engaging in sex changes” (quoting Anonymous v. Weiner, 270 N.Y.S.2d 319, 322 (Sup. Ct. 1966)). In *Anonymous v. Weiner*, the Board of Health consulted with the Committee on Public Health of the New York Academy of Medicine and based its denial of the petition to change a birth certificate because “male-to-female transsexuals are still chromosomally males while ostensibly females; [and] it is questionable whether laws and records such as the birth certificate should be changed and thereby used as a means to help psychologically ill persons in their social adaptation.” *Weiner*, 270 N.Y.S.2d at 322.

124. *See, e.g.,* Hispanic AIDS Forum v. Estate of Bruno, 792 N.Y.S.2d 43, 46 (App. Div. 2005) (explaining how other tenants complained about “‘men who think they’re women . . . using the women’s bathroom” (quoting Amended Verified Complaint, Hispanic AIDS Forum v. Estate of Bruno, 792 N.Y.S.2d 43 (App. Div. 2005) (No. 112428/2001))).

125. *See, e.g.,* Corbett v. Corbett, (No.1), [1971] P. 83, 107–8 (Eng.) (issuing decree of nullity based on incapacity of wife to consummate intercourse because, in the judge’s opinion, “intercourse, using the completely artificial cavity . . . , can [not] possibly be described . . . as ‘ordinary and complete intercourse’”).

126. For example, in *Littleton v. Prange*, “Judge Hardberger states ‘through surgery and hormones, a transsexual male can be made to look like a woman.’” *In re Marriage of Kantaras v. Kantaras*, Case No. 98-5375CA, at 610 (Fla. Cir. Ct. Feb. 21, 2003), *available at* <http://www.transgenderlaw.org/cases/kantarasopinion.pdf> (quoting *Littleton v. Prange*, 9 S.W.3d 223, 230 (Tex. App. 1999)). However, “[t]hat is the departure point. He does not accept that female genitalia and breasts alone constitute a reconstituted female. He wants the male reconstruct to provide a ‘womb,

horror”<sup>127</sup> of courts’ inability to accept and validate transgender people as full human beings is the courts’ failure to embrace the medical understanding of sex, which gives primacy to gender identity when weighing the factors of sex.

*A. Courts Have Used Dehumanizing and Inconsistent Methods of Determining Sex That Are Contrary to Medical Authority*

1. Marriage/Custody Context

In the past, courts have used a variety of approaches to determine a person’s legal sex that have been inconsistent with, and at times, contrary to the latest understandings of medical science—with harmful and degrading results.<sup>128</sup> In the marriage context, for example, courts have used an “essentialist approach [where] sex is immutable and fixed at birth,” rather than multifaceted.<sup>129</sup> Using this fixed-determination theory,<sup>130</sup> courts have concluded that sex is determined by a person’s genitals, or sometimes chromosomes, and that no matter what one does to one’s body,<sup>131</sup> one can never alter one’s originally assigned sex.<sup>132</sup>

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cervix and ovaries.’ Anything short of that is a male ‘look alike.’ He also wants the chromosomes to change from XY to XX. Anything short of these changes is just ‘make believe.’” *Id.* (emphasis added) (quoting *Littleton*, 9 S.W.3d at 230). The idea that transgender people do not exist is reflected in current social dialogue, for example the author’s favorite comment on a video about transgender voting rights: “I don’t believe transgender people exist. They are a myth, like unicorns.” *What’s It Like to Vote as a Transgender Person?*, DAILY BEAST (Nov. 2, 2012), <http://www.thedailybeast.com/videos/2012/11/02/what-s-it-like-to-vote-as-a-transgender-person.html>.

127. See *supra* note 103.

128. Greenberg & Herald, *supra* note 36, at 832–33.

129. Flynn, *supra* note 117, at 33.

130. Green classifies this line of case law as the “determinism” strain and explains that the “[determinism] strain privileges the opinions of observers and assumptions about biological ‘normalcy’” and “seek[s] evidence of physical proof of sex and gender”. Green, *supra* note 15, at 61–63.

131. See Greenberg & Herald, *supra* note 36, at 840–41; see, e.g., *Littleton v. Prange*, 9 S.W.3d 223, 231 (Tex. App. 1999) (“Some physicians would consider Christie a female; other physicians would consider her still a male. Her female anatomy, however, is all man-made. The body that Christie inhabits is a male body in all aspects other than what the physicians have supplied.”).

132. See Flynn, *supra* note 117, at 37 (discussing how courts generally use a “‘body-parts’ checklist” to determine an individual’s legal sex and “[i]n adhering to the view of sex as genitalia-at-birth, the majority of courts simultaneously ‘de-sex’ and hypersexualize trans men and women”); Greenberg & Herald, *supra* note 36, at 832–36 (discussing case law, beginning with *Corbett*, that concludes “an individual’s ‘true sex’” is determined by “chromosomal pattern, gonadal sex, and genitalia” (footnote omitted)).

The defining case for the notion that sex is fixed at birth was the 1970 English case, *Corbett v. Corbett*.<sup>133</sup> In *Corbett*, the court would not consider the gender identity, or even medical interventions, of the transgender litigant, April Ashley Corbett.<sup>134</sup> Instead, the court used dehumanizing language to refer to Ms. Corbett's body, finding that surgical intervention created "artificial" sex attributes.<sup>135</sup> Even though the court was presented with expert medical testimony as to the nature of transsexualism, including testimony about how transsexualism can be considered an intersex condition and the existence of a "male or female brain," the court determined "that the biological sexual constitution of an individual is fixed at birth (at the latest), and cannot be changed, either by the natural development of organs of the opposite sex, or by medical or surgical means."<sup>136</sup>

Though U.S. courts are not bound by court decisions of other countries, they relied almost without exception on the *Corbett* reasoning and other "determinism" approaches,<sup>137</sup> rather than the scientific literature other countries were beginning to consider.<sup>138</sup> The U.S. courts embraced what

133. *Corbett v. Corbett* (No.1), [1971] P. 83, 104 (U.K.). For a discussion of the *Corbett* decision and its impact, see Green, *supra* note 15, at 37–41, and Greenberg & Herald, *supra* note 36, at 833–35.

134. *Corbett*, [1971] P. at 104. In an interview, Ms. Corbett described her experience of aligning her body with her gender identity: "I hope that everybody at one point in their lives knows the happiness I felt the day after the operation because suddenly my whole mind was in line with my body, and the joy I felt was unbelievable. And to this day I still feel that joy." LiverpoolGayScene.com, *An Evening With April Ashley at the Southbank Centre, Part 1 of 2*, YOUTUBE (Apr. 30, 2009), <https://www.youtube.com/watch?v=lJkXfawJRTk>.

135. *Corbett*, [1971] P. at 107.

136. *Id.* at 104.

137. Green, *supra* note 15, at 64; Greenberg & Herald, *supra* note 36, at 833–36; see, e.g., Littleton v. Prange, 9 S.W.3d 223, 226–231 (Tex. App. 1999) (discussing *Corbett* and cases following *Corbett*, and holding that transgender woman was a male "as a matter of law"); *In re Marriage of Kantaras v. Kantaras*, Case No. 98-5375CA, at 587 (Fla. Cir. Ct. Feb. 21, 2003), available at <http://www.transgenderlaw.org/cases/kantarasopinion.pdf> ("[In *Lim Ying v. Hiok Kian Ming Erie*, the judge] chose to follow *Corbett*, and he said: . . . 'A person biologically a female with an artificial penis, after surgery and psychologically a male, must, for purposes of contracting a monogamous marriage of one man and one woman, . . . be as a "woman."'" (quoting *Lim Ying v. Hiok Kian Ming Erie*, 1 SLR 184, 194 (1992))). *But see* M.T. v. J.T., 355 A.2d 204, 210–11 (N.J. Super. Ct. App. Div. 1976) ("If such sex reassignment surgery is successful and the postoperative transsexual is . . . thereby possessed of the full capacity to function sexually as a male or female, as the case may be, we perceive no legal barrier, cognizable social taboo, or reason grounded in public policy to prevent that person's identification at least for purposes of marriage to the sex finally indicated."); Julie Greenberg, *Legal Aspects of Gender Assignment*, 13 ENDOCRINOLOGIST 277, 281 (2003) (discussing the 1997 decision *Vecchione v Vecchione* (no written opinion) where California trial "court held that a postoperative transsexual acquires his postoperative sex for purposes of marriage").

138. During the same time, other courts affirmed the emerging scientific model in Australia, New Zealand, and the European Court of Human Rights while the United States lagged behind.

Greenberg and Herald call a “kaleidoscope of approaches”<sup>139</sup> for determining sex, including the ability to have children,<sup>140</sup> religious rhetoric,<sup>141</sup> “public policy against same-sex marriages,”<sup>142</sup> the plain meaning rule,<sup>143</sup> chromosomes,<sup>144</sup> and Webster’s dictionary,<sup>145</sup> all of which robbed transgender people of their dignity, and at times their families.<sup>146</sup>

In England, *Corbett’s* legacy lasted an unfortunate thirty-five years, until in 2004, Parliament adopted the Gender Recognition Act. This law gives credence to gender identity for all purposes of determining sex.<sup>147</sup> The *Corbett* reasoning, however, took hold in the United States, and its impact continues to linger in some U.S. courts, even though it has now been completely overruled in its country of origin. Noting the impact of this case and its legacy in the United States, Dr. Green writes:

This desire to pin, cement, or stabilize sex, based on a narrow view of human experience has damaged the lives of countless transsexual and other sex and gender-variant people by denying

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Greenberg & Herald, *supra* note 36, at 833; *see also* Greenberg, *Roads Less Traveled*, *supra* note 17, 65–66.

139. Greenberg & Herald, *supra* note 36, at 822.

140. *Id.* (citing *In re Estate of Gardiner*, 42 P.3d 120, 135 (Kan. 2002)). The *Gardiner* court, concluded that “[f]emale” is defined as ‘designating or of the sex that produces ova and bears offspring: opposed to male.’” *Gardiner*, 42 P.3d at 135; *see also* B. v. B., 355 N.Y.S.2d 712, 717 (Sup. Ct. 1974) (focusing on a trans person’s inability to beget offspring as proper justification to find marriage invalid).

141. Greenberg & Herald, *supra* note 36, at 822 & n.6 (“[C]an 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?” (quoting *Littleton v. Prange*, 9 S.W.3d 223, 224 (Tex. App. 1999))).

142. *Id.* at 865–66 (citing *In re Nash*, Nos. 2002-T-0149, 2002-T-0179, 2003 WL 23097095, at \*6 (Ohio Ct. App. 2003)).

143. *Id.* at 840–41 (citing *Gardiner*, 42 P.3d at 135; *Nash*, 2003 WL 23097095, at \*6). The *Gardiner* court, after discussing dictionary definitions of “sex,” “male,” and “female,” concluded that “the words . . . in everyday understanding do not encompass transsexuals.” *Gardiner*, 42 P.3d at 135.

144. Greenberg & Herald, *supra* note 36, at 833–34 (explaining that state courts initially relied on *Corbett* which determined a person’s sex based on the person’s chromosomes). For example, Greenberg & Herald cite to *In re Ladrach*, which held “that a post-operative male-to-female transsex person still retained male chromosomes and therefore could not marry in the female role because she was still legally a male.” *Id.* at 834 n.73 (citing *In re Ladrach*, 513 N.E.2d 828, 832 (Ohio Prob. 1987)).

145. *Id.* at 833; *see, e.g., In re Marriage of Kantaras v. Kantaras*, No. 98-5375CA, at 667–69 (Fla. Cir. Ct. Feb. 21, 2003), *available at* <http://www.transgenderlaw.org/cases/kantarasopinion.pdf>.

146. Courts used degrading and de-humanizing language to refer to transgender people’s bodies, all of which is public record. *See, e.g., Kantaras*, No. 98-5375CA, at 558 (discussing *Corbett’s* conclusion that transsexual people’s sexual organs are incapable of “ordinary and complete” sexual intercourse and are “the reverse of ordinary, and in no sense ‘natural’”); *Gardiner*, 42 P.3d at 135 (“A male-to-female post-operative transsexual does not fit the definition of a female.”); *Littleton v. Prange*, 9 S.W.3d 223, 231 (Tex. App. 1999) (“The body that Christie inhabits is a male body in all aspects other than what the physicians have supplied.”).

147. Greenberg & Herald, *supra* note 36, at 838–39 (citing Gender Recognition Act, (2004) c. 7 (Eng.)).

them any possibility of personal development, self-discovery, or access to medical technologies that might permit them to live full lives.<sup>148</sup>

Interestingly, Greenberg and Herald point out that the lower courts in *Kantaras v. Kantaras* (Florida trial court)<sup>149</sup> and *In re Estate of Gardiner* (Kansas Court of Appeals)<sup>150</sup> “conducted a thorough review of the [latest] medical and legal literature on transsexualism,”<sup>151</sup> which included “well-substantiated medical information about the diversity of biological variations in sex.”<sup>152</sup> Specifically, the courts were offered evidence “refuting the rigid binary of exclusive male and female categories” that “can be objectively detected by observation at the moment of birth . . . and the assumption that chromosomes always comport with genital configuration, both significant premises in the *Corbett* reasoning.”<sup>153</sup> After reviewing the evidence, the *Gardiner* court “rejected the earlier decisions as ‘a rigid and simplistic approach to issues that are far more complex than addressed.’”<sup>154</sup>

However, the court of appeals reversed the trial court’s decision, which had relied entirely upon the record, and instead relied upon Webster’s New Twentieth Century Dictionary and Black’s Law Dictionary<sup>155</sup> to define “male” as “designating or of the sex that fertilizes the ovum and begets offspring: opposed to *female*” and “female” as “designating or of the sex that produces ova and bears offspring: opposed to *male*.”<sup>156</sup> The court of appeals stated: “The plain, ordinary meaning of ‘persons of the opposite sex’ contemplates a *biological* man and a *biological* woman and not persons who are experiencing gender dysphoria.”<sup>157</sup>

148. Green, *supra* note 15, at 40–41.

149. *Kantaras*, No. 98-5375CA.

150. *In re Estate of Gardiner*, 22 P.3d 1086 (Ct. App. Kan. 2001).

151. Greenberg & Herald, *supra* note 36, at 840; see *Kantaras*, No. 98-5375CA, at 266–97 (discussing testimony of medical expert Dr. Bockting and his expert opinion that “‘there are other variations in between (male and female) – some of them will result in ambiguous genitalia at birth and others go undetected until maybe some of them may come out in puberty’”). Importantly, the court in *Gardiner* relied upon Greenberg’s article, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*. *Gardiner*, 22 P.3d at 1094–1100 (Ct. App. Kan. 2001) (quoting Greenberg, *Defining Male and Female*, *supra* note 37, at 278–92).

152. Green, *supra* note 15, at 54–55 (describing Greenberg article relied on in *Gardiner*).

153. *Id.*

154. Greenberg & Herald, *supra* note 36, at 840 (quoting *Gardiner*, 22 P.3d at 1110).

155. See *In re Estate of Gardiner*, 42 P.3d 120, 135 (Kan. 2002).

156. Greenberg & Herald, *supra* note 37, at 841 (quoting *Gardiner*, 42 P.3d at 135 (quoting WEBSTER’S NEW TWENTIETH CENTURY DICTIONARY (2d. ed. 1970))) (internal quotation marks omitted).

157. *Gardiner*, 42 P.3d at 135 (emphasis added).

Similarly in *Kantaras*, the lower court was presented with an array of evidence, including: expert testimony regarding gender identity as innate, fixed, and the most critical factor that contributes to sex determination, as opposed to genital characteristics; expert testimony of the treatment for gender dysphoria according to the established Standards of Care; expert testimony that “it would not be medically ethical to require specific surgical procedures to recognize male social status”; and additional testimony that “the steps of legally changing one’s name and birth certificate are indicative of the medical and social authenticity of a [gender] change which [courts] should recognize as valid.”<sup>158</sup> During the three-week custody trial, which was broadcast on Court TV, the court applied what Flynn calls a “‘body-parts’ checklist” to “meticulously scrutinize[] a litigant’s sexual anatomy and compare[] its various features to a presumed [cisgender] norm.”<sup>159</sup> The court went into intimate detail about Mr. Kantaras’s body, evaluating whether his penis should be deemed sufficient to enable penetration and asking him to describe his body, how he has sex, and how he urinates,<sup>160</sup> all for a marriage validity and custody determination. The lower court gave weight to the medical evidence and found that Mr. Kantaras was sufficiently male for purposes of marriage in Florida, but the Florida Supreme Court reversed:

We agree with the Kansas, Ohio, and Texas courts in their understanding of the common meaning of male and female, as those terms are used statutorily, to refer to immutable traits determined at birth. Therefore, we also conclude that the trial court erred by declaring that Michael is male for the purpose of the marriage statutes. Whether advances in medical science support a change in the meaning commonly attributed to the terms male and female as they are used in the Florida marriage statutes is a question that raises issues of public policy that should be addressed by the legislature.<sup>161</sup>

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158. Green, *supra* note 15, at 78–79; *see also Kantaras*, No. 98-5375CA, at 266–97. According to Green, “[*Kantaras*] is important here because it laid the groundwork for progress by consolidating all the past arguments and focusing on contemporary medical opinion.” Green, *supra* note 16, at 57.

159. Flynn, *supra* note 117, at 37; *see also Kantaras*, No. 98-5375CA, 51–55. Green states that, “*Kantaras* is a particularly rich case, not for its persuasive decisions, but for the unusual cultural setting imposed by the media presence and by the influence of fundamentalist religion in the appeal process.” Green, *supra* note 15, at 57.

160. Flynn, *supra* note 117, at 38 (discussing how *Kantaras* trial “was devoted almost entirely to a single issue: whether Michael has a penis deemed sufficient for penetration”); *see also Kantaras*, No. 98-5375CA, at 51–55.

161. *Kantaras v. Kantaras*, 884 So. 2d 155, 161 (Dist. Ct. App. Fla. 2004).

In the marriage and custody context, transgender litigants often must undergo a barrage of intrusive inquiries about their bodies, their medical histories and their sex lives in cases where these questions have nothing to do with their parenting ability.<sup>162</sup> The courts, using cisgender bodies as a presumed norm, de-humanize transgender and intersex bodies.<sup>163</sup> “Trans women and men thus must participate in a system that robs them of dignity and privacy to protect the most precious and personal aspects of their lives.”<sup>164</sup> Similarly, when seeking protections under discrimination laws, particularly in the workplace context, courts have historically treated transgender litigants’ claims as somehow separate and undeserving of the law’s promises of formal justice.

## 2. Discrimination Context

Although it may seem obvious that an employer’s decision to fire an employee based on gender transition could not be anything other than discrimination based on sex,<sup>165</sup> early judicial opinions involving Title VII of the federal Civil Rights Act of 1964 excluded transgender people from the concept of “sex.” Courts in the 1970s and 1980s deemed transgender people as legally nonexistent—not a man or a woman.<sup>166</sup> Courts repeatedly

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162. See, e.g., Flynn, *supra* note 117, at 38 (“The *Kantaras* court, in essence, was asking Michael whether he was ‘man enough’ to be a father to his children.”); E-mail from Michael Kantaras to M. Dru Levasseur, Transgender Rights Project Nat’l Dir., Lambda Legal (Jan. 25, 2015) (on file with author (“The only reason I was able to endure that horrendous court proceeding was because I loved my kids and I didn’t want to lose them. I couldn’t give up on them.”)).

163. See JULIA SERANO, WHIPPING GIRL 13 (2007) (“While often different in practice, cissexism, transphobia, and homophobia are all rooted in *oppositional sexism*, which is the belief that female and male are rigid, mutually exclusive categories, each possessing a unique and nonoverlapping set of attributes, aptitudes, abilities, and desires. Oppositional sexists attempt to punish or dismiss those of us who fall outside of gender or sexual norms because our existence threatens the idea that women and men are ‘opposite’ sexes.”); see also Noah Lewis, Making Cisness Visible: Naming the Hidden Cis Ideals that Shape Trans Lives, Presentation at the Eighth Annual Transgender Lives Conference (Apr. 26, 2014) (PowerPoint on file with author) (“Cis[gender] supremacy [is a] political, economic and cultural system in which cis[gender] people control power and material resources, conscious and unconscious ideas of cis[gender] superiority and entitlement are widespread, and relations of cis[gender] dominance and trans subordination are daily reenacted across a broad array of institutions and social settings.”).

164. Flynn, *supra* note 117, at 38.

165. Cf. Glenn v. Brumby, 663 F.3d 1312, 1316 (11th Cir. 2011) (“A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes. ‘[T]he very acts that define transgender people as transgender are those that contradict stereotypes of gender-appropriate appearance and behavior.’” (alteration in original) (quoting Ilona M. Turner, *Sex Stereotyping Per Se: Transgender Employees and Title VII*, 95 CALIF. L. REV. 561, 563 (2007))).

166. See, e.g., Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1085 (7th Cir. 1984) (reasoning that statute’s legislative history “clearly indicates that Congress never considered nor intended that [Title VII] apply to anything other than the traditional concept of sex”), *rev’g* 581 F. Supp. 821 (N.D. Ill.

rejected claims of sex discrimination by transgender people on the grounds that “Congress had a narrow view of sex in mind” when it added sex to Title VII and it did not “believe[] that transsexuals should *enjoy* the protection of Title VII.”<sup>167</sup> In doing so, courts revealed a deep lack of understanding of who transgender people are, dismissing the experience as a choice or personal belief, and referring to the litigants’ bodies as “surgically altered” for appearance’s sake.<sup>168</sup>

For example, in *Holloway v. Arthur Anderson & Co.*, the Ninth Circuit held that Holloway, a transgender woman who was fired when she transitioned on the job, was not discriminated against “because she is male or female, but rather because she is a transsexual who *chose* to change her sex.”<sup>169</sup> Similarly, in *Ulane v. Eastern Airlines, Inc.*, the Seventh Circuit held that a transgender woman, fired from her job as an airline pilot because she transitioned, failed to state a viable claim of sex discrimination under Title VII.<sup>170</sup> In dismissing her claim, the court provided a graphic example of the level of disrespect toward transgender plaintiffs bringing Title VII claims at the time:

Ulane is entitled to any personal belief about her sexual identity she desires. . . . But even if one believes that a woman can be so easily created from what remains of a man, that does not decide this case. . . . [I]f Eastern did discriminate against Ulane, it was not because she is female, but because Ulane is a transsexual—a biological male who takes female hormones, cross-dresses, and has surgically altered parts of her body to make it appear to be female.<sup>171</sup>

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1983); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982) (“[E]ven medical experts disagree as to whether Sommers is properly classified as male or female.”); *cf.* Green, *supra* note 15, at 71 (“Most Americans do not consider, say, a male transsexual, even following conversion, to be a woman.’ . . . The fact that the effort is ‘painful, time-consuming, expensive—and irreversible’ mitigates transsexualism somehow, but does not fully redeem it, nor does it entitle the transsexual body to the status or privileges granted to either a female or a male body.” (quoting POSNER, *supra* note 103, at 27)).

167. *Ulane*, 742 F.2d at 1086 (emphasis added); *see also Sommers*, 667 F.2d at 750 (noting that there is no evidence that transsexuals should be included in Title VII claims in the “legislative history”); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662 (9th Cir. 1977) (holding that Title VII does not protect against transgender employment discrimination because “Congress had only the traditional notions of ‘sex’ in mind” when passing the law).

168. *See, e.g., Ulane*, 742 F.2d at 1087 (“Ulane is a transsexual—a biological male who takes female hormones, cross-dresses, and has surgically altered parts of her body to make it appear to be female.” (footnote omitted)); *Holloway*, 566 F.2d at 664 (referring to the process of “sex change surgery” as “a transsexual individual’s decision”).

169. *Holloway*, 566 F.2d at 664 (emphasis added).

170. *Ulane*, 742 F.2d at 1087.

171. *Id.* at 1087.

Just as lower courts in the marriage and custody cases tended to pay deference to medical experts' views of sex and find for the transgender litigant, only to be overturned by the appeals court, the district court in *Ulane* had held:

[S]ex is not a cut-and-dried matter of chromosomes, and . . . that the term, "sex," as used in any scientific sense and as used in the statute can be and should be reasonably interpreted to include among its denotations the question of sexual identity and that, therefore, transsexuals are protected by Title VII.<sup>172</sup>

The U.S. Supreme Court's expansion of the interpretation of the term "sex" in both the 1989 *Price Waterhouse* decision (sex stereotyping)<sup>173</sup> and the 1998 *Oncale* decision (same-sex sexual harassment)<sup>174</sup> extended the reach of Title VII and state nondiscrimination laws for transgender people, as did the erosion of the Court's distinction between the terms "sex" and "gender."<sup>175</sup> The exclusion of transgender people from the meaning of sex under Title VII was rooted in a distinction between *sex* as a fundamental "biological truth" and *gender* as a psychological, expressive self-identity.<sup>176</sup> A handful of courts recognized that sex was, perhaps, not clear-cut, easy to measure, or somehow distinct from self-identity.<sup>177</sup> But, in the

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172. *Ulane v. E. Airlines, Inc.*, 581 F. Supp. 821, 825 (N.D. Ill. 1983), *rev'd*, 742 F.2d 1081 (1984).

173. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989) (collapsing the distinction between sex and gender for purposes of Title VII).

174. See *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 79 (1998) ("[M]ale-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.").

175. Mottet, *supra* note 66, at 387 n.44 ("[T]he Supreme Court uses both terms [*sex* and *gender*] in its jurisprudence relating to women's constitutional rights and Congress also has used both *sex* and *gender* in different civil rights statutes, while not intending a different meaning."); see also Schwenk v. Hartford, 204 F.3d 1187, 1202 (9th Cir. 2000) ("Indeed, for purposes of [Title VII and the Gender Motivated Violence Act], the terms 'sex' and 'gender' have become interchangeable."); Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 4 (1995) (explaining that Title VII, if applied correctly, protects from discrimination based on both sex and gender identity). For the history regarding Supreme Court Justice Ruth Bader Ginsburg, see Green, *supra* note 15, at 67–68.

176. For an overview of the practical consequences and harms of separating sex and gender, see Weiss, *supra* note 99, at 610–14, and Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 1–4 (1995). According to Weiss, "[l]aw cannot effectively battle sex discrimination while it persists in privileging biological anatomy, and it is the insistence that gender is unrelated to sex that permits that privileging." Weiss, *supra* note 99, at 613.

177. See cases cited *supra* note 32.

discrimination context, the conflation of “sex” and “gender” allowed courts leeway to generally avoid examining what sex means where sex could simply be seen as the motivating factor behind the unlawful conduct.<sup>178</sup>

Transgender people started to “enjoy”<sup>179</sup> protections in the workplace under Title VII in 2004, when the Sixth Circuit, in *Smith* overruled a trial court decision to dismiss the complaint of a transgender woman who claimed discrimination based on failing to conform to sex stereotypes.<sup>180</sup> The Sixth Circuit relied on *Price Waterhouse*, which held that an employee had an actionable sex discrimination claim under Title VII when her employer refused to propose her for partnership based on a perceived failure to conform to sex stereotypes, and “noted that ‘ . . . a label such as ‘transsexual,’ is not fatal to a sex discrimination claim.’”<sup>181</sup>

Although the *Price Waterhouse* sex stereotyping theory was successful in providing transgender litigants protection under Title VII where they could prove discrimination for failure to conform to sex stereotypes, it was

178. See *Schwenk*, 204 F.3d at 1201–02 (applying the Title VII framework of “sex” to the definition of “gender” in the Gender Motivated Violence Act and stating “what matters, for purposes of . . . the *Price Waterhouse* analysis, is that in the mind of the perpetrator the discrimination is related to the sex of the victim”); Sharon M. McGowan, *Working with Clients to Develop Compatible Visions of What It Means to “Win” a Case: Reflections on Schroer v. Billington*, HARV. C.R.-C.L. L. REV. 205, 229 (2011) (analyzing *Schroer* in an attempt to differentiate between “sex” and “gender”).

179. See *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1086 (7th Cir. 1984) (“If Congress believes that transsexuals should *enjoy* the protection of Title VII, it may so provide.” (emphasis added)).

180. See McGowan, *supra* note 178, at 210 (citing *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004)). Following *Smith*, a number of courts held that transgender individuals are protected by anti-discrimination statutes. See, e.g., *Barnes v. City of Cincinnati*, 401 F.3d 729, 737–38 (6th Cir. 2005) (holding that transgender police officer was member of protected class by alleging discrimination against plaintiff for failure to conform to sex stereotypes); *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 215–16 (1st Cir. 2000) (holding male in traditionally feminine attire could bring action against bank that refused him service because of his attire under antidiscrimination statutes based on sex discrimination); *Creed v. Family Express Corp.*, No. 3:06-CV-465RM, 2009 WL 35237, at \*6 (N.D. Ind. Jan. 5, 2009) (“Sex stereotyping based on a person’s gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior. . . .” (quoting *Smith*, 378 F.3d at 575)); *Lopez v. River Oaks Imaging & Diagnostics Grp., Inc.* 542 F. Supp. 2d 653, 660 (S.D. Tex. 2008) (“Lopez’s ‘transsexuality is not a bar to her sex stereotyping claim. Title VII is violated when an employer discriminates against any employee, transsexual or not, because he or she has failed to act or appear sufficiently masculine or feminine enough for an employer.” (citing *Schroer v. Billington*, 525 F.Supp.2d 58, 63 (D.D.C. 2007)); *Schroer v. Billington*, 424 F. Supp. 2d 203 (D.D.C. 2006) (denying a motion to dismiss *Schroer*’s claim that the Library of Congress refused to hire her based on her sexual identity); *Mitchell v. Axcan Scandipharm, Inc.* No. 05-243, 2006 WL 456173, at \*2 (W.D. Pa. Feb. 17, 2006) (“Having included facts showing that his failure to conform to sex stereotypes of how a man should look and behave was the catalyst behind defendant’s actions, plaintiff has sufficiently pleaded claims of gender discrimination.”); *Tronetti v. TLC HealthNet Lakeshore Hosp.*, No. 03-CV-0375E(SC), 2003 WL 22757935, at \*4 (W.D.N.Y. Sept. 26, 2003) (holding *Tronetti*’s claim that was discriminated against for not acting like a man was properly asserted under Title VII).

181. McGowan, *supra* note 178, at 210–11 (quoting *Smith*, 378 F.3d at 575 (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250–51)).

less effective where a transgender person was gender-conforming and the adverse employment action was based solely on the idea of gender transition itself, as in the 2008 case *Schroer v. Billington*.<sup>182</sup> In *Schroer*, the court recognized that discrimination against individuals because they have transitioned from one gender to another is just as much sex discrimination as it would be *religious* discrimination to penalize someone for converting from one religion to another.<sup>183</sup> The “conversion theory” of *Schroer* helped expand the scope of Title VII protections so that transgender litigants could fight discrimination where gender transition itself was targeted.

Then, in 2011, the Eleventh Circuit applied Title VII sex stereotyping and conversion theories to an equal protection claim on behalf of a transgender woman fired after informing her employer, the Georgia State Assembly, that she intended to transition.<sup>184</sup> Tying it all together, the court explained: “A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes . . . . Accordingly, discrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it’s described as being on the basis of sex or gender.”<sup>185</sup> The following year, the Equal Employment Opportunity Commission (“EEOC”)

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182. In her article, McGowan, the attorney for the transgender litigant in *Schroer*, discusses the tension of weighing the need to respect her client’s identity as a transgender woman against the need to bring a strong claim under Title VII where the case law prior to that point was generally limited to sex stereotyping claims. See McGowan, *supra* note 178, at 205, 212 (quoting Diane Schroer, saying, “I haven’t gone through all this only to have a court vindicate my rights as a gender non-conforming man” and explaining “[i]t felt as though we would be disavowing Ms. Schroer’s identity as a woman, and accepting society’s discriminatory conception that transgender women are just men who want to dress as women”).

183. *Schroer*, 424 F. Supp. 2d at 212 (“[D]iscrimination against transsexuals *because they are transsexuals* is ‘literally’ discrimination ‘because of . . . sex.’” (quoting *Ulane v. E. Airlines, Inc.*, 581 F. Supp. 821, 825 (N.D. Ill. 1983)); see also *Rentos v. OCE-Office Sys.*, No. 95 CIV. 7908 LAP., 1996 WL 737215, at \*1–2, \*8–9 (S.D.N.Y. Dec. 24, 1996) (citing Amended Complaint at ¶¶ 6–19, *Rentos v. OCE-Office Sys.*, No. 95 CIV. 7908 LAP., 1996 WL 737215 (S.D.N.Y. Dec. 24, 1996); *Maffei v. Kolaeton Indus., Inc.*, 626 N.Y.S.2d 391 (Sup. Ct. 1995)) (finding that plaintiff had adequately alleged a protected status under New York employment discrimination law when she suffered adverse employment actions as a result of her transition from male to female); *Maffei v. Kolaeton Indus.*, 626 N.Y.S.2d 391, 396 (N.Y. Sup. Ct. 1995) (“[T]he creation of a hostile work environment as a result of derogatory comments relating to the fact that as a result of an operation an employee changed his or her sexual status, creates discrimination based on ‘sex,’ just as would comments based on the secondary sexual characteristics of a person.”).

184. *Glenn v. Brumby*, 663 F.3d 1312, 1314, 1316–17 (11th Cir. 2011).

185. *Id.* at 1316–17 (“[T]he very acts that define transgender people as transgender are those that contradict stereotypes of gender-appropriate appearance and behavior.” (quoting Turner, *supra* note 166, at 563) (internal quotation marks omitted)); see also Taylor Flynn, *Transforming the Debate: Why We Need to Include Transgender Rights in the Struggles for Sex and Sexual Orientation Equality*, 101 COLUM. L. REV. 392, 392 (2001) (defining transgender persons as those whose “appearance, behavior, or other personal characteristics differ from traditional gender norms”).

issued the *Macy v. Holder* decision, clarifying that “intentional discrimination against a transgender individual because that person is transgender is, by definition, discrimination ‘based on . . . sex,’ and such discrimination therefore violates Title VII.”<sup>186</sup> While these developments in Title VII jurisprudence provided a new opportunity for transgender people to seek protections from discrimination in the workplace, the limits of the sex stereotyping and conversion theories began to emerge.

*B. Limits to Sex-Stereotyping and Conversion Theories:  
The “Biological Sex” Misnomer*

While these cases cleared the path for transgender people to bring claims of sex discrimination under civil rights law, neither the *Price Waterhouse* sex stereotyping theory nor the *Schroer* conversion theory addressed the full range of discrimination that transgender people face in the workplace and beyond.<sup>187</sup> Courts were reticent to interpret sex discrimination against transgender people as a “per se” violation of Title VII.<sup>188</sup> Without a firm understanding of gender identity as the core determinant of sex,<sup>189</sup> courts carved out a new exception, this time in the realm of single-sex restrooms.<sup>190</sup> Although courts have found it can be unlawful to not hire or to fire someone on the basis of their gender identity, they have somehow simultaneously found it can be lawful to deny someone use of the restroom that matches their gender identity. When it comes to interpreting sex in the discrimination context, many courts have reverted back to the notion of sex as a biologically fixed truth, determined by genital characteristics,<sup>191</sup> and somehow separate from core gender identity.<sup>192</sup> As

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186. *Macy v. Holder*, EEOC Appeal No. 0120120821, at 14 (Apr. 20, 2012), available at <http://www.pcc.edu/programs/paralegal/documents/macy-v-holder.pdf>.

187. *Cf. McGowan*, *supra* note 178, at 219 (“Although sex stereotyping was a sound theory for our Title VII claim, we had lingering concerns that a court viewing transgender issues only through this lens might not gain a sufficient understanding of what it meant to be transgender.”).

188. *See, e.g., Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1224 (10th Cir. 2007) (noting that a “per se” claim under Title VII cannot be made based solely on an employer’s restroom policies); *Goins v. W. Grp.*, 635 N.W.2d 717, 725 (Minn. 2011) (holding that an employer’s designation of restroom use “based solely on biological gender” was not a “prima facie” case of employment discrimination).

189. *See McGowan*, *supra* note 178, at 219 (discussing concern while working on *Schroer* case that the court would not understand what gender identity meant).

190. *See, e.g., Etsitty*, 502 F.3d at 1225 (noting that employers do not handicap employees based on their sex by asking that they use single-sex restrooms); *Goins*, 635 N.W.2d at 725–26 (stating that an employer’s policy of designating bathrooms according to biological gender does not justify hostile work discrimination claims based on sexual orientation).

191. *See Green*, *supra* note 15, at 78 (“Visible external genitalia, presumed chromosomal make-up, and presumed reproductive capacity are viewed as primal, objective, fixed, and ‘true’ . . .”).

Sharon McGowan points out, even in jurisdictions with explicit protections on the basis of gender identity,<sup>193</sup> “courts have *sua sponte* crafted exceptions to these laws with respect to gender-segregated facilities such as restrooms.”<sup>194</sup>

For example, in the 2001 *Corbett v. Corbett*<sup>195</sup> of bathroom cases, *Goins v. West Group*, the court distinguished “biological gender” from gender identity (or, in the court’s words, “self-image of gender”),<sup>196</sup> ironically in Minnesota, the first state to pass an explicit “gender identity” nondiscrimination law in 1993.<sup>197</sup> In *Goins*, a transgender woman sued her employer when it refused to allow her to use the women’s restroom at work.<sup>198</sup> With little analysis, the court stated that the legislature could not have intended to upset what it termed “the cultural preference for restroom designation based on biological gender.”<sup>199</sup>

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192. See, e.g., *Etsitty*, 502 F.3d at 1222 (“[T]here is nothing in the record to support the conclusion that the plain meaning of ‘sex’ encompasses anything more than male and female. In light of the traditional binary conception of sex, transsexuals may not claim protection under Title VII from discrimination based solely on their status as a transsexual. Rather, like all other employees, such protection extends to transsexual employees only if they are discriminated against because they are male or because they are female.”).

193. Eighteen states, the District of Columbia, and over 140 jurisdictions have laws and ordinances that explicitly prohibit discrimination on the basis of gender identity. *Non-Discrimination Laws*, TRANSGENDER LAW CENTER, <http://transgenderlawcenter.org/equalitymap> (follow “State Non-Discrimination Laws” hyperlink; then click on “Table Format” tab) (last visited Apr. 14, 2015).

194. McGowan, *supra* note 178, at 240.

195. *Corbett* was a similar case where the court deeply misunderstood transgender people, and the precedent left a lasting effect on the lives of transgender Americans. See *Corbett v. Corbett* (No. 1), [1971] P. 83, 104 (U.K.).

196. See *Goins v. W. Grp.*, 635 N.W.2d 717, 723–25 (Minn. 2011).

197. DANA BEYER, JILLIAN T. WEISS & RIKI WILCHINS, NEW TITLE VII AND EEOC RULINGS PROTECT TRANSGENDER EMPLOYEES 4 (2014), available at <http://transgenderlawcenter.org/wp-content/uploads/2014/01/TitleVII-Report-Final012414.pdf>; see also McGowan, *supra* note 178, at 240 & n.143 (quoting and citing MINN. STAT. ANN. § 363A.03(44) (West 2009)) (discussing inclusion of “gender identity” within Minnesota’s nondiscrimination law).

198. *Goins*, 635 N.W.2d at 720.

199. *Id.* at 723. For a discussion of how civil rights movements always play out in the restroom, see Brief of Appellant Me. Human Rights Comm’n at 15, *Doe v. Clenchy*, 2014 ME 11, 86 A.3d 500 (No. PEN-12-582), 2013 WL 8351143, available at <https://www.glad.org/uploads/docs/cases/doe-v-clenchy/2013-03-14-doe-v-clenchy-mhrc-brief.pdf> (“[T]he court in *Goins* provided no analysis of the language in the statute, noting simply that bathrooms have historically been segregated by sex and the statute is not express. The same could be said for racial segregation leading up to the passage of the Title VII of the Civil Rights Act 1964. Then, the traditional and accepted practice in parts of the country was to segregate bathrooms and other facilities based on race. Here, as with Title VII, the “traditional and accepted” norms must yield to the requirements of the MHRA.” (citation omitted)), and *Transgender Rights Toolkit: A Legal Guide for Trans People and Their Advocates: Equal Access to Public Restrooms*, LAMBDA LEGAL, [http://www.lambdalegal.org/sites/default/files/publications/downloads/trt\\_equal-access-to-public-restrooms\\_3.pdf](http://www.lambdalegal.org/sites/default/files/publications/downloads/trt_equal-access-to-public-restrooms_3.pdf) (last visited Apr. 14, 2015) (“Bathrooms have played a role in virtually every civil rights movement in the United States.”).

Similarly, in the 2005 case, *Hispanic AIDS Forum v. Estate of Bruno*, the court relied solely on *Goins*, without any independent analysis, in its interpretation of the New York City Human Rights Law, ruling that a nonprofit organization could not pursue a claim for discrimination when a landlord refused to renew a lease based on his objection to the restroom use by transgender clients.<sup>200</sup> The landlord cited complaints from other tenants who allegedly objected to the use of restrooms by “men who think they’re women . . . using the women’s bathroom.”<sup>201</sup> In spite of the explicit gender identity protections the court read into the law, it dismissed the claims, holding that there was no discrimination where the landlord applied the exclusion to everyone on the basis of “their biological sexual assignment.”<sup>202</sup>

In the 2007 case, *Etsitty v. Utah Transit Authority*, a federal court denied a transgender woman’s employment discrimination claim where she was fired from her job as a bus driver.<sup>203</sup> The employer asked Krystal Etsitty “where she was in the sex change process” and whether “she still had male genitalia.”<sup>204</sup> In the absence of any complaint about Ms. Etsitty’s “performance, appearance, or restroom usage,” the employer fired her based solely on a “concern about liability” if she “was observed using the female restroom” and a “concern that [she] would switch back and forth between using male and female restrooms.”<sup>205</sup> The court found this to be a “legitimate, nondiscriminatory reason.”<sup>206</sup> Relying on *Ulane’s* “traditional binary conception of sex,” the court found that a transsexual “may not claim protection . . . based solely on their status as a transsexual.”<sup>207</sup> The court deemed termination for the use of the gender-appropriate restroom nondiscriminatory because the transgender litigant was seen as neither male nor female, and thus, outside the law’s protection on the basis of sex.<sup>208</sup> Ironically, the *Etsitty* court cited cases that discussed the multi-faceted nature of sex and contemplated the biological root of gender identity,<sup>209</sup> yet

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200. See *Hispanic AIDS Forum v. Estate of Bruno*, 792 N.Y.S.2d 43, 47 (App. Div. 2005).

201. McGowan, *supra* note 178, at 241 (internal quotation marks omitted).

202. *Id.* (quoting *Hispanic AIDS Forum*, 792 N.Y.S.2d at 47).

203. *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1218–19 (10th Cir. 2007).

204. *Id.* at 1219.

205. *Id.*

206. *Id.* at 1224.

207. *Id.* at 1222.

208. See *id.* at 1224 (concluding employer’s reason for terminating Ms. Etsitty was permissible because it was unreasonable for the employer to comply with her restroom preferences).

209. *Id.* at 1222 (“Scientific research may someday cause a shift in the plain meaning of the term ‘sex’ so that it extends beyond the two starkly defined categories of male and female.” (citing *Schroer v. Billington*, 424 F. Supp. 2d 203, 212–13 & n.5 (D.D.C. 2006); *Brown v. Zavaras*, 63 F.3d 967, 971 (10th Cir. 1995)).

it failed to grasp that gender identity is a *part* of sex—the core component. Several courts have relied on the flawed reasoning of *Etsitty* to deny gender-appropriate restroom usage for transgender employees.<sup>210</sup> The key to undoing these harms is to update the law with modern medical science.

### III. GENDER IDENTITY IS “BIOLOGICAL” AND THE PRIMARY DETERMINANT OF SEX

#### A. *The Third Theory of Schroer*

The *Schroer* case was groundbreaking in expanding protections for transgender people in the workplace and beyond. The court in *Schroer*, like many trial courts before, reviewed extensive medical testimony on the components of sex but found it unnecessary to rely upon these factors in determining that the litigant had experienced sex discrimination when her job offer was rescinded based on her gender transition.<sup>211</sup> Sharon McGowan, the ACLU lawyer in *Schroer* and, at the time of this Article’s publication, Deputy Chief of the Appellate Section of the Civil Rights Division of the U.S. Department of Justice, analyzes her team’s litigation strategy in her article, *Working with Clients to Develop Compatible Visions of What It Means to “Win” a Case: Reflections on Schroer v. Billington*.<sup>212</sup> In discussing her team’s litigation strategy, McGowan explains that they feared what many transgender litigants face: that the court would have “no familiarity with the concepts of gender identity.”<sup>213</sup>

As McGowan describes, the ACLU’s expert, Dr. Walter Bockting of WPATH, testified that the community of scientific experts:

recognized nine<sup>214</sup> elements that comprised one’s sex:  
chromosomal sex, gonadal sex, fetal hormonal sex (prenatal

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210. See, e.g., *Michaels v. Akal Sec., Inc.*, No. 09-cv-01300-ZLW-CBS, 2010 U.S. Dist. LEXIS 62954, at \*9 (D. Colo. June 24, 2010) (citing *Etsitty* to state that “transsexuals are not a protected class under Title VII,” and holding that “*Etsitty* precludes [a Title VII] claim based solely upon restrictions on Plaintiff’s usage of certain bathrooms”).

211. *Schroer*, 424 F. Supp. 2d at 212–13 (recognizing various scientific components of sexual identity but preferring to focus on a straightforward theory of sex stereotyping and a religious conversion analogy).

212. McGowan, *supra* note 178.

213. *Id.* at 219.

214. While experts agree that there is a range of components that comprise one’s sex, the categories have evolved over time. See, e.g., *In re Heilig*, 816 A.2d 68, 73 (Md. 2003) (citing Greenberg, *Defining Male and Female*, *supra* note 37, at 278; *In re Estate of Gardiner*, 22 P.3d 1086 (2001); *Maffei v. Kolaeton Indus., Inc.*, 626 N.Y.S.2d 391 (Sup. Ct. 1995)) (listing seven factors relevant to the determination of gender); Greenberg & Herald, *supra* note 36, at 825–26 (discussing eight factors that contribute to a person’s sex, including gender identity). Regardless of the total and

hormones produced by the gonads), internal morphologic sex (internal genitalia, i.e., ovaries, uterus, testes), external morphological sex (external genitalia, i.e., penis, clitoris, vulva), hypothalamic sex (i.e., sexual differentiations in brain development and structure), sex of assignment and rearing, pubertal hormonal sex, and gender identity and role.<sup>215</sup>

In his testimony, Bockting agreed with the defendant's expert that one's chromosomes cannot be changed, but pointed out that "scientific study had also concluded that attempts to change one's gender identity have been unsuccessful and in many cases were very harmful to the individual involved."<sup>216</sup>

Accordingly, he testified that, whenever there is a lack of congruence among the various elements of sex, the goal of the gender specialists is to bring the other elements of sex into conformity with one's gender identity, thus confirming the primacy of gender identity relative to the other aspects of sex.<sup>217</sup>

McGowan further notes that Bockting explained that while experts do not yet have a precise biological explanation for gender identity, the "best science available definitively eliminated the possibility that *only* psychosocial influences produce gender identity,<sup>218</sup> and the scientific inquiries underway were looking at *how*, not *whether*, biological forces influence the development of gender identity."<sup>219</sup> The litigation team presented evidence that "gender identity was, in fact, part of one's biological sex, and that a definitive biological etiology was not necessary in order for gender identity to be part of 'sex' as a matter of law."<sup>220</sup> Of note, even the defendant's expert conceded in his testimony that "if and when a

varying language, all agree that gender identity or self-identity is biologically based and a core, immutable factor that should be given primacy for determining sex.

215. McGowan, *supra* note 178, at 234. "For most people, all aspects of sex are in alignment, and therefore a lay person may not necessarily think about all of the component parts of sex when describing themselves as male or female." *Id.* Yet, "[t]he existence of transgender and intersex people . . . demonstrates that there can be a lack of consonance among the various aspects of a person's sex." *Id.*

216. *Id.* at 234–35 (citing Tr. of Bench Trial at 212–12, 445–46, *Schroer v. Billington*, 525 F. Supp. 2d 58 (D.D.C. 2007) (No. 05-1090)).

217. *Id.* at 235 (citing Tr. of Bench Trial at 212–12, 445–46, *Schroer*, 525 F. Supp. 2d 58 (No. 05-1090)).

218. *Id.* at 237 (citing Tr. of Bench Trial at 219–22, *Schroer*, 525 F. Supp. 2d 58 (No. 05-1090)).

219. *Id.* at 237 (emphasis added) (citing Tr. of Bench Trial at 442–43, *Schroer*, 525 F. Supp. 2d 58 (No. 05-1090)).

220. *Id.* at 235.

cause for gender dysphoria is finally identified, it would probably reflect a combination of both *biological* and psychosocial influences.”<sup>221</sup>

In the end, the *Schroer* court did not need to conclude that gender identity is part of a person’s biological sex to reach the groundbreaking ruling that helped define gender transition itself as transgressing sex stereotypes. But, a “biological sex blind spot” remained. In her post-litigation reflections, McGowan questions whether the litigation team “lost an opportunity to secure a legal ruling on [gender identity as a component of sex] that would have been tremendously useful in later advocacy efforts.”<sup>222</sup>

It is important to understand gender identity as both *biological* and *primary* in determining sex. Transgender people continue to suffer indignities and harms in their daily lives by not having their gender identity respected or seen as real.<sup>223</sup> When “gender identity” is separated from “biological sex,” it is the equivalent of stripping a transgender person of legal, medical, and social identity. Thus, it is critical for courts to have a basic understanding of the etiology of sex.

### B. Etiology of Sex

For transgender people to be treated equally before the law and in the eyes of society, courts must use the latest medical science of determining sex.<sup>224</sup> Segregating so-called “real” or tangible sex characteristics using coded language, such as “physical,” “anatomical,” “biological,” or “genetic,”—from so-called “imaginary” or intangible or psychological characteristics like “gender identity” or “self-identity,” reflects a fundamental misunderstanding of sex.<sup>225</sup> The etiology of sex reveals that it is a multi-faceted determination.<sup>226</sup>

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221. *Id.* (emphasis added) (citing Tr. of Bench Trial at 376, 395, *Schroer*, 525 F. Supp. 2d 58 (No. 05-1090)).

222. *Id.* at 239. McGowan continued, “I suspect . . . that such a ruling would have been a powerful tool in our arsenal for combating the kinds of discrimination that most regularly interfere with transgender people’s ability to participate meaningfully in society.” *Id.* at 241.

223. *See id.* at 241 (“If advocates had a definitive legal ruling making clear that gender identity is part of what constitutes a person’s biological sex, it seems like it would—or at least should—be much more difficult to restrict the access of transgender people to gender identity appropriate facilities simply by characterizing access restrictions as neutral rules reflecting an irrefutable biological truth about sex.”).

224. *See* Greenberg, *Roads Less Traveled*, *supra* note 17, at 51–52 (proposing that legal understanding of sex should reflect scientific understanding that sex is not a fixed binary); Flynn, *supra* note 117, at 34–35 (critiquing approach taken by majority of courts of defining sex as an “inflexible category” and suggesting instead using gender identity, which reflects “current understanding of sex”).

225. Separating gender identity from the physical attributes of the body is not only inaccurate, but frames it as a matter of preference or self-expression, rather than a core aspect of identity. *Cf.* Jesse

Sex determinations have not always been based on “genital shorthand.”<sup>227</sup> The definition of sex has evolved over time. For example, during the Renaissance Era, also known as the “Age of the Gonads,”<sup>228</sup> determinations of sex were based on the ability to reproduce.<sup>229</sup> As Greenberg and Herald describe, beginning in the 1950s, the

idea that gender identity was based upon nurture and not nature became the conventional wisdom . . . [P]sychologists believed that children were born without a sense of a male or female gender and that gender identity would develop consistently with the appearance of the child’s genitalia and the gender role in which the child is raised.<sup>230</sup>

Doctors began the practice of surgically altering the infant genitalia that did not conform in size and shape to what was considered “acceptable” or “normal,”<sup>231</sup> even if it “destroy[ed] the person’s ability to have satisfactory sex.”<sup>232</sup> The practice still persists and is the subject of active litigation.<sup>233</sup>

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Bering, *Stop Saying “Sexual Preference,”* SLATE (June 17, 2013, 7:45 AM), [http://www.slate.com/articles/health\\_and\\_science/science/2013/06/sexual\\_preference\\_is\\_wrong\\_say\\_sexual\\_orientation\\_instead.html](http://www.slate.com/articles/health_and_science/science/2013/06/sexual_preference_is_wrong_say_sexual_orientation_instead.html) (discussing the debate regarding use of the term “sexual preference” versus “sexual orientation” and stating “[t]hink how bizarre it would sound if we were to apply the same language [or preference] to any other unalterable biological trait”).

226. See Greenberg, *Defining Male and Female*, *supra* note 36, at 278–79; Greenberg & Herald, *supra* note 36, at 825–26; McGowan, *supra* note 178, at 234–35; *cf.* Green, *supra* note 15, at 78 (“[T]o define ‘sex’ as the fixed point of a compass that always tells us the ‘truth’ about a person is both archaic and naive.”).

227. Flynn, *supra* note 117, at 34 (referring to “shorthand use of one’s birth genitalia to identify sex”); see also Greenberg, *Roads Less Traveled*, *supra* note 17, at 58 (noting that gender is not always identifiable at birth). For example, the Olympics has a shifting policy on sex determination—genitals, then chromosomes, and currently recognizing transgender people according to gender identity if the person has had surgery. *Transsexual Athletes OK for Athens*, CNN.COM (May 18, 2004), <http://edition.cnn.com/2004/SPORT/05/17/olympics.transsexual/>.

228. Alice Domurat Dreger, *A History of Intersexuality: From the Age of Gonads to the Age of Consent*, 9 J. CLINICAL ETHICS, 345, 345–46 (1998) [hereinafter Dreger, *A History of Intersexuality*].

229. Greenberg & Herald, *supra* note 36, at 826–27 (explaining that genitals were not always the test); Alice Domurat Dreger, “*Ambiguous Sex*”—or *Ambivalent Medicine? Ethical Issues in the Treatment of Intersexuality*, 28 HASTINGS CENTER REP. 24, 26 (1998) [hereinafter Dreger, “*Ambiguous Sex*”].

230. Greenberg & Herald, *supra* note 36, at 827–28.

231. An “adequate penis” must be “2.5 centimeters (one inch) when stretched at birth.” Greenberg & Herald, *supra* note 36, at 828 n.35 (citing Dreger, *A History of Intersexuality*, *supra* note 228). “The penis became the essential determinant of sex because . . . a man could only be a true man if he possessed a penis that was capable of performing two acts: penetrating a vagina and being used to urinate while standing.” *Id.* at 828 (citing Dreger, “*Ambiguous Sex*”, *supra* note 229, at 26). Infants with XY chromosomes with “inadequate” penises or other genital ambiguity turned into girls. *Id.* at 829. Infants with XX chromosomes who had an “unacceptable” size clitoris were surgically reduced even if it destroyed the person’s ability to have satisfactory sex.” *Id.* An “adequate vagina” was defined as

There are unlimited ambiguities that may occur within each of the components of sex, including gender identity.<sup>234</sup> For most people, these factors are congruent. For transgender and intersex people, one or more of these categories vary. When any of these conflict, “gender identity is the determinative component.”<sup>235</sup>

Many years of research have confirmed the importance and immutability of gender identity in sex determinations.<sup>236</sup> As discussed in Part I, the case studies have shown that attempts to change or dismiss gender identity can have serious consequences.<sup>237</sup> “[E]xperts in a variety of disciplines . . . believe that the brain plays the primary role in determining gender self-identity.”<sup>238</sup> Flynn states, “[r]eliance on gender identity to

capable of being penetrated by an ‘adequate penis.’” *Id.* at 828. “In other words, men are defined based on their ability to penetrate females, and females are defined based on their ability to procreate. Sex, therefore, can be viewed as a social construct rather than a biological fact.” Greenberg, *Roads Less Traveled*, *supra* note 17, at 52.

232. Greenberg & Herald, *supra* note 36, at 829. Anne Tamar-Mattis, *Exceptions to the Rule: Curing the Law’s Failure to Protect Intersex Infants*, 21 BERKLEY J. GENDER L. & JUST. 59, 60 (2006) (mentioning genital-normalizing procedures that aim to allow intersex individuals to live “normal” lives). For a detailed, scientific discussion on intersex medical conditions, see, Greenberg, *Defining Male and Female*, *supra* note 36, at 278–92 (providing a thorough background on the biological components of intersexuality). See also Kishka-Kamari Ford, “First, Do No Harm”—*The Fiction of Legal Parental Consent to Genital Normalizing Surgery on Intersexed Infants*, 19 YALE L & POL’Y REV. 469, 470 (2001) (specifying the myriad intersex conditions).

233. See, e.g., *M.C. ex rel. Crawford v. Amrhein*, Nos. 13-2178, 13-2182, 12-2183, 2015 WL 310523, at \*1–2 (4th Cir. Jan. 26, 2015).

234. “[A]t least eight attributes contribute to a person’s sex”: (1) “genetic or chromosomal sex”; (2) “gonadal sex (reproductive sex glands)”; (3) “internal morphologic sex (seminal vesicles, prostate, vagina, uterus, fallopian tubes)”; (4) “external morphologic sex (genitalia)”; (5) “hormonal sex”; (6) “phenotypic sex (secondary sexual features such as facial hair or breasts)”; (7) “assigned sex and gender of rearing”; (8) “gender identity”. Greenberg & Herald, *supra* note 36, at 825–26 (citing JOHN MONEY, *SEX ERRORS OF THE BODY AND RELATED SYNDROMES: A GUIDE TO COUNSELING CHILDREN, ADOLESCENTS AND THEIR FAMILIES* 4 (2d ed. 1994)).

235. Flynn, *supra* note 117, at 34; see also *supra* note 36.

236. See Greenberg & Herald, *supra* note 36, at 830–31 (“[G]ender identity is not as malleable as was once believed.”). “There is evidence suggesting that the brain differentiates into ‘male’ and ‘female’ brains, just as the fetus’s rudimentary sex organs differentiate into ‘male’ and ‘female’ genitalia.” *Id.* at 832.

237. See Greenberg, *Roads Less Traveled*, *supra* note 17, at 63 (noting “[t]he reports about . . . intersex persons, whose self-identities do not conform to their assigned genders, have forced the medical and psychiatric communities to question their long-held beliefs about sexual identity formation”); John Colapinto, *The True Story of John/Joan*, ROLLING STONE, Dec. 11, 1997 (reporting on an attempt to change gender identity resulting in a patient who “struggled against his imposed girlhood from the start”).

238. Greenberg & Herald, *supra* note 36, at 829. “[R]ecent studies of gender-identity development indicate that gender identity may be more dependent upon brain function and hormonal influences than the appearance of the genitalia.” *Id.* at 830; see, e.g., Berglund, et al., *Male-to-Female Transsexuals Show Sex-Atypical Hypothalamus Activation When Smelling Odorous Steroids*, 18 CEREBRAL CORTEX, 1900, 1908 (2008) (suggesting that “in transsexuals the organization of certain sexually dimorphic circuits of the anterior hypothalamus could be sex atypical”); Besser et al., *Atypical*

determine legal sex is straightforward.”<sup>239</sup> In her article, *The Roads Less Traveled: The Problem with Binary Sex Categories*, Greenberg proposes that “legal sex reflect scientific developments that emphasize the importance of self-identification.”<sup>240</sup> She argues that “[s]uch an approach will benefit the people most affected by these laws and is consistent with principles of justice and other legal values.”<sup>241</sup> Greenberg’s proposal would provide an opportunity for courts to have a deeper understanding of who transgender people are and of why gender identity is essential in legal determinations of sex. The next subpart discusses an example of a case litigated by a pioneering transsexual attorney, Rachael Wallbank,<sup>242</sup> in which an Australian court was provided the most recent medical science of sex and, in contrast to the “legal horrors” discussed in Part II, the court validated and affirmed the transgender litigant.

### C. Transgender as Intersex: Success of *In re Kevin*

The landmark 2001 Australian case, *In re Kevin*, involving the status of a transgender man’s marriage and his relationships with his wife and child,

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*Gender Development: A Review*, 9 INT’L J. TRANSGENDERISM 29, 38 (2006) (demonstrating that gender dysphoria has a physical origin); Ernest Govier et al., *Dichotic Listening, Handedness, Brain Organization and Transsexuality*, 12 INT’L J. TRANSGENDERISM 144, 152 (2010) (describing scientific studies resulting in the conclusion that “[t]he recent reevaluation of the standard view of sexual differentiation of the brain sees the different expression of genes in male and female brains as playing a major role in sexing brains”); Alicia Garcia-Falgueras & Dick F. Swaab, *A Sex Difference in the Hypothalamic Uncinate Nucleus: Relationship to Gender Identity*, 131 BRAIN 3132, 3141–45 (2008) (showing that section of male-to-female transsexual brain is similar in volume and neuron number to section of female brain); Frank Kruijver et al., *Male-to-Female Transsexuals Have Female Neuron Numbers in a Limbic Nucleus*, 85 J. CLINICAL ENDOCRINOLOGY & METABOLISM 2034, 2037–38 (2000) (showing neuronal sex differences in brains of transsexuals); Eileen Luders et al., *Regional Gray Matter Variation in Male-to-Female Transsexualism*, 46 NEUROIMAGE 904 (2009), available at <http://www.sciencedirect.com/science/article/pii/S1053811909003176> (finding evidence that transsexualism has distinct cerebral patterns, which helps confirm that brain anatomy plays a role in gender identity); Giuseppina Rametti et al., *White Matter Microstructure in Female to Male Transsexuals Before Cross-Sex Hormonal Treatment: A Diffusion Tensor Imaging Study*, 45 J. PSYCHIATRIC RES. 199, 201–03 (2011) (showing inherent difference in the brain structure of transsexuals); D.F. Swaab, *Sexual Differentiation of the Human Brain: Relevance For Gender Identity, Transsexualism and Sexual Orientation*, 19 GYNECOL ENDOCRINOL 301, 301 (2004) (“In the human brain, structural differences have been described that seem to be related to gender identity . . .”); Mariko Tanaka et al., *Regional Cerebral Blood Flow Changes in Female to Male Gender Identity Disorder*, 64 PSYCHIATRY & CLINICAL NEUROSCIENCES 157, 157–58 (2010) (showing that subjects with gender dysphoria had significant brain differences from those without); Zhou et al., *supra* note 61, at 68 (showing cisgender female brain structure in transgender women).

239. Flynn, *supra* note 117, at 35. Flynn “urge[s] an approach already taken by a handful of courts—relying on gender identity as the defining basis for determining legal sex.” *Id.* at 34.

240. Greenberg, *Roads Less Traveled*, *supra* note 17, at 52.

241. *Id.*

242. See Green, *supra* note 15, at 53.

set an international standard of respect and validation for transgender people in the eyes of the law.<sup>243</sup> Attorney Wallbank provided the court with extensive medical testimony about transsexualism and how the purpose of treatment is “to alter [the] sexually differentiated body in order to bring it into better harmony with the individual’s innate sexual identity (otherwise called neurological, psychological or brain sex.)”<sup>244</sup> According to McGowan, “the judge concluded that, on balance, it was more likely than not that gender identity is a product of biological influences, including brain development, and that transsexuality was a natural variation of gender that, like intersexuality, demonstrated that gender was a spectrum rather than a rigid binary.”<sup>245</sup>

The court specifically refuted the “absolute and unsupported assertions,” from the *Corbett* decision, “that a person’s sex is fixed unalterably at birth.”<sup>246</sup> As Green presents, the court stated it is a “question of law what criteria should be applied in determining whether a person is a man or a woman for purposes of the law of marriage, and a question of fact whether the criteria exist in a particular case.”<sup>247</sup> The court was convinced ““that the characteristics of transsexuals are as much ‘biological’ as those of people thought of as intersex.””<sup>248</sup>

Following the court’s declaration, the Attorney-General for the Commonwealth petitioned for a final disposition before the full Family Court of Australia.<sup>249</sup> Further, as Green describes, after considering the full record, as well as “the history of the institution of marriage” and the “‘contemporary and ordinary’ meanings of the words man and woman,” the court affirmed the lower court’s ruling.<sup>250</sup> Green writes that the court wrote, “‘an intersex person appears to be defined as someone with at least one sexual incongruity. If brain sex can give rise to such an incongruity then, legally, we think that there may be no difference between an intersex person and a transsexual person.’”<sup>251</sup>

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243. See *In re Kevin: Validity of Marriage of a Transsexual* (2001) FamCA 1074 (Austl.), available at [http://www.wallbanks.com/PDF/Re%20Kevin\\_ChisholmDecision.pdf](http://www.wallbanks.com/PDF/Re%20Kevin_ChisholmDecision.pdf).

244. Wallbank, *supra* note 18, at 461–62.

245. McGowan, *supra* note 178, at 239 (citing *In re Kevin*, FamCA 1074 [312]) (Austl.).

246. *In re Kevin*, FamCA 1074 [315].

247. Green, *supra* note 15, at 52 (internal quotation marks omitted). “[The task of the law], in a legal and social context that divides all human beings into male and female, is to assign individuals to one category or the other, including individuals whose characteristics are not uniformly those of one or the other sex.” *Id.* at 52–53 (quoting *In re Kevin*, FamCA 1074).

248. Green, *supra* note 15, at 53 (quoting *Re Kevin*, FamCA 1074).

249. *Id.* at 58.

250. *Id.* (quoting *Kevin & Jennifer*, FamCA 94).

251. *Id.* (quoting *Kevin & Jennifer*, FamCA 94).

Unlike the U.S. case law discussed above, in making a determination of sex, the Australian court treated the transgender litigant with respect. Dr. Green notes that, “the Court refrained from exposing Kevin in a verbal, genital, and sexual dissection, and from requiring his external genitalia to have specific dimensions.”<sup>252</sup> In her article, Wallbank credits her success to positioning transsexuality “squarely within the intersexual continuum”<sup>253</sup> so that the court could view transsexualism as “a form of human diversity in sexual formation.”<sup>254</sup> Wallbank asserts that the limitation of “common law sex” is that it “does not require or invite some scientific investigation or argument as to which (or which set) of the sexually differentiated aspects of a person determine their possibly multi-faceted biological sex.”<sup>255</sup> She continues:

A human being’s sexual identity derives from the sexual differentiation of [the] human brain as to either the male or the female sex, in the same way as the other sexually differentiated aspects of the human body such as the genitalia, and is fixed and unalterable by the completion of infancy at the latest irrespective of social environment.<sup>256</sup>

Thus, “whether one is able to live a reasonable life as a male or a female is ultimately determined by one’s brain-sex differentiation rather than the appearance of one’s genitalia and/or other sexually differentiated body parts.”<sup>257</sup> In other words, “biological sex” is determined by “brain sex,” i.e., gender identity.<sup>258</sup>

The *In re Kevin* decision provides an example of how courts can better understand, validate, and respect transgender people. A court presented with expert medical testimony of the multifaceted components of sex can properly acknowledge gender identity as a biological factor, rather than a choice, and will be more likely to provide a transgender litigant with understanding and proper legal recognition.

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252. *Id.* at 53. Green also discusses Rachael Wallbank and her article about the *In re Kevin* case. *Id.*

253. *See* Wallbank, *supra* note 18, at 471.

254. *See id.* at 461.

255. *Id.* at 466.

256. *Id.* at 474.

257. *Id.* at 467.

258. *See id.*

*D. Forgiveness, Choice, and Biological Justification*

One of the barriers to recognition and respect that transgender people face in the courts and beyond is that “brain sex” is not readily apparent,<sup>259</sup> and transgender people must be believed about who they are.<sup>260</sup> The law has taken an interest in distinguishing transsexuals from intersex people.<sup>261</sup> Unfortunately, as Dr. Green notes, even the Encyclopedia Britannica is at odds with modern science, “establishing the transsexual person [as]: one who claims the other sex without *biological justification*.”<sup>262</sup>

Professor Alex Sharpe, in her article, *Transgender Marriage and the Legal Obligation to Disclose Gender History*, notes “[w]hile both intersex and transgender people may undergo genital surgeries, in the case of intersex people, surgery is understood as assisting nature, whereas in the case of transgender people, surgery is understood as a departure from it.”<sup>263</sup> Once the *In re Kevin* court understood the nature of gender identity and that it was biological, and not a choice, the court extended the legal forgiveness granted to intersex conditions to transgender people.

A common misunderstanding about the transgender experience is that it is about choice.<sup>264</sup> Professor Jillian Weiss states: “Transgender identity is a choice only in the sense of ‘Hobson’s choice,’ the option of taking the one thing offered or nothing. . . . Essentially, gender chooses us, and not the other way around.”<sup>265</sup> If the goal for transgender people is to provide for the most self-determination under the law, we must go to the root of the reason for “changing” one’s sex. A proper understanding of medical science reveals the “‘innocence’ with respect to the underlying condition that is triggering discrimination by third parties.”<sup>266</sup> Transition is not altering one’s sex, but affirming one’s underlying gender identity.<sup>267</sup> It is not done to evade or to be someone you are not; rather, it is to realize who you deeply are.

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259. See *supra* notes 55, 257 and accompanying text.

260. See Wallbank, *supra* note 18, at 481 (explaining that a challenge for transgender litigants is the fact that “[p]eople with transsexualism self-diagnose their condition”).

261. Green, *supra* note 15, at 36.

262. *Id.* at 26 (emphasis added) (citing Transsexualism, ENCYCLOPEDIA BRITANNICA).

263. Sharpe, *supra* note 103, at 42–43.

264. Laura Jane Grace, lead singer of a popular punk band, has written lyrics in response to this common misperception. See AGAINST ME!, TRANSGENDER DYSPHORIA BLUES (Total Treble 2014) (“You know it’s obvious, but we can’t choose how we’re made.”).

265. Jill Weiss, *Gender Autonomy, Transgender Identity and Substantive Due Process: Finding a Rational Basis for Lawrence v. Texas*, 5 TOURO J. RACE, GENDER & ETHNICITY 2, 7–8 (2010), available at [https://www.tourolaw.edu/JournalRGE/uploads/Issues/Vol5Issue1/Weiss\\_Final.pdf](https://www.tourolaw.edu/JournalRGE/uploads/Issues/Vol5Issue1/Weiss_Final.pdf).

266. McGowan, *supra* note 178, at 242.

267. *Clenchy Amicus*, *supra* note 34, at 9.

By providing a framework for the importance of gender identity, medical science validates, rather than further pathologizes, transgender people's existence in the eyes of the law.<sup>268</sup> Understanding the importance of self-identity provides an avenue to liberation. Such framing provides the necessary context for arguing for heightened scrutiny under the Constitution, shifting the concept from expressing oneself by choice to aligning oneself with a core, immutable trait.<sup>269</sup> The more the courts understand gender identity as the primary component of sex, the more deference will be given to transgender people under the law to define themselves. The next Part will provide an overview of how recent gains in transgender rights law have been linked to a proper understanding of gender identity as the core determinant of sex.

#### IV. LEGAL GAINS HINGE ON UNDERSTANDING GENDER IDENTITY AS THE PRIMARY COMPONENT OF SEX

Where courts have given weight to the etiology of sex, transgender people have found validation and dignity in the eyes of the law. Even during the *Corbett* era, a handful of U.S. courts validated the transgender litigant's gender identity, after reviewing, at times, "overwhelming medical evidence"<sup>270</sup> of its importance among the factors that determine sex, in

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268. See Weiss, *supra* note 265, at 22–23 (noting that Laura Langley, in her note, *Self-Determination in a Gender Fundamentalist State: Toward Legal Liberation of Transgender Identities*, "acknowledges the problems inherent in medicalization, but suggests that 'under current paradigm, understanding, manipulating and exploding these regulatory entities is prerequisite to obtaining the maximum gender self-determining agency possible for any transgender individual' because courts often rely on medical experts in this area" (quoting Laura Langley, *Self-Determination in a Gender Fundamentalist State: Toward Legal Liberation of Transgender Identities*, 12 TEX. J. C.L. & C.R. 101 (2006)); Dean Spade, *Resisting Medicine, Re/modeling Gender*, 18 BERKELEY WOMEN'S L.J. 15, 23–24 (2003), reprinted in *SEXUALITY, GENDER, AND THE LAW* 1457 (William N. Eskridge & Nan D. Hunter eds., Foundation Press 2d ed. 2004) (discussing how medical authority is tied to trans identity); cf. Press Release, Walter Bockting et al., President, World Prof'l Ass'n of Transgender Health (May 26, 2010), available at [http://www.wpath.org/uploaded\\_files/140/files/de-psychopathologisation%205-26-10%20on%20letterhead.pdf](http://www.wpath.org/uploaded_files/140/files/de-psychopathologisation%205-26-10%20on%20letterhead.pdf) (noting that "psychopathologisation" can lead to "discrimination").

269. See, e.g., Chai R. Feldblum, *The Right to Define One's Own Concept of Existence: What Lawrence Can Mean for Intersex Transgender People*, 7 GEO. J. GENDER & L. 115, 116 (2006). Feldblum, current EEOC Commissioner, argued that under *Lawrence v. Texas*:

[T]he right "to define one's own concept of existence"—is an interest that speaks directly . . . to the efforts of transgender people to define their gender identity and expression . . . [The state has an obligation] to provide intersex and transgender people with the affirmative protection and social structures necessary for them to realize their efforts towards self-definition.

*Id.* For a detailed analysis of scholarship applying *Lawrence v. Texas* to transgender rights, see generally Weiss, *supra* note 265.

270. *Richards v. U.S. Tennis Ass'n*, 400 N.Y.S.2d 267 (Sup. Ct. 1977).

marriage determinations,<sup>271</sup> birth certificate challenges,<sup>272</sup> court orders affirming sex,<sup>273</sup> and equal protection challenges.<sup>274</sup> In recent landmark cases involving transgender people, courts have finally properly interpreted Title IX and state nondiscrimination statutes to protect transgender litigants. There has also been a shift in policy to better define gender identity as the core biological determinant of sex.

### A. Title IX Interpretation of Sex Recognizing Gender Identity

Drawing on the significant advances under Title VII over the last several years,<sup>275</sup> the U.S. Department of Education has paid increasing

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271. For example, in *M.T. v. J.T.*, the cisgender spouse of a transgender woman claimed that his wife, who transitioned prior to the marriage, was male and that the marriage was void. *M.T. v. J.T.*, 355 A.2d 204, 205 (N.J. Super. Ct. App. Div. 1976). “The court relied on the predominant view within the medical establishment that, among the many components involved in determining sex, chief among them is gender identity. When birth anatomy and gender identity conflict, the court stated, the role of anatomy is merely ‘secondary.’” Flynn, *supra* note 117, at 35. For other examples, see *In re Estate of Araguz*, 443 S.W.3d 233, 245 (Tex. Ct. App. 2014) (discussing whether decedent’s marriage was void as a matter of law as a same-sex marriage); *In re Beatie v. Beatie*, 333 P.3d 754, 757–58 (Ariz. Ct. App. 2014) (holding trial court erred in concluding it did not have subject matter jurisdiction to dissolve a marriage between a transgender man and a cisgender woman, when the transgender man had complied with statutory requirements to legally amend his birth certificate); and *Miller v. Angel*, No. GD053180, slip. op. at 8, 10 (Cal. Super. Ct. Aug. 6, 2014) (rejecting expert testimony that “the absence of a birth certificate for Petitioner demonstrating he was male” rendered the marriage an “absolute nullity”). See also Greenberg, *Roads Less Traveled*, *supra* note 17, at 51, 68–69 (noting that courts must begin to recognize gender identity as a key factor in determining a person’s sex); Greenberg & Herald, *supra* note 36, at 840 (discussing state trial courts’ ruling that “post-operative transsex persons acquire their self-identified sex as their legal sex”).

272. See, e.g., *Anonymous v. Mellon*, 398 N.Y.S.2d 99, 103 (Sup. Ct. 1977) (noting that the practice of Bureau of Vital Records not to list transgender petitioner’s post-transition gender on birth certificate would not “preclude petitioner under appropriate circumstances in attempting to establish female gender when legal obligations are to be decided;” “sexual gender is not merely a matter of anatomy. Other determinants include psychological identity, acceptability by others, chromosomal makeup, reproductive capacity and endocrine levels. . . . Basing determinations of gender upon any one indicator might well lead to an unwarranted conclusion”); *Richards v. U.S. Tennis Ass’n*, 400 N.Y.S.2d 267, 267 (Sup. Ct. 1977) (explaining that reliance on chromosomes as sole determinant of person’s sex is discriminatory in light of “overwhelming medical evidence” that transgender person was female; multiple other factors must also be considered to determine a person’s sex).

273. See, e.g., *In re Heilig*, 816 A.2d 68, 73, 87 (Md. 2003) (citing Greenberg, *Defining Male and Female*, *supra* note 37, at 278; *In re Estate of Gardiner*, 22 P.3d 1086 (2001); *Maffei v. Kolaeton Indus.*, 626 N.Y.S.2d 391 (Sup. Ct. 1995)) (listing seven medically recognized factors comprising a person’s gender and concluding lower court possessed equitable jurisdiction to grant order changing plaintiffs’ name and “sexual identity” designation on her birth certificate).

274. See, e.g., *Brown v. Zavaras*, 63 F.3d 967, 970–71 (10th Cir. 1995) (stating that the possibility that gender identity may be biological suggests reevaluating whether transgender people are a protected class for purposes of the Equal Protection Clause); *In re Lovo-Lara*, 23 I&N Dec. 746, 747, 752 (BIA 2005), available at <http://www.justice.gov/eoir/vll/intdec/vol23/3512%20.pdf>.

275. See, e.g., *Franklin v. Gwinnet Cnty. Pub. Schs.*, 503 U.S. 60, 76 (1991) (applying Title VII to Title IX); *Glenn v. Brumby*, 663 F.3d 1312, 1321 (11th Cir. 2011) (holding that a supervisor at the

attention to transgender students. The Department has clarified on multiple occasions that discrimination on the basis of sex under Title IX includes discrimination on the basis of gender identity.<sup>276</sup> For example, in two recent settlements with school districts, the U.S. Department of Justice (“DOJ”) and the U.S. Department of Education Office of Civil Rights (“OCR”) affirmed that protection on the basis of sex means being treated in accordance with the student’s gender identity for all purposes, including use of the restroom.

In 2013, the DOJ reached a settlement with a California school on behalf of a twelve-year-old transgender boy who was told to use a restroom in the nurse’s office instead of the boys’ restroom and locker room.<sup>277</sup> The school also told him that he could not room with the other boys on a field trip.<sup>278</sup> The settlement required the school district to take a number of steps to ensure that the school would treat the transgender student like the other boys, including allowing the student to use the boys’ multi-stall restroom and locker room.<sup>279</sup>

Then, in 2014, the OCR approved an agreement between a transgender girl and her school district, after she complained of gender-based peer

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Georgia State Assembly did not have a satisfactorily important governmental interest that would justify firing an employee who intended to transition); *Schroer v. Billington*, 424 F. Supp. 2d 203, 213 (D.D.C. 2006) (applying Title VII to a straightforward understanding of transsexuality); *Macy v. Holder*, EEOC Appeal No. 0120120821 6–7 (Apr. 20, 2012), available at <http://www.pcc.edu/programs/paralegal/documents/macy-v-holder.pdf> (reinforcing the notion that Title VII prohibits discrimination on the basis of both sex and gender, which includes “the cultural and social aspects associated with masculinity and femininity”); Harper Jean Tobin & Jennifer Levi, *Securing Equal Access to Sex-Segregated Facilities for Transgender Students*, 28 WISC. J. L. GENDER & SOC’Y 301, 314 (2013) (documenting how “at least eight states” and “numerous municipalities” have adopted policies that focus on gender identity, rather than so-called “biological sex,” for determining access to school restrooms and facilities).

276. See, e.g., CATHERINE E. LHAMON, U.S. DEP’T OF EDUC., QUESTIONS AND ANSWERS ON TITLE IX AND SINGLE-SEX ELEMENTARY AND SECONDARY CLASSES AND EXTRACURRICULAR ACTIVITIES 25 (2014) (“Under Title IX, a recipient generally must treat transgender students consistent with their gender identity in all aspects of the planning, implementation, enrollment, operation, and evaluation of single-sex classes.”); Letter from Russlynn Ali, Assistant Sec’y for Civil Rights, Office for Civil Rights, U.S. Dep’t of Educ., to Colleague (Oct. 26, 2010), available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf>; cf. Letter from Leon Rodriguez, Dir., Office for Civil Rights, U.S. Dep’t of Health & Human Servs., to Maya Rupert, Esq., Fed. Policy Dir., Nat’l Ctr. for Lesbian Rights (July 12, 2012) (stating that the Department of Health and Human Services, Office of Civil Rights recognizes that § 1557 of the Affordable Care Act, which prohibits discrimination on the grounds prohibited under Title IX of the Education Amendments of 1972, “extends to claims of discrimination based on gender identity”).

277. See Resolution Agreement Between Arcadia Unified Sch. Dist., U.S. Dep’t of Educ., & U.S. Dep’t of Justice, OCR Case No. 09-12-1020, DOJ Case No. 169-12C-70, at 1 (July 24, 2013), available at [http://www.nclrights.org/wp-content/uploads/2013/09/Arcadia\\_Resolution\\_agreement\\_07.24.2013.pdf](http://www.nclrights.org/wp-content/uploads/2013/09/Arcadia_Resolution_agreement_07.24.2013.pdf).

278. *Id.*

279. *Id.* at 3.

harassment.<sup>280</sup> The agreement memorialized the student's use of sex-designated facilities "for female students at school . . . consistent with her gender identity."<sup>281</sup>

More recently, the DOJ issued a Statement of Interest in *Tooley v. Van Buren Public Schools*, where a fourteen-year-old transgender boy endured severe bullying by classmates and was denied access to the boys' restroom by the school.<sup>282</sup> The DOJ clarified that gender identity is a component of sex and that "transgender persons may allege sex discrimination based on sex stereotyping under Title IX and the Equal Protection Clause [as well as on the basis of] gender identity and transgender status."<sup>283</sup>

These major steps by federal agencies ensuring proper application of the protections against sex discrimination, including discrimination on the basis of gender identity, reveal significant progress. Jennifer Levi and Harper Jean Tobin in their article, *Securing Equal Access to Sex-Segregated Facilities for Transgender Students*, summarize the shift in thinking:

Denying equal access to school facilities for transgender students effectively singles them out, apart from all others in the community, with a stigmatizing message that a transgender boy is not a normal or real boy, or a transgender girl is not a normal or real girl. This message, which coincides precisely with the cultural messages that drive bullying of transgender youth, is reinforced on a daily basis when students are treated differently from other boys and girls.<sup>284</sup>

The cost to the transgender student when the student's gender identity is not respected can be severe.<sup>285</sup> "This is precisely the kind of 'badge of inferiority' that antidiscrimination laws, such as Title IX, forbid."<sup>286</sup>

280. Resolution Agreement, Downey Unified Sch. Dist., OCR Case No. 09-12-1095, at 1 (Oct. 8, 2014), available at <http://www2.ed.gov/documents/press-releases/downey-school-district-agreement.pdf>.

281. *Id.* at 1.

282. Statement of Interest of the United States, at \*4–5, *Tooley v. Van Buren Pub. Schs.*, No. 2:14-cv-13466 (E.D. Mich. Feb. 20, 2015), ECF No. 60.

283. *Id.* at \*8; see also *id.* at \*11 (stating that the U.S. Department of Justice agrees that "an individual's gender identity is one aspect of an individual's sex").

284. Tobin & Levi, *supra* note 275, at 309.

285. See generally *id.* (discussing the adverse psychological and physical effects of denying transgender people equal access to public facilities).

286. *Id.* (quoting *Lake v. Arnold*, 112 F.3d 682, 688 (3d Cir. 1997); citing *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896); *Plessy*, 163 U.S. at 562 (Harlan, J., dissenting)). "If the concept of gender identity discrimination as sex discrimination is to have any real meaning for transgender people, it must protect a transgender girl's ability to live in her community as a girl, and a transgender boy's ability to live as a boy." *Id.* at 310.

*B. State Nondiscrimination Laws: Proper Interpretation of Gender Identity*

When interpreting state nondiscrimination laws that protect on the basis of gender identity, courts and administrative bodies must first understand who transgender people are. In 2014, the Maine Supreme Court ruled in *Doe v. Clenchy* that forcing a teenage transgender girl to use a staff-only, non-communal restroom in isolation from her peers was a violation of the Maine Human Rights Law prohibiting discrimination on the basis of gender identity.<sup>287</sup> In their opening brief, Gay and Lesbian Advocates and Defenders (“GLAD”), wrote simply: “Susan Doe is a girl. She is also transgender.”<sup>288</sup> GLAD’s framing of the case allowed the court to see that the student’s female gender identity defined her sex and that treating her differently from other girls was the type of discrimination that the State law was meant to protect.<sup>289</sup> This landmark decision followed the 2011 Maine Superior Court’s denial of a motion to dismiss a transgender woman’s claim for discrimination when a Denny’s restaurant told her not to use the women’s restroom until she provided proof of genital surgery.<sup>290</sup>

In another landmark decision in 2013, the Colorado Division of Civil Rights (“the Division”) found that a school discriminated on the basis of both sex and gender identity when it singled out Coy Mathis, a six-year-old transgender girl, and required she use the nurse’s bathroom rather than the girls’ bathroom.<sup>291</sup> The Division rejected the school’s argument that sex is “biological” and separate from “gender,” noting the law’s evolution in understanding sex and gender as interchangeable.<sup>292</sup> Notably, the Division also conducted its own independent research into the medical science of sex and the possible intersex variations, finding: “[R]esearch demonstrates that sex assignments given at birth do not accurately reflect the sex of a child, indicating that birth certificates may no longer constitute conclusive evidence of a child’s sex.”<sup>293</sup> The Division found that Coy was a girl socially, legally, and medically for purposes of the law. As Tobin and Levi noted, in its letter issuing a probable cause determination, the Division

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287. *Doe v. Reg’l Sch. Unit 26*, 2014 ME 11, ¶¶ 3, 9, 24, 86 A.3d 600 (Me. 2014).

288. Brief of Appellants John & Jane Doe as Parents & Next Friend of Susan Doe at 2, *Doe v. Clenchy*, 2014 ME 11, 86 A.3d 600 (No. PEN-12-582), 2013 WL 8351143, available at <http://www.glad.org/uploads/docs/cases/doe-v-clenchy/2013-03-14-doe-v-clenchy-brief-of-appellants.pdf>.

289. *Reg’l Sch. Unit 26*, 2014 ME 11, ¶ 22.

290. Denial of Motion to Dismiss at 1, *Freeman v. Realty Res. Hospitality, LLC*, No. CV 09-199 (Me. Super. Ct. May 27, 2010).

291. Mathis, Charge No. P20130034X, at 7, 13–14 (Colo. Civil Rights Div. June 17, 2013) (determination), available at [http://www.transgenderlegal.org/media/uploads/doc\\_529.pdf](http://www.transgenderlegal.org/media/uploads/doc_529.pdf).

292. *Id.* at 10.

293. *Id.* at 6.

stated: “‘Telling [her] that she must disregard her identity while performing one of the most essential human functions constitutes severe and pervasive [disparate] treatment, and creates an environment that is objectively and subjectively hostile, intimidating or offensive.’”<sup>294</sup> The Mathis matter is an important example of how medical science can provide clarity to a court or administrative body on how to properly apply protections on the basis of sex or gender identity. Some agencies and jurisdictions are taking the lead on better defining laws to ensure proper interpretation and avoid “biological sex blind spots.”

### *C. Policy Changes Defining Gender Identity as Determinant of Sex*

Because of the difficulties transgender people face when courts and administrative bodies do not defer to the latest medical science, some jurisdictions and agencies have taken proactive steps to clarify that existing laws prohibit discrimination on the basis of “sex” or “gender identity.”

#### 1. Clarification of Sex (Includes Gender Identity)

In light of the advances in Title VII case law to include transgender people—prohibiting discrimination on the basis of both sex stereotyping and the transition itself (i.e., the conversion theory of *Schroer*)—multiple federal agencies in the last several years have taken steps to clarify that their own workplace EEO policies protect workers on the basis of sex. Specifically, agencies have clarified that “sex” includes gender identity and that single-sex facilities, such as restrooms and locker rooms, should be used consistently with gender identity.<sup>295</sup>

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294. Tobin & Levi, *supra* note 275, at 314 (alteration in original) (quoting *Mathis*, No. P20130034X, at 12). Similarly, in *Jones v. Johnson County Sheriff's Department*, the Iowa Civil Rights Commission held that a transgender woman had a valid gender identity discrimination claim when she was singled out and denied access to the restroom in a courthouse. *Id.* at 313–14 (quoting and citing *Jones v. Johnson Cnty. Sheriff's Dep't*, CP No. 12-11-61830, at 8 (Iowa Civil Rights Comm'n Feb. 11, 2013) (finding of probable cause)).

295. For example, the Office of Personnel Management's policy states “sex (includes gender identity and pregnancy)” and restroom use should be “consistent with one's gender identity.” *Diversity & Inclusion Reference Materials: Guidance Regarding the Employment of Transgender Individuals in the Federal Workplace*, U.S. OFFICE OF PERSONNEL MGMT., <http://www.opm.gov/policy-data-oversight/diversity-and-inclusion/reference-materials/gender-identity-guidance/> (last visited Apr. 14, 2015) (“agencies should allow access to restrooms and (if provided to other employees) locker room facilities consistent with his or her gender identity”). For other examples, see 41 C.F.R. § 60-1.8 (2014) available at [http://www.dol.gov/ofccp/LGBT/OFCCP\\_LGBT\\_Rule%20Final\\_12114\\_JRF\\_QA\\_508c.pdf](http://www.dol.gov/ofccp/LGBT/OFCCP_LGBT_Rule%20Final_12114_JRF_QA_508c.pdf) (noting that sexual orientation and gender identity are now included in the list of reasons employers cannot use to discriminate); OFFICE OF FED. CONTRACT COMPLIANCE PROGRAMS, DEP'T OF LABOR, DIRECTIVE 2014-02: GENDER IDENTITY AND SEX DISCRIMINATION (2014), available at

## 2. Gender Identity (Defining Component of Sex)

In an effort to clarify the existing protections of sex and provide notice of their meaning, states and municipalities have passed explicit protections on the basis of gender identity. However, legislative drafting contributes to confusion by separating gender identity from sex, leading to a “biological sex blind spot” in the case law.<sup>296</sup> Some states and jurisdictions have attempted to address this problem by clarifying that: (1) sex includes gender identity; and (2) gender identity is an individual’s internal sense of their own sex and a definitive *component of sex*.<sup>297</sup> This framing reflects the latest medical understanding of sex and leaves no room for discriminatory interpretation, or so-called “biological sex” carve-outs.

In 2013, California passed Assembly Bill 1266, the School Success and Opportunities Act, which further clarified the already existing protections on the basis of gender identity to ensure that transgender students have access to single-sex facilities and can participate in sports regardless of their gender identity.<sup>298</sup> Additionally, a number of jurisdictions have clarified, through guidance or regulation, that “sex” refers to gender identity for purposes of single-sex spaces, like school restrooms, and in places of public accommodation.<sup>299</sup>

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[http://www.dol.gov/ofccp/regs/compliance/directives/dir2014\\_02.html](http://www.dol.gov/ofccp/regs/compliance/directives/dir2014_02.html); *Equal Employment Opportunity*, CONSUMER FIN. PROT. BUREAU, <http://www.consumerfinance.gov/equal-employment-opportunity/> (last visited Apr. 14, 2015); *Employment Polices*, U.S. DEP’T OF THE TREASURY, BUR. OF PUBLIC DEBT, <http://www.publicdebt.treas.gov/careers/policies.htm> (last updated Jan. 6, 2014); and U.S. DEP’T OF THE INTERIOR, PERSONNEL BULLETIN NO: 13-03: TRANSGENDER AND OTHER GENDER NON-CONFORMING EMPLOYEE POLICY (2013), available at <http://www.doi.gov/pmb/eo/directives/upload/PB-13-03.pdf>.

296. See McGowan, *supra* note 178 (analyzing *Schroer* and discussing “legal blind spots”).

297. See, e.g., Ann Arbor, Mich. Code of Ordinances tit. IX, ch. 112, § 9:151(12), (24), (25) (2014) (defining “gender identity” as “[a]n individual’s internal sense of their own sex, and a defining component of sex”; defining “sex” as “[i]nclud[ing], but . . . not limited to, an individual’s gender, gender identity, gender expression, pregnancy, childbirth, and medical conditions related to pregnancy or childbirth. An individual’s sex shall be defined by that individual’s gender identity; and use and/or occupancy of, access to and/or participation in sex-segregated facilities and/or entities shall be granted on that basis. Such sex-segregated facilities and entities include, but are not limited to, dwellings, housing, public accommodations, lavatories, locker rooms, instructional programs, athletic events and athletic teams”; and finally, defining “sexual harassment” to include “sex discrimination”).

298. The School Success & Opportunity Act, Assemb. B. 1266 (Cal. 2013), available at [http://leginfo.ca.gov/faces/billNavClient.xhtml?bill\\_id=201320140AB1266](http://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=201320140AB1266).

299. See Tobin & Levi, *supra* note 275, at 310–11; see, e.g., Statement of Interest of the United States at \*11, *Tooley v. Van Buren Pub. Schs.*, No. 2:14-cv-13466 (E.D. Mich. Feb. 20, 2015), ECF No. 60).

V. NORMALIZING/LEGALIZING TRANSGENDER BODIES:  
DIFFERENCE WITHOUT SHAME

A. *Privacy, but for Whom?*

Despite recent gains and efforts to codify the proper interpretation of sex and the importance of gender identity, transgender people continue to face enormous difficulties in seeking legal recognition and respect. In this subpart, I discuss ways that courts often reinforce a cisgender norm and privilege certain perspectives and bodies over others.

In the discrimination context, courts have carved out an exception for restroom-use based on a misunderstanding that “biological sex” and gender identity are separate. These opinions often focus on the imagined experience of a cisgender person sharing a restroom with a transgender person, and center on the cisgender person’s comfort or feeling of safety in the presence of a transgender person. For example, “the [*Etsitty*] court stated that because the employer ‘was nevertheless genuinely concerned about the possibility of liability and public complaints . . . [t]he question of whether UTA was legally correct about the merits of such potential lawsuits is irrelevant.’”<sup>300</sup> The court’s offensive view that transgender people are less valued than cisgender people privileges the cisgender experience over the transgender experience. And, rather than considering the well-documented safety risks (e.g., the high rate of murders of transgender people, particularly of women of color) or the well-being of transgender people, whose medical treatment is to live in their affirmed gender,<sup>301</sup> often courts concern themselves with the potential prejudice that others manifest.<sup>302</sup>

These arguments send a message to transgender people—and reinforce with cisgender people—that there is something inherently flawed about a transgender person’s existence or body. Courts assume and legitimize that the general public have “an aversion to sharing a restroom with a transgender person.”<sup>303</sup> This presumption is incredibly harmful and damaging to transgender people who are already struggling to find the

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300. Tobin & Levi, *supra* note 275, at 320 (quoting *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1227 (10th Cir. 2007)).

301. The importance of which cannot be understated. *See supra* notes 59–75 and accompanying text.

302. *See* Tobin & Levi, *supra* note 275, at 316 (“A commonly asserted justification for discrimination against transgender people in gender-specific settings is that such discrimination is necessary to protect the privacy interests of others who are uncomfortable with the presence of a transgender person.”).

303. *See id.* at 320 (discussing this assumption in *Etsitty*).

courage each day to be their true selves and find some shred of dignity in a world that marginalizes their existence. This struggle is compounded when courts find that it is not discriminatory for their employer to deny them the use of the restroom based on a misunderstanding of their identity and other peoples' level of comfort.

As Levi and Tobin point out, these arguments, however regularly made, are legally unsound.<sup>304</sup> In *Cruzan v. Special School District #1*, the court rejected a cisgender woman's claim that her personal privacy was violated when her employer permitted a transgender coworker to use the gender-appropriate restroom.<sup>305</sup> And, the recent federal agencies' involvement in cases about transgender students highlights that "generalized concerns about safety and privacy" do not justify denial of access to facilities based on gender identity.<sup>306</sup>

While many people—not just transgender people—might enjoy increased privacy options,<sup>307</sup> courts have recognized a constitutional right to privacy for transgender people, specifically with regard to medical

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304. *Id.* at 316–20. Compare *Etsitty*, 502 F.3d at 1224 (noting that an employer's worries about cisgender customers' reactions to sharing a restroom with a transgender person is a sufficient reason for terminating transgender person), with *Glenn v. Brumby*, 663 F.3d 1312, 1321 (11th Cir. 2011) ("Brumby advances only one putative justification for Glenn's firing: his purported concern that other women might object to Glenn's restroom use. . . . The fact that such a hypothetical justification may have been sufficient to withstand rational-basis scrutiny, however, is wholly irrelevant to the heightened scrutiny analysis that is required here."). For further support that the argument is legally unsound, see *Ricci v. DeStefano*, 557 U.S. 557, 563 (2009) (holding that fear of third-party litigation cannot constitute a legitimate nondiscriminatory motive absent "a strong basis in evidence that, had it not taken the [challenged] action, it would have been liable" to third parties); *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273, 1276–77 (9th Cir. 1981) (citing *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 389 (5th Cir. 1971), *cert. denied*, 404 U.S. 950 (1971)) (stating that a female employee could not be fired simply because certain foreign clients would only work with men); *Schroer v. Billington*, 577 F. Supp. 2d 293, 302 (D.D.C. 2008) (stating that if an employer defers to the biases of others, he is acting discriminatorily, "no less than if [he] act[ed] on behalf of his own prejudices"); EEOC Decision No. 78-47, 1978 WL 5798, at \*3 (Oct. 2, 1978) (concluding company discriminated under Title VII when it refused to hire a white, female truck driver because African-American employees of the company were uncomfortable riding with a white woman through predominantly African-American areas).

305. Tobin & Levi, *supra* note 275, at 317–18 (citing *Cruzan v. Special Sch. Dist. #1*, 294 F.3d 981, 983–84 (8th Cir. 2002)).

306. *See id.* at 316 n.80 (quoting Letter from Anurima Bhargava, Chief of Educ. Opportunities Section, Civil Rights Div., U.S. Dep't of Justice, & Arthur Zeidman, Dir. San Francisco Reg'l Office, Office for Civil Rights, U.S. Dep't of Educ., to Asaf Orr, Nat'l Ctr. for Lesbian Rights 3 (July 24, 2013), available at <http://www.scribd.com/doc/155984958/Arcadia-Notification-Letter>); *see also* Mathis, Charge No. P20130034X, at 13 (Colo. Civil Rights Div. June 17, 2013) (determination), available at [http://www.transgenderlegal.org/media/uploads/doc\\_529.pdf](http://www.transgenderlegal.org/media/uploads/doc_529.pdf) (rejecting school district's argument that allowing a student who is a transgender girl to use the girls' bathroom posed safety concerns).

307. *See, e.g.*, Tobin & Levi, *supra* note 275, at 325 ("Just as students with other physical differences, such as different stages of sexual development, visible disabilities or medical devices, or unusual scars or skin conditions, must be treated equally, so much transgender students.").

privacy.<sup>308</sup> However, as illustrated above, courts, like the general public,<sup>309</sup> feel that transgender people's bodies are fair game for discussion and dissection<sup>310</sup> and demand that transgender people disclose intimate details about their bodies, which courts then analyze through a cisgender lens of what is considered "normal."<sup>311</sup>

### *B. Dissecting Transgender Bodies: Disclosure and Legitimacy*

The question of whether a transgender person is a "legitimate man or woman" is inherent in the expectation that transgender people disclose intimate details about their bodies, functions, and sexual practices. The "'body-parts' checklist"<sup>312</sup> is really just an inventory to determine whether a transgender person is man or woman "enough" and is an effort to detect what Sharpe calls "interpersonal fraud."<sup>313</sup> In her article questioning the legal obligation to disclose one's "gender history" prior to marriage under the U.K.'s Gender Recognition Act of 2004,<sup>314</sup> Sharpe addresses the underlying problem:

The assumption, implicit within the non-disclosure provision, that non-disclosure of gender history represents a form of harm, appears to be an effect of law's inability to suspend its disbelief about bodies it has otherwise incorporated within social and legal order. This difficulty points to the transphobia and/or homophobia of law. . . .

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308. *Id.* at 317 ("In recognizing this right, the U.S. Court of Appeals for the Second Circuit has stated that '[t]he excruciatingly private and intimate nature of transsexualism, for persons who wish to preserve privacy in the matter, is really beyond debate.'" (quoting *Powell v. Schriver*, 175 F.3d 107, 111 (2d Cir. 1999))); *see also id.* at 317 n.84 ("We now hold . . . that individuals who are transsexuals are among those who possess a constitutional right to maintain medical confidentiality." (quoting *Powell*, 175 F.3d at 112)).

309. *See, e.g.,* Mey, *Flawless Trans Women Carmen Carrera and Laverne Cox Respond Flawlessly To Katie Couric's Invasive Questions*, AUTOSTRADDLE (Jan. 7, 2014, 5:00 AM), <http://www.autostraddle.com/flawless-trans-women-carmen-carrera-and-laverne-cox-respond-flawlessly-to-katie-couric-invasive-questions-215855> ("Things started to seem a little odd when the viewers kept being reminded about Carrera's transition by being shown pictures of her in bandages and mentions of her transition at every chance."); Dan Savage, *When Should a Transgender Person Disclose?*, METROTIMES (Apr. 2, 2014), <http://www.metrotimes.com/detroit/when-should-a-transgender-person-disclose/Content?oid=2143827>.

310. *See* Flynn, *supra* note 117, at 37 (discussing court's use of the "body-parts" checklist).

311. *See supra* Part V.B.

312. *See supra* note 159 and accompanying text.

313. Sharpe, *supra* note 103, at 50.

314. *See id.* at 47, 52 (arguing that the legal requirement to disclose "gender history" prior to marriage is discriminatory and encroaches on the right to privacy guaranteed by Article 8 of the European Convention on Human Rights).

This idea of transgender bodies, and particularly sexual congress with them, as evoking legal horror is an important one in understanding the gender history provision.<sup>315</sup>

The U.K. law reinforces the notion that transgender bodies are available for public discourse (that everyone should be able to weigh in on whether one is truly a man or a woman), placing transgender people in the position of constantly defending their identity, and privileging cisgender opinions over theirs.<sup>316</sup> Rather than viewing transgender status as medically private information, the U.K. law privileges cisgender people's reactions and opinions.<sup>317</sup> For example, transgender people are seen as "a source of sexual danger."<sup>318</sup> Notably, the law applies only to transgender people and, not intersex people, based on what Sharpe calls a "nature/artifice dyad."<sup>319</sup>

Legitimizing transgender people's existences requires both leveling expectations of privacy for transgender and cisgender bodies and viewing transgender bodies as equally acceptable and fully human under the law. If the law takes into account the current medical science that defers to gender identity as the key determinant of sex, the law must allow for the range of human variation and must refrain from privileging certain bodies over others by enforcing a cisgender standard as a "norm."

Even if the general public does not fully understand the etiology of sex, courts must account for the variations in factors that comprise a determination of sex, how common those variations are, and why gender identity is considered the core determinant of sex.<sup>320</sup> Courts should not rely on popular opinion of what constitutes sex, while ignoring medical reality. The lives of many people, transgender and intersex, are at stake.

The general assumption that all bodies in single-sex spaces, like restrooms or locker rooms, are similar is something that many people do not consciously reflect upon, but when the assumption is evaluated, it

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315. *Id.* at 40–41.

316. *Cf. id.* at 40 (arguing that the U.K.'s "gender history" disclosure law is premised on the assumption that "a transgender woman is really not a woman"); Savage, *supra* note 311 (discussing how cisgender people are not held to the same expectation).

317. *See supra* Part V.A.

318. Sharpe, *supra* note 103, at 43.

319. *Id.* at 42; *see supra* Part III.D.

320. *See* Greenberg, *Roads Less Traveled*, *supra* note 17, at 51–52 (arguing that "legal sex" should "reflect scientific developments"); Flynn, *supra* note 117, at 34 (arguing that "gender identity" should be the "defining basis for determining legal sex"); *cf.* Tobin & Levi, *supra* note 275, at 325 (discussing how the "very purpose of nondiscrimination laws" is to protect against norms and stereotypes and "[a]dopting and institutionalizing social discomfort with a specific group has the opposite effect of reifying the underlying social norms that give rise to the discriminatory attitudes in the first place").

becomes clear that the assumption is rooted in sex-stereotypes<sup>321</sup> about what an idealized or average woman or man ought to look like.<sup>322</sup> Most considerations of sex stereotyping stop at clothing, appearance, and mannerisms (i.e., gender role or expression). The law is clear that discrimination on the basis of sex includes sex stereotyping, specifically whether the way a person looks or acts meets expectations about what is “normal” according to the binary gender.<sup>323</sup> Sex stereotyping is not always limited to outward expressions or mannerisms, but also includes body characteristics and traits that are not considered “typical” for a man or a woman.<sup>324</sup>

Many people who do not fit gender stereotypes are subject to “gender-policing” when accessing single-sex spaces.<sup>325</sup> But “bathroom panic” concerns go beyond people’s appearances. The offense is not that transgender people are insufficiently male or female for that space; rather, the panic stems from the fear of different bodies<sup>326</sup> and people’s refusal to acknowledge or validate that a transgender woman is actually a woman, or a transgender man is actually a man. In other words, a transgender person could fit all of the stereotypes of how a woman or man should look and act,

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321. See *M.T. v. J.T.*, 355 A.2d 204, 206 (N.J. Super. Ct. App. Div. 1976) (“[JT’s] vagina had a ‘good cosmetic appearance’ and was ‘the same as a normal female vagina after a hysterectomy.’”); *In re Marriage of Kantaras v. Kantaras*, No. 98-5375CA at 49–52, 309 (Fla. Cir. Ct. Feb. 21, 2003), available at <http://www.transgenderlaw.org/cases/kantarasopinion.pdf> (summarizing how trial court refused to call Mr. Kantaras’s penis a penis even after Mr. Kantaras affirmed that this is the language he uses).

322. See Tobin & Levi, *supra* note 275, at 324 & n.131 (discussing specific discomfort with trans people’s bodies, including depictions of trans bodies as “monstrous”); see also *supra* note 126 (*Kantaras* discussing *Littleton*); Glenn v. Brumby, 663 F.3d 1312, 1320 (11th Cir. 2011) (“In this case, Brumby testified at his deposition that he fired Glenn because he considered it ‘inappropriate’ for her to appear at work dressed as a woman and the he found it ‘unsettling’ and ‘unnatural’ that Glenn would appear wearing women’s clothing.”).

323. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (noting that Congress intended to do away with all discrimination based on gender, including discrimination based on gender stereotypes).

324. Cf. Kylie Byron, Note, *Natural Law and Bona Fide Discrimination: The Evolving Understanding of Sex, Gender, and Transgender Identity in Employment*, 6 WASH. U. JURISPRUDENCE REV. 343, 357–69 (2014) (arguing that gender identity, rather than biology alone, is the only logical method of determining a “Bona Fide Occupational Qualification (BFOQs)” and that “sex-based BFOQs . . . are structures that both actively endorse and further violence and oppression”).

325. See Jody L. Herman, *Gendered Restrooms and Minority Stress: The Public Regulation of Gender and Its Impact on Transgender People’s Lives*, 19 J. PUB. MGMT. & SOC. POL’Y 65, 65–66 (2013), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Herman-Gendered-Restrooms-and-Minority-Stress-June-2013.pdf> (discussing American policies of gender segregation in public facilities).

326. See Green, *supra* note 15, at 29–30 (discussing transphobia).

but the repulsion comes in reaction to their bodies or gender histories being somehow different.<sup>327</sup>

While cisgender bodies may be considered most common, they are not the only bodies, and certainly not the only bodies entitled to protection or respect under the law. The notion that cisgender bodies are somehow “normal” is entrenched in the law and creates a legal hierarchy of recognition and treatment.<sup>328</sup> Transgender bodies are considered “monstrous” and “unnatural”; cisgender bodies are privileged as the standard.<sup>329</sup> Although in reality a range of bodies exist, the U.S. legal system still requires everyone to fit into a binary category of male or female to enjoy the full rights and privileges of personhood under the law. However, there is no requirement that bodies look or function a certain way to be recognized as male or female—to qualify as “normal” or “enough.” As Professors Greenberg and Herald note, if that were the case, many cisgender people might fall outside of the categories because of breast or penis size for example.<sup>330</sup> Which bodies get to be male? Which bodies get to be female? If you take away a certain body characteristic, for example, if a woman has a mastectomy, does that take away her legal status as a woman?

Courts have no business in doing a “‘body-parts’ checklist.”<sup>331</sup> Nor should they violate one’s body by prying into the appearance and function of one’s genitals or how one uses them to have sex. They should not ask a cisgender man the length of his penis or a cisgender woman the size of her breasts. Yet, transgender bodies are somehow placed in a separate category for display and assessment in the courtroom, using sex stereotyping as a compass. For example, for one to have the legal status of male, one must have the following combination: XY chromosomes; chest hair; testicles; deep voice; and a phallus that is more than one inch at birth (stretched) and

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327. Cf. Sharpe, *supra* note 103, at 35–36 (discrediting the assumption that failure to disclose gender history prior to marriage will result in some type of “harm” upon discovering that the body or history of the non-disclosing partner is somehow different).

328. See Green, *supra* note 15, at 83 (“[F]or trans people the issue is not that bodies need to be understood as similar, but they must be recognized as different. This difference must not be made qualitative such that trans bodies are valued as inferior to non-trans bodies. All bodies must be valued as intrinsically equal.”).

329. See *supra* note 324.

330. See Greenberg & Herald, *supra* note 36, at 869–70 (arguing that, in rejecting scientific development, courts are engaging in sex stereotyping). Greenberg and Herald analogize, “if a state adopted a test for the determination of sex that defined men according to the size of their penises and women according to the size of their breasts, it would undoubtedly fail even the rational basis test.” *Id.* at 870.

331. See *supra* note 159 and accompanying text.

completely functioning sexually, meaning large enough to have intercourse with a vagina.<sup>332</sup>

During the *Kantaras* trial, the court asked Mr. Kantaras if he refers to his genitals as his penis.<sup>333</sup> In spite of his affirmative answer, the court went on to refer to his body as “his enlarged clitoris.”<sup>334</sup> The court refused to acknowledge his genitals as a penis by refusing to use the language that he used to refer to his own body.<sup>335</sup> Mr. Kantaras testified that his penis “might not be a ‘standard-sized penis as everyone wants to call it, but it does function. You have feeling there. You can urinate. And that’s why I don’t have the problem that everybody seems to be—hung up on that I don’t have a standard size penis.”<sup>336</sup>

To affirm transgender people’s existence, the law must grasp that sex is multi-faceted and must look to gender identity. If gender identity is the decisive legal component for sex, then self-identity defines the rest of the body, and the legal recognition and affirming language must follow. There is no need to dissect a person’s private bodily integrity to satisfy a court’s purported need to find an individual masculine or feminine enough.

### *C. Respecting and Affirming: A Body Positive Approach*

Even well-meaning transgender allies might say, “[i]t doesn’t matter what is in your pants,” in an effort to provide acceptance to a transgender person. While the statement appears to reassure a person that he or she will not be judged on difference, it can also be viewed as dismissive of the bodies that transgender people do have. In fact, it *does* matter what is in your pants—all bodies matter. That said, legal or social validation should not hinge on how a body looks.

Language is important for affirming a transgender person, and language must be led by the person with that body.<sup>337</sup> The importance of language extends to correct names, pronouns, and also to labeling body

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332. See Greenberg & Herald, *supra* note 36, at 828–29 & n.35 (citing Dreger, *A History of Intersexuality*, *supra* note 228) (discussing “‘normal’ genitalia” for men under majority protocol).

333. *In re Marriage of Kantaras v. Kantaras*, No. 98-5375CA, at 51 (Fla. Cir. Ct. Feb. 21, 2003), available at <http://www.transgenderlaw.org/cases/kantarasopinion.pdf>.

334. *Id.*; see also Flynn, *supra* note 118 (discussing the *Kantaras* case on Court TV); cf. M.T. v. J.T., 355 A.2d 204, 206 (N.J. Super. Ct. App. Div. 1976) (“Plaintiff[s] . . . vagina had a ‘good cosmetic appearance.’”).

335. See, e.g., *Kantaras*, No. 98-5375CA, at 309 (referring to Mr. Kantaras’s penis as “an enlarged clitoris”).

336. *Id.* at 51–52.

337. See Langer, *supra* note 56, at 70 (“There can be enough of a match up for language to bridge what is missing or in the way.”).

parts.<sup>338</sup> If we afford legal recognition to people through identity documents, there is no reason to deny social recognition to the language used to describe their experience of gender and their bodies. Even if a court must decide which binary gender most suits a person,<sup>339</sup> there is no reason for judicially labeling or stripping a transgender or intersex person of dignity, as the court did to Mr. Kantaras. Many transgender people need surgery<sup>340</sup> to bring their bodies into alignment with their gender identity; but legal, medical, and social affirmation of gender identity should not depend on the presence of primary or secondary sex characteristics or the shape of one's genitals. A transgender person may experience those body parts according to their brain sex, not based on other people's idea of whether they are male or female enough.<sup>341</sup>

Moreover, labeling body parts according to a cisgender body norm (e.g., genitals must look a certain way to be male or female, she is a transgender woman with "male anatomy," he is "female-bodied") relies on sex stereotyping. If gender identity is core and immutable, courts must refrain from dissecting a transgender person's body. If a sex determination is necessary for legal purposes, the courts should rely upon the medical standard that appropriately elevates gender identity above all other components and recognizes that treatment may not warrant or accomplish a precise alignment of stereotypical (cisgender-typical) body parts. It is possible for transgender people to have equal status under the law and to enjoy the rights and privileges that others enjoy. One such privilege is having their self-identity and language about their bodies respected.

When advocating for equal access to restrooms, arguments often hinge on an "assumption of shame." These arguments presume, for example, that transgender people will prefer to stay clothed—as if there is inherent shame in having a body that is somehow different from the cisgender norm (which

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338. See, e.g., *Jameson v. Donahoe*, EEOC Decision No. 0120130992, 2013 WL 2368729, at \*2 (May 21, 2013) ("Intentional misuse of the employee's new name and pronoun may cause harm to the employee, and may constitute sex based discrimination and/or harassment."); *supra* notes 1–10 and accompanying text (discussing Donisha McShan's experience).

339. See *Wallbank*, *supra* note 18, at 483 ("The task of the law in determining the sex of a person . . . is not that of determining the person's 'true sex' or predominant biological sex, but rather the sex, male or female, into which the person best fits having regard to the sexually differentiated characteristics of the person, the person's ability to function and live in either sex, the person's gender expression as well as cultural expectations of what it means to be a man/male or a woman/female person . . .").

340. Even with surgery, "[t]he body must ultimately be accepted as an imperfect project. 'Ambiguity is of the essence of human existence.'" Langer, *supra* note 57, at 70 (quoting M. MERLEAU-PONTY, *PHENOMONOLOGY OF PERCEPTION* 169 (Colin Smith trans., Routledge 1996)).

341. See Langer, *supra* note 56, at 69 ("Once the process begins of the individual recognizing the individual's own gender identity by connecting to this internal sense of self and awareness of how that clashes with public perception is when the individual considers modifications.").

is likely not “achieved” by many cisgender individuals). The law should question and reject this assumption of shame. Transgender people have the right to live without fear or shame. Full equality requires a level of comfort with a range of bodies that might not fit the cisgender ideal.<sup>342</sup> Transgender people have a right to exist and be fully recognized under the law in every respect.

### CONCLUSION

In U.S. courtrooms, transgender people face a “legal shredding of self.”<sup>343</sup> This happens regardless of their efforts to come to terms with themselves, their struggles to explain who they are to friends and loved ones, and the medical processes they have endured. Furthermore, courts violate, shame, and ridicule transgender people and their bodies and refuse to recognize transgender people as people.

So long as a legal binary gender system exists in the United States, it is critical that transgender people receive legal validation and have access to the rights and privileges they deserve. Transgender people deserve to have their identities affirmed by the law. They deserve to have their privacy respected, not their bodies dissected. The most protective method for the courts to use is also the most legally and medically sound: Sex is multifaceted, and of the multiple factors that determine sex, gender identity must be given primary weight, as the single most important *biological* determinant of sex.

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342. See Tobin & Levi, *supra* note 275, at 324–26 (“Adopting and institutionalizing social discomfort with a specific group has the . . . effect of reifying the underlying social norms that give rise to the discriminatory attitudes in the first place.”).

343. Flynn, *supra* note 117, at 32.