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## Naming the Grotesque Body in the "Nascent Jurisprudence of Transsexualism"

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NAMING THE GROTESQUE BODY IN THE  
"NASCENT JURISPRUDENCE OF  
TRANSSEXUALISM"†

*Richard F. Storrow\**

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† *Farmer v. Haas*, 990 F.2d 319, 320 (7th Cir. 1993).

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## INTRODUCTION

In a legal system wedded to the notion that only two mutually exclusive sexes coexist, transsexualism<sup>1</sup> poses a daunting challenge. Whereas judges purport to decide disputes based on principles of justice, fairness, objectivity and adherence to *stare decisis*, transsexualism engenders judicial responses ranging from understanding and acceptance to disbelief and hostility. This Article explores the influences on judicial reactions to transsexualism and attempts to explain why the issues of gender incongruence posed by transsexualism are troubling to the bench.

After a description of an analytical framework constructed of theories drawn from the writings of Mikhail Bakhtin, Roland Barthes, and Sigmund Freud, this Article discusses the discrepancies in courts'

1. Transsexualism is defined as "[t]he desire to change one's anatomic sexual characteristics to conform physically with one's perception of self as a member of the opposite sex." *STEDMAN'S MEDICAL DICTIONARY* 1841 (26th ed. 1995). The condition experienced is properly termed "gender dysphoria," its manifestation (i.e., adoption of the desired sex role) "transsexualism." William A.W. Walters, *Human Sexual Differentiation and Its Disturbances*, in *SEX CHANGE: THE LEGAL IMPLICATIONS OF SEX REASSIGNMENT* 21 (H.A. Finlay ed., 1988).

"Transgendered" has emerged as an alternative to "transsexual" and refers to "women and men whose self-described gender identity is other than their sexual identity at birth (regardless of whether those people have had hormonal treatment or surgery to reassign their sexual identity)." Odeana R. Neal, *The Limits of Legal Discourse: Learning from the Civil Rights Movement in the Quest for Gay and Lesbian Civil Rights*, 40 N.Y.L. SCH. L. REV. 679, 679 n.\* (1996). Transgenderism also refers to "all those subjects who cross gender boundaries (as in 'the transgender community') [and] (more specifically) those subjects who undergo partial sex change, usually hormonal." BERNICE L. HAUSMAN, *CHANGING SEX: TRANSSEXUALISM, TECHNOLOGY, AND THE IDEA OF GENDER* 228 n.85 (1995). See also KATE BORNSTEIN, *GENDER OUTLAW: ON MEN, WOMEN AND THE REST OF US* 67-68 (1994) (explaining the hierarchy among transsexuals, transgenders, and transvestites); GORDENE OLGA MACKENZIE, *TRANSGENDER NATION* 55-56 (1994) (explaining the relationship between "transgenderism" and "transsexualism").

As this Article addresses individuals who seek medical intervention in order to harmonize their psychological and anatomical sexual identities, the terms "transsexualism" and "transsexual" will be used throughout. The term "postoperative" is used to signify one who has undergone sex conversion surgery. The acronyms MTF (male-to-female) and FTM (female-to-male) will be used, and pronouns and references to "female" or "male" refer to psychological sex unless otherwise made clear. In the main, though not exclusively, this Article examines the legal position of MTFs, given that most of the extant case law on transsexualism involves MTFs.

use of medical authority in cases considering the rights of transsexuals<sup>2</sup> and then analyzes courts' ultimate refusal to recognize transsexuals' psychological sex. The thrust of this Article is an examination of the forces compelling such inconsistencies. The result is an analysis which interweaves medical, juridical, psychological and mythic perspectives to disclose the underpinnings of courts' antipathy toward transsexuals.

### I. THE TRANSSEXUAL AS GROTESQUE: A FRAMEWORK FOR ANALYSIS

The primary factor influencing judicial emphasis on predictable outcomes is the Western classical tradition's emphasis on rationalism and closure.<sup>3</sup> The representation of the body in such a classical mode, according to Mikhail Bakhtin, is:

entirely finished, completed, strictly limited . . . [It] does not merge with other bodies and with the world. All attributes of the unfinished world are carefully removed, as well as all the signs of its inner life. The verbal norms of official and literary language, determined by the canon, prohibit all that is linked with fecundation, pregnancy, childbirth.<sup>4</sup>

In the classical mode, organs of the body:

acquire an exclusiveness; in other words, they convey a merely individual meaning of the life of one single, limited body. . . . [N]o signs of duality have been left. . . . The severance of the

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2. "A transsexual believes that he is the victim of a biologic accident, cruelly imprisoned within a body incompatible with his real sexual identity. Most are men who consider themselves to have feminine gender identity and regard their genitalia and masculine features with repugnance. Their primary objective in seeking psychiatric help is not to obtain psychologic treatment but to secure surgery that will give them as close an approximation as possible to a female body. The diagnosis is made only if the disturbance has been continuous (not limited to periods of stress) for at least 2 years, is not symptomatic of another mental disorder such as schizophrenia, and is not associated with genital ambiguity or genetic abnormality." *THE MERCK MANUAL OF DIAGNOSIS AND THERAPY* 1434 (Robert Berkow ed., 14th ed. 1982).
  3. See ROLAND BARTHES, *S/Z* 7 (Richard Miller trans., 1974) (noting that a discursive focus on truth, objectivity and law is grounded in a "return to the closure of Western discourse"); Paul Brest, *The Thirty-First Cleveland-Marshall Fund Lecture Constitutional Citizenship*, 34 *CLEV. ST. L. REV.* 175, 192 (1986) (noting American constitutional law's deep-rootedness in the post-Enlightenment tradition of rationalistic ethics).
  4. MIKHAIL BAKHTIN, *RABELAIS AND HIS WORLD* 320 (Helene Iswolsky trans., 1968).

organs from the body or their independent existence is no longer permitted.

....

That which protrudes, bulges, sprouts, or branches off (when a body transgresses its limits and a new one begins) is eliminated, hidden, or moderated.<sup>5</sup>

The classical notion of the body, Bakhtin has commented, conflicts with the grotesque image of the body prevalent in antique and medieval literature, a literature punctuated with carnivalesque images of death, renewal, and fertility. In such works, the body is always in the act of becoming:

It is never finished, never completed; it is continually built, created, and builds and creates another body. . . . [It] ignores the impenetrable surface that closes and limits the body as a separate and completed phenomenon. . . . [and] constructs [an existence in which] the life of one body is born from the death of the preceding, older one. . . . A tendency toward duality can be glimpsed everywhere.<sup>6</sup>

In the course of his commentary, Bakhtin criticizes literary scholar G. Schneegans for deeming the grotesque in literature merely “a negation, an exaggeration pursuing narrowly satirical aims.”<sup>7</sup> Schneegans “did not see that, in the grotesque world of becoming, the limits between objects and phenomena are drawn quite differently than in the static world of art and literature of his time.”<sup>8</sup> Schneegans’ response to the grotesque in literature is similar to that of jurists employing classical models of interpretation to address the phenomenon of transsexuality. The law, ever at the ready with its categories and distinctions, is prepared to recognize only two sexes, male and female, and rejects and finds jocular a body “in the act of becoming.” Bifurcating sex into the exclusive categories male and female, the law rejects recognition of any different sex, of any state of intersex, or of a sexual continuum that would call into question the legal system’s insistence on mutually exclusive sexual categories. The law is unprepared to

5. BAKHTIN, *supra* note 4, at 320–22.

6. BAKHTIN, *supra* note 4, at 317–18, 323.

7. BAKHTIN, *supra* note 4, at 304.

8. BAKHTIN, *supra* note 4, at 308.

encompass the blurring of these categories in the phenomenon of transsexualism and reacts to maintain them.<sup>9</sup>

For the courts the grotesque image of the transsexual threatens an unhinging of a paradigmatic sexual order and a defiance of closure and certainty in the realm of sexual identity. If the courts were to try to place an individual whose characteristics did not indicate one sex or the other sex into the mainstream of society, the result would be a fundamental challenge to the meaning of sex itself. Without exclusion on some level from participation in society, transsexuals would threaten a subversion of the categories upon which the law of sexual identity rests;<sup>10</sup> the binary categories male and female, mutually exclusive in law, would be called into question.

Roland Barthes' *S/Z*, a post-structuralist unraveling of Honoré de Balzac's *Sarrasine*, describes what happens to meaning and intended closure when a binary classification essential to a given paradigm no longer holds:

the physical contact between these two completely separate substances . . . produces a catastrophe: there is an explosive shock, . . . the depths are emptied, as in vomiting. This is what happens when the arcana of meaning are subverted, when the sacred separation of the paradigmatic poles is abolished, when one removes the separating barrier . . . the *excess* explodes.<sup>11</sup>

Disapproval of challenging a fixed social order is not the only element present in the courts' stance with respect to transsexualism. There is also the presence of judicial horror at the thought of castration and of the implantation of the image of a female father into social consciousness. While on the surface juridical discourse seeks to

9. Kenji Yoshino sees the basis of the binary system of sex classification as follows: "A corollary of the axiom of 'one body, one person' appears to be 'one body, one sex.' The social interest in this corollary reveals itself in the vehemence with which sexual deviance is defined and regulated by it." Kenji Yoshino, *Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays*, 96 COLUM. L. REV. 1753, 1829 (1996).

10. *Compare Loving v. Virginia*, 388 U.S. 1, 3 (1966), in which the trial court described miscegenation as a subversion of God's plan:

'Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for [interracial] marriages. The fact that he separated the races shows that he did not intend for the races to mix.'

11. BARTHES, *supra* note 3, at 65-66. See also *Meriwether v. Faulkner*, 821 F.2d 408, 417 (7th Cir. 1987) (remarking that housing the transsexual inmate "in a general population cell would undoubtedly create . . . 'a volatile and explosive situation.'").

categorize transsexualism as play, and those who indulge in it as societal dropouts, at a deeper level the court objectifies the transsexual as a disruption of a fixed social order through her willful alteration of her body,<sup>12</sup> and thus sees her as deserving of social censure.<sup>13</sup>

Transsexualism, invested with this explosive threat of abolishing the binary separation of the sexes, is in this sense a discursive interloper, threatening, with its definitive mutability, the jurisprudential paradigm upon which questions of sexual identity have been based. Courts are in the position of repelling this subversive force and do so, employing discourse replete with overdetermined references to the frivolousness of transsexuality and a subliminal judicial preoccupation with castration, and deploying into the social consciousness the image of a female father. It is at this level that the juridical discourse, facially one of containment, is in fact nascent, invested with its own explosive potential.

## II. MEDICAL AUTHORITY

One of the salient characteristics of judicial opinions considering transsexualism is their inclusion of medical authority. Courts defer to medical evidence in some cases, while in others they merely refer to it, basing the outcome of such cases on what best promotes societal equilibrium. This selective use of medical authority occurs in cases ranging from the availability of medical assistance for indigent transsexuals, to cases involving the ability of transsexuals to marry, the rights of transsexual prisoners, and the status of transsexuals under federal, state, and local anti-discrimination laws.

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12. See HAUSMAN, *supra* note 1, at 192 (“[T]he idea of gender identity disrupts the binary opposition understood as given in nature. As the body can be made to signify in opposition to its original designation as male or female, the clinical opinion that an individual has a cross-sex core gender identity usually signifies a decision to go ahead with surgical and hormonal treatments to effect sex change. In this scenario, the binary opposition between the sexes turns on the determination of gender; that is, sexual difference is undone by the idea of identity.”) (footnote omitted).
  13. See JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* 16–17, 151 n.6 (1990) [hereinafter *GENDER TROUBLE*] (arguing that the discourse of gender, taking for its premise “that for bodies to cohere and make sense there must be a stable sex expressed through a stable gender,” hegemonically regulates to produce subjects who fit its requirements for “harmony” between sex, gender, and sexuality and punishes those for whom the categories are in disarray).

Courts have no trouble finding sex reassignment surgery<sup>14</sup> medically necessary<sup>15</sup> for the treatment of gender dysphoria due to the medical consensus that surgery is the most promising route toward alleviating the suffering of transsexuals.<sup>16</sup> Courts have more difficulty, however, when the sexual identity of transsexuals, both pre- and post-surgery, is an issue. Resorting to medical authority, the courts are faced with the *lack* of a medical consensus regarding the sexual identity of the transsexual.<sup>17</sup> There *is*, however, unanimity of opinion in the medical community that sex exists along a continuum,<sup>18</sup> that male

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14. At least one commentator has suggested such procedures be deemed ““sex-confirmation” operations.” See J. Joris Hage, *Medical Requirements and Consequences of Sex Reassignment Surgery*, in *TRANSSEXUALISM, MEDICINE AND LAW, PROCEEDINGS OF THE XXIII<sup>RD</sup> COLLOQUY ON EUROPEAN LAW* [hereinafter *TRANSSEXUALISM*] 103, 104 (1995).
  15. See *infra* notes 24–37, and accompanying text. Note, though, that “transsexualism” has disappeared from the American Psychiatric Association’s list of mental disorders and may no longer be considered a mental disorder. Compare AMERICAN PSYCHIATRIC ASSOCIATION, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 74, 463 (3d ed. rev. 1987) (defining transsexualism as a mental disorder) with AMERICAN PSYCHIATRIC ASSOCIATION, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 532 (4th ed. 1994) (excluding any mention of transsexualism from category of “Gender Identity Disorders”).
  16. See *Richards v. United States Tennis Ass’n*, 400 N.Y.S.2d 267, 271 (Sup. Ct. 1977) (“Medical Science has not found any organic cause or cure (other than sex reassignment surgery and hormone therapy) for transsexualism, nor has psychotherapy been successful in altering the transsexual’s identification with the other sex or his desire for surgical change.”); Richard Green, *Spelling “Relief” for Transsexuals: Employment Discrimination and the Criteria of Sex*, 4 *YALE L. & POL’Y REV.* 125, 125 (1985) (“This compulsion to change anatomic sex is not modifiable by psychiatric intervention.”); Notes and Comments, *Transsexuals in Limbo: The Search for a Legal Definition of Sex*, 31 *MD. L. REV.* 236, 239 (1971) (“The transsexual is usually not responsive to any form of psychotherapy and requires surgery for social adjustment.”).
  17. See Erwin K. Koranyi, *Transsexuality Revisited*, 16 *AUSTRAL. J. OF FORENSIC SCI.* 34, 37 (1983) (“Sex of a person—a simple ‘yes’ or ‘no’ before—was broken down by Science to chromosomal sex, nuclear sex, hormonal sex, gonadal sex, and gender sex—to the dismay of courts, finding scientists in argument over as ‘simple’ a question as whether the subject is male or female.”). *But see* *Maffei v. Kolaeton Indus., Inc.*, 626 N.Y.S.2d 391, 395–96 (Sup. Ct. 1995) (determining, given “overwhelming medical evidence,” that transsexuals become their psychological sex once sex reassignment is complete).
  18. See *BODY GUARDS: THE CULTURAL POLITICS OF GENDER AMBIGUITY* 20 (Julia Epstein & Kristina Straub eds., 1991) [hereinafter *BODY GUARDS*] (“The notion of a ‘natural’ continuum along which sexual differentiation subtly occurs derives . . . from the earliest biomedical explanations in Western discourse.”); Henry Finlay, *Legal Recognition of Transsexuals in Australia*, 12 *J. CONTEMP. HEALTH L. & POL’Y* 503, 517 (1996) (“It appears that the simplistic biblical dichotomy between the sexes may now, in the light of modern insights, have to give way to a bipolar model of human sexuality. Along the continuum linking the two archetypal extremes are the various



and female are not the sole and mutually exclusive categories,<sup>19</sup> and that determination of sexual identity requires consideration of several factors.<sup>20</sup> The medical community has appealed to law-making bodies to recognize this phenomenon.<sup>21</sup> The courts, though, have not based decisions regarding the sexual identity of transsexuals on the medical paradigm of the sexual continuum; instead, the courts tend to base such decisions on factors other than medical authority.<sup>22</sup>

The fact that there is medical consensus that sex reassignment surgery<sup>23</sup> is necessary for the treatment of the gender dysphoric makes

intermediate 'abnormalities' that diverge, in greater or lesser degree, from the norm."); Stefano Rodotà, *General Presentation of Problems Related to Transsexualism*, in *TRANSSEXUALISM*, *supra* note 14, at 17, 19; William A.W. Walters, *Transsexualism—Medical and Legal Aspects*, 16 *AUSTRAL. J. OF FORENSIC SCI.* 65, 65 (1983) ("[T]he concept has developed of a spectrum of sexuality ranging from extreme masculinity on one hand to extreme femininity on the other."). The view of a sexual continuum has also been advanced for the purpose of challenging the political implications of adopting contestable identity categories. Cf. URVASHI VAID, *VIRTUAL EQUALITY: THE MAINSTREAMING OF GAY AND LESBIAN LIBERATION* 289 (1995) (arguing that the conception of sexual identity as categorically organized and fixed frustrates "the homosexual potential in all people"). See also MARTINE ROTHBLATT, *THE APARTHEID OF SEX: A MANIFESTO ON THE FREEDOM OF GENDER* 103 (1995) (using the view of a sexual continuum for the purpose of providing "equal, nondiscriminatory opportunity for personal fulfillment to all persons").

19. See *supra* note 17.

20. See Walters, *supra* note 18, at 69 ("Seven variables are thought to be involved in determination of sexual identity, viz., chromosomal sex, gonadal sex, hormonal function, internal genital morphology, external genital morphology, assigned sex (rearing) and psychosexual differentiation.").

21. See Finlay, *supra* note 18, at 517 ("It is the task of the legislature to adjust the received view of humanity accordingly and to integrate all forms of sexuality into society as legitimate members.").

22. See Section III, *infra*.

23. Genital surgical sex reassignment involves the following: in male-to-female transsexuals, breast augmentation and resection of both testes followed by vaginoplasty in which the erectile tissues of the penis are excised and the urethra is shortened. The penile skin tube is turned outside-in and brought in to the neovaginal cavity resulting in a skin-lined vaginal cul-de-sac. If the penile skin is unusable, transplantation of a section of the colon or a free split-skin graft is considered. The scrotal skin is then used for the construction of the labia and a clitoris is formed from a graft from the tip of the penis affixed over the shortened penile dorsal nerves. These alterations can be accomplished in one operation. For female-to-male transsexuals, two operations may be required. The first of these usually involves mastectomy and can be combined with the resection of the uterus and ovaries. The second operation focuses on construction of a penis, an as yet unperfected technique, and on giving the labial region a scrotum-like appearance via the use of testicular prostheses. See generally Edward S. David, *The Law and Transsexualism: A Faltering Response to a Conceptual Dilemma*, 7 *CONN. L. REV.* 288, 293 (1974-75); Hage, *supra* note 14, at 105-09. For personal accounts of the physical odyssey of sex reassignment, see BORNSTEIN, *supra* note 1, at

cases requiring determination of whether transsexual surgery is medically necessary for the treatment of transsexualism "easy" cases for the courts. Courts dealing with the coverage of sex reassignment surgery under health insurance policies and the availability of public medical assistance for the sex reassignment surgeries of indigent transsexuals must make such a determination in the first instance. *G.B. v. Lackner*<sup>24</sup> and its companion case *J.D. v. Lackner*<sup>25</sup> presented indigent transsexuals who had applied for Medi-Cal<sup>26</sup> benefits in order to pay for sex reassignment surgery. In response to the state's claim that the surgery was merely cosmetic, the *G.B.* court, in ruling that the plaintiffs were entitled to the benefits, stated, "Surely, castration and penectomy cannot be considered surgical procedures to alter the texture and configuration of the skin and the skin's relationship with contiguous structures of the body. Male genitals have to be considered more than just skin, one would think."<sup>27</sup>

A similar outcome obtained in *Doe v. State, Department of Public Welfare*.<sup>28</sup> There the court found the Department of Public Welfare's summary denial of medical assistance benefits for transsexual surgery void, because it conflicted with the federal statute with which Minnesota was required to comply in exchange for receiving federal funds for its medical assistance program.<sup>29</sup> The court determined, after a review of authoritative literature in the field of transsexualism, that:

it is not unreasonable to conclude that transsexualism is a very complex medical and psychological problem which is generally developed by individuals early in life. By the time an individual reaches adulthood, the problem of gender role disorientation and the transsexual condition resulting therefrom

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16-19; CAROLINE COSSEY, *MY STORY*, 35, 50-51, 95-103, 107 (1991); NANCY HUNT, *MIRROR IMAGE: THE ODYSSEY OF A MALE-TO-FEMALE TRANSSEXUAL* 140-144, 179, 203-04 (1978); CHRISTINE JORGENSEN, *CHRISTINE JORGENSEN: A PERSONAL AUTOBIOGRAPHY* 106, 111-114, 117, 133-137 (1967); JAN MORRIS, *CONUNDRUM* 105-09, 139-41 (1974); RENÉE RICHARDS, *SECOND SERVE* 166-75, 176-78, 205-08, 211-13, 264-65, 268, 272, 275-89 (1983).

24. *G.B. v. Lackner*, 145 Cal. Rptr. 555 (Cal. Ct. App. 1978).

25. *J.D. v. Lackner*, 145 Cal. Rptr. 570 (Cal. Ct. App. 1978).

26. Medi-Cal is California's Medicaid program. See *Intercommunity Med. Ctr. v. Belshe*, 39 Cal. Rptr. 2d 43, 45 (Cal. Ct. App. 1995).

27. *G.B.*, 145 Cal. Rptr. at 558.

28. *Doe v. State, Dept. of Pub. Welfare*, 257 N.W.2d 816 (Minn. 1977).

29. See *Doe*, 257 N.W.2d at 820.

are so severe that the only successful treatment known to medical science is sex conversion surgery.<sup>30</sup>

The case of *Pinneke v. Preisser*<sup>31</sup> contained an even stronger assertion that surgery is medically necessary for the treatment of transsexualism. In that case the court overrode the Iowa Department of Social Services' determination that "sex reassignment surgery can never be medically necessary when the surgery is a treatment for transsexualism and removes healthy, undamaged organs and tissue."<sup>32</sup> The Eighth Circuit concluded that "[t]his approach reflects inadequate solicitude for the applicant's diagnosed condition, the treatment prescribed by the applicant's physicians, and the accumulated knowledge of the medical community."<sup>33</sup>

Private insurers have also been required to underwrite transsexual surgery. In *Davidson v. Aetna Life & Casualty Insurance Co.*,<sup>34</sup> the court declined to interfere with the professional judgment of medical experts and ruled that sex reassignment surgery is not merely cosmetic in nature.<sup>35</sup> The *Davidson* court, echoing the tenor of the *Doe, G.B.*, and *Pinneke* opinions, noted that sex reassignment surgery, which "is requested rarely and done even more infrequently," "is lengthy, requires extensive modification . . . of the human body," and "is performed to correct a psychological defect, and not to improve muscle tone or physical appearance."<sup>36</sup>

In the area of medical necessity, at least, courts recognize the unique issues of transsexuals and reach outcomes of a surprisingly humanitarian character.<sup>37</sup>

30. *Doe*, 257 N.W.2d at 819.

31. *Pinneke v. Preisser*, 623 F.2d 546 (8th Cir. 1980).

32. *Pinneke*, 623 F.2d at 549.

33. *Pinneke*, 623 F.2d at 549.

34. *Davidson v. Aetna Life & Casualty Insurance Co.*, 420 N.Y.S.2d 450 (Sup. Ct. 1979).

35. *See id.* at 453.

36. *Davidson*, 420 N.Y.S.2d at 452-53.

37. Not all courts have reached this conclusion. The courts in *Denise R. v. Lavine*, 347 N.E.2d 893 (N.Y. 1976), *rev'g* 364 N.Y.S. 2d 557 (N.Y. App. Div. 1975) and *Rush v. Johnson*, 565 F. Supp. 856 (N.D. Ga. 1983), for example, denied benefits for transsexual surgery. Given the more recent precedent against this conclusion and the fact that the outcome in *Rush* relied on the characterization of sex reassignment as "experimental," a similar case would likely reach the opposite outcome.

One commentator's explanation of the state's facilitation of transsexuals' treatment is that the state "is so relieved to comprehend transsexuality as a gender illness with a cure." *See Note, Patriarchy is Such a Drag: The Strategic Possibilities of a Post-modern Account of Gender*, 108 HARV. L. REV. 1973, 1993 (1995) [hereinafter

## III. SOCIAL PARTICIPATION

As explained above, in the cases considering the necessity of transsexual surgery, courts adopt the consensus of the medical community that sex conversion surgery is necessary to bring a transsexual individual's psychological and anatomical sexes into congruence. Recognition of this congruence, or of the psychological sex of preoperative transsexuals, does not always follow; transsexuals' rights cases in the areas of family law, prisoners' rights, and employment discrimination make this clear. The different outcomes in these cases are not contradictory, especially in light of the lack of unanimity of the medical profession in regard to the preoperative or the postoperative transsexual's sexual identity,<sup>38</sup> and because medical necessity focuses on achieving integration within individuals, while social participation focuses on the integration of individuals with the larger world. In addressing this question in the context of transsexuals, courts ignore medical debate and simply deny recognition of transsexuals' psychological sexual identities, even post-surgery.

*A. Marriage*

In general, a postoperative transsexual may not marry a person of the opposite anatomical but same chromosomal sex.<sup>39</sup> If a postoperative transsexual marries someone of the same anatomical but opposite

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*Patriarchy*]. The point is weak, as it does not take into account either the failure of the state to facilitate treatment in prisoners' rights cases, see *infra* notes 130–176, and accompanying text, or the cases in which the courts systematically deny recognition of transsexuals' psychological sex.

38. At least one practitioner, a federal prosecutor, has advocated criminal penalties, given the "public interest in the sexual identity and physical integrity of citizens," for surgeons who perform transsexual surgery. See Stan Twardy, *Medicolegal Aspects of Transsexualism*, MEDICAL TRIAL TECHNIQUE Q. 249, 305 (Winter 1980) ("In the author's opinion, . . . surgeons, performing sex change operations, could be prosecuted under existing statutes of mayhem, simple and aggravated battery, criminal negligence, murder, conspiracy, suicide (where it is still a crime), and some other laws."). The author explains that the "castration" occurring in transsexual surgeries could be criminalized as assault and battery or mayhem and that "it would be no defense to the physician's crime of removing a healthy organ to say that the patient consented. . . . [C]onsent to an illegal act is invalid." Twardy, *supra* at 297–299.
39. See *In re Ladrach*, 513 N.E.2d 828, 832 (Ohio Probate Ct. 1987) ("[T]here is no authority in Ohio for the issuance of a marriage license to consummate a marriage between a post-operative male to female transsexual person and a male person.").

chromosomal sex, the marriage is voidable on the basis that it cannot be consummated.<sup>40</sup> This result is startlingly different from the cases of medical necessity where courts have so humanely found transsexuals to be in a state of incongruence *before* surgical intervention. Post-surgery, when congruent as individuals, transsexuals are nonetheless, in the eyes of the law, incongruent with society, with the result that their fundamental right to marry is denied.<sup>41</sup>

In *Corbett v. Corbett*,<sup>42</sup> the landmark English case influencing the law relating to transsexuals, an MTF postoperative sought to avoid a declaration that her marriage to a man was void. The court concluded that the marriage was a nullity, since the transsexual was not in fact a female.<sup>43</sup> A plethora of medical authority assisted the judge, himself a former medical practitioner,<sup>44</sup> in making the determination that, since the transsexual's chromosomal, gonadal, and genital makeup was characteristically male, the plaintiff was male for the purposes of the law of marriage.<sup>45</sup>

In a curious departure from the cases involving medical necessity, the *Corbett* court's stance was that sexual congruence or order existed *before* surgical intervention, since the plaintiff's chromosomes, gonads, and genitalia were all characteristically male, and that disorder existed *after*. The plaintiff's chromosomes and gonads were deemed those of a normal male;<sup>46</sup> only the genitalia had been altered. The court, by privileging three of the seven determinants of sexual identity, determined that the MTF postoperative, who possessed "male" chromosomes, was still male.<sup>47</sup> What *Corbett* said, in very elementary

40. See *M.T. v. J.T.*, 355 A.2d 204, 206, 207, 211 (N.J. Super. Ct. App. Div. 1976) (suggesting that validity of marriage depends on parties' possession of sex organs adequate for heterosexual sexual intercourse).

41. See *M.L.B. v. S.L.J.*, \_\_\_ U.S. \_\_\_, \_\_\_ 117 S. Ct. 555, 564 (1996) ("Choices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked as 'of basic importance in our society,' rights sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect.") (citation omitted).

42. *Corbett v. Corbett*, 2 W.L.R. 1306 (P. 1970).

43. See *Corbett*, 2 W.L.R. at 1325, 1327, 1328.

44. See *Sir Roger Ormrod*, *TIMES* (London), January 9, 1992, at 14.

45. See *Corbett*, 2 W.L.R. at 1325.

46. *But see* *Richards v. United States Tennis Ass'n*, 400 N.Y.S.2d 267, 271 (Sup. Ct. 1977) (MTF's gonadal structure post-surgery deemed by experts testifying on her behalf to be that of ovariectomized female).

47. *But see* *Finlay*, *supra* note 18, at 510 ("[C]hromosomes are of no direct significance in the formation of a person's character or in their interaction with others. The ordinary person cannot see them, smell them, or feel them. Why then should they have an

terms, was that a man could not become a woman as the result of surgical intervention.

As seen above, in *Corbett*, the court invoked the binary system of sex classification and denied April Ashley the classification which would have reflected the congruence between her psychological and her anatomical sex. A static rubric for the classification of sex, such as that imposed by the *Corbett* court, is consistent with and ultimately aids the driving objective of the legal system, predictable outcomes. In this way the court invoked a sexual order based on a static rubric of chromosomal typing and rejected the disorder posed by the MTF postoperative, because her claimed sex could not be encompassed by that typing.

An attempt to harmonize the cases of medical necessity and the denial of social participation in *Corbett* requires one to realize that the questions being asked in them are distinct: to ask whether surgical intervention is necessary in the treatment of transsexuals is *not* the same as asking whether, via surgery, a transsexual male can become female. This realization only takes one part of the way, however. To deem transsexual surgery medically necessary, and thus place no legal impediment in the way of procuring it, while simultaneously denying legal recognition of the "new" sex which results from it is as inhumane as would be denying all treatment whatsoever to gender dysphorics. One concludes, perhaps not as a matter of pure logic, but certainly as a matter of intuition, that the legal determination that transsexual surgery is medically necessary should likewise lead to the legal recognition of the postoperative's "new" sex. The reason behind this discrepancy in the decisions lies in the courts' reliance on medical authority in this area. Medical authority regarding the necessity of transsexual surgery offers a consensus. Regarding the identity of the postoperative transsexual, however, it does not. In short, post-surgery,

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overriding role in determining the sex in which a person is seen by society?"); Rodotà, *supra* note 18, at 20 ("[E]ven genetic sex is not clear-cut and certain. . . . [C]ertainties which used to provide a point of reference by which to affirm the inalienability of personal status are no longer valid. . . . [N]owadays this assumption, this legal fiction, can no longer be viewed with the same certainty as in the past."); Bonnie B. Spanier, "Lessons" from "Nature": *Gender Ideology and Sexual Ambiguity in Biology*, in *BODY GUARDS*, *supra* note 18, at 329, 344 (finding evidence of societal biases against sexual ambiguity in discourse related to cellular and subcellular biology); Walters, *supra* note 1, at 8 ("[N]ew discoveries point to the fallacy in concluding that the presence of a Y chromosome as a distinct entity seen on conventional chromosome analysis is essential for the diagnosis of maleness.").

some doctors advocate for legal recognition of the postoperative sex, others for the primacy of chromosomes.

Judge Roger Ormrod, author of the opinion in *Corbett*, believed in the primacy of chromosomes. In his article, *The Medico-Legal Aspects of Sex Determination*,<sup>48</sup> delivered at a meeting of the Medico-Legal Society of London in 1972, Ormrod contrasts medical and legal approaches to sex determination. In the medical field, admits Ormrod, “the categories male and female are not mutually exclusive,”<sup>49</sup> a concept difficult for the law, with its emphasis on a binary system of sex classification, to accept.<sup>50</sup> Ormrod uses a discussion of the indicia of sexual identity to prove that transsexuals can never be their psychological sex but only “imitations of the other;” “they remain, unhappily for themselves, what they always were—psychologically abnormal males or psychologically abnormal females.”<sup>51</sup> This tragic outcome is primarily due, according to Ormrod, to the fact that a transsexual’s sex is not chromosomally ambiguous. Surgical intervention in these cases is only part of a recommendation of a particular mode of living,<sup>52</sup> not a “reassignment” at all.

Ormrod’s argument, however, relies on two assumptions: first, that medical authorities are prepared to say that a given combination of chromosomal, genital and gonadal characteristics *determines* sex (some medical authorities consider psychological factors as well);<sup>53</sup> and

48. Roger Ormrod, *The Medico-Legal Aspects of Sex Determination*, 40 MEDICO-LEGAL J. 78 (1972).

49. Ormrod, *supra* note 48, at 78.

50. See *In re Anonymous*, 293 N.Y.S.2d 834, 837 (Civ. Ct. 968) (“It has been suggested that there is some middle ground between the sexes, a ‘no-man’s land’ for those individuals who are neither truly ‘male’ nor truly ‘female.’ Yet the standard is much too fixed for such far-out theories.”).

51. Ormrod, *supra* note 48, at 82, 83. Such a view was not unique to the medical community of England. A New York Academy of Medicine committee formed to study the issue of changing sex designations on birth certificates for postoperative transsexuals concluded that MTFs were “‘still chromosomally males while ostensibly females’” and that it was “‘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.’” *Anonymous v. Weiner*, 270 N.Y.S.2d 319, 322 (Sup. Ct. 1966).

52. See *Corbett*, 2 W.L.R. at 1319 (“[W]e [doctors] do not determine sex—in medicine we determine the sex in which it is best for the individual to live.”) (quoting expert testimony of Professor Dewhurst, Professor of Obstetrics and Gynecology at Queen Charlotte’s Hospital).

53. See, e.g., *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1083 n.6 (7th Cir. 1984); *M.T. v. J.T.*, 355 A.2d 204, 209 (N.J. Super. Ct. App. Div. 1976); *Richards*, 400 N.Y.S.2d at 269–70.

second, that if medicine were to adopt a specific rubric for determining sex, the law should likewise adopt that rubric. Ormrod trivializes both issues by claiming that the law is indifferent to sex: "The only branch of the law . . . in which problems of sex-determination may arise in practice is family law and in this branch it will only arise where the validity of a marriage is in issue."<sup>54</sup>

Marriage, though, is not the only legal context in which a determination of sexual identity is critical. Ormrod obviously did not foresee *Regina v. Tan*,<sup>55</sup> an English criminal case in which the defendant was charged with living off the earnings of prostitution. The criminal statute required that the defendant in such a case be male.<sup>56</sup> The Court of Appeals held that the same rules of law as were laid down in *Corbett* applied to English criminal law, and thus the defendant, though having undergone sex reassignment surgery and hormonal treatment, was male for the purposes of the statute.<sup>57</sup> One of the policy reasons behind this decision was "the desirability of certainty and consistency" in law:

It would, in our view, create an unacceptable situation if the law were such that a marriage between Gloria Greaves and another man was a nullity, on the ground that Gloria Greaves was a man; that buggery to which she consented with such other person was not an offence for the same reason; but that Gloria Greaves could live on the earnings of a female prostitute without offending against [the act] because for that purpose he/she was not a man . . . .<sup>58</sup>

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54. Ormrod, *supra* note 48, at 85.

55. *Regina v. Tan*, 1 Q.B. 1053 (1983).

56. *See* Sexual Offences Act, 1956, 4 & 5 Eliz. 2, ch. 69, § 30.

57. *See Tan*, 1 Q.B. at 1064.

58. *Tan*, 1 Q.B. at 1064. Of course the true horror of the case is what it spelled for a case involving the rape of a postoperative MTF. In such a case, the MTF could be raped, but since she is male in the opinion of the courts, the offense would be mere assault or sodomy, not rape, because under English law prior to 1994 only females could be victims of rape. The following commentary anticipated *Tan*: "Male adulterers should be heartened by the fact that they may indulge in cunnilingus, copula cruce, per oram, per anum and even per vaginum—perennially *ad nauseam* and with impunity. It is open season on transsexuals . . ." C. Nelson et al., *Medicolegal Aspects of Transsexualism*, 21 CANADIAN PSYCHIATRIC ASS'N J. 557, 561 (1976) (quoting Terrence Walton, *Trans-sexualism: When is a Woman not a Woman?*, 124 NEW L.J. 501, 502 (1974)). The English law has since been amended. *See* Criminal Justice and Public Order Act, 1994, ch. 33 § 142 (Eng.) (amending Sexual Offences Act, 1956, ch. 69, § 1).



An Australian court, on the other hand, reached the opposite conclusion in *Regina v. Harris and McGuiness*,<sup>59</sup> a case dealing with two MTFs, one pre- and one postoperative, who had both been convicted of being male persons attempting to procure other males to commit acts of indecency.<sup>60</sup> Both convictions were based on a finding that the accused were men according to the test of sexual identity laid down in *Corbett*.<sup>61</sup> But on appeal, the court turned away from *Corbett* and held that, for the purposes of the criminal law, in contrast to a transsexual who had not yet undergone sex reassignment surgery, a transsexual who had undergone sex reassignment surgery should be treated as a member of his or her reassigned sex.<sup>62</sup> The court followed the New Jersey family law case *M.T. v. J.T.*<sup>63</sup> and made the following conclusion:

[T]he criminal law is concerned with the regulation of behaviour. It is the relevant circumstances at the time of the behaviour to which we must have regard. And I cannot see that the state of a person's chromosomes can or should be a relevant circumstance in the determination of his or her criminal liability. It is equally unrealistic, in my view, to treat as relevant the fact that the person has acquired his or her external attributes as a result of operative procedure. After all, sexual offences—with which we are particularly concerned here—frequently involve the use of the external genitalia. How can the law sensibly ignore the state of those genitalia at the time of the alleged offence, simply because they were artificially created or were not the same as at birth?<sup>64</sup>

In *M.T.*, an MTF brought an action for maintenance against her husband. The husband interposed the defense that M.T. was also a male and that the marriage was thus void. The court, with the aid of expert testimony, made a novel ruling that M.T. was in fact female for the purposes of marriage, since she was able to function sexually as a female, saying, "In this case the transsexual's gender and genitalia are

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59. *Regina v. Harris and McGuiness*, (1988) 17 N.S.W.L.R. 158.

60. See *Harris*, 17 N.S.W.L.R. at 162 (Carruthers, J.).

61. See *Harris*, 17 N.S.W.L.R. at 171 (Carruthers, J.).

62. The New South Wales District of the Federal Court of Australia maintained this distinction in *Secretary, Department of Social Security v. "SRA"*, No. NG745 of 1992, FED No. 869/93 (Dec. 1, 1993), holding that a preoperative MTF was not entitled to receive the "wife's pension" of her invalid pensioner partner.

63. *M.T. v. J.T.*, 355 A.2d 204 (N.J. Super. Ct. App. Div. 1976).

64. *Harris*, 17 N.S.W.L.R. at 192 (Mathews, J.).

no longer discordant; they have been harmonized through medical treatment. Plaintiff has become physically and psychologically unified and fully capable of sexual activity consistent with her reconciled sexual attributes of gender and anatomy.<sup>65</sup> Though the opinion is couched in very humanitarian language, the emphasis on sexual function<sup>66</sup> is unfortunate, albeit consistent with *Corbett* and New Jersey law, since the inability to function sexually renders a marriage voidable.<sup>67</sup> The ruling thus leaves one with the question of how the case affects the validity of FTMs' marriages, since, even with advances in technology, many postoperative FTMs are incapable of achieving an erection suitable for vaginal penetration.<sup>68</sup> The case is also an anomaly<sup>69</sup> among American jurisdictions which, if the reported cases illustrate the trend, by and large do not follow *M.T.*<sup>70</sup> The humanitarian

65. *M.T.*, 355 A.2d at 211.

66. The *M.T.* court said:

[I]t is the sexual capacity of the individual which must be scrutinized. Sexual capacity or sexuality in this frame of reference requires the coalescence of both the physical ability and the psychological and emotional orientation to engage in sexual intercourse as either a male or a female. . . . If such sex reassignment surgery is successful and the postoperative transsexual is, by virtue of medical treatment, thereby possessed of the full capacity to function sexually as a male or female, as the case may be, we perceive no legal barrier, cognizable social taboo, or reason grounded in public policy to prevent that person's identification at least for purposes of marriage to the sex finally indicated."

*M.T.*, 355 A.2d at 209-11.

67. See N.J. STAT. ANN. § 2A:34-1 (West 1987). This law states:

Judgments of nullity of marriage may be rendered in all cases, when:

....

c. The parties, or either of them, were at the time of marriage physically and incurably impotent, provided the party making the application shall have been ignorant of such impotency or incapability at the time of the marriage, and has not subsequently ratified the marriage.

N.J. STAT. ANN. § 2A:34-1 (West 1987).

68. See Hage, *supra* note 14, at 106-07.

69. The author of *Patriarchy* employs *M.T.*, calling it the leading case on transsexual marriage, as support for the point that the state affords transsexuals benefits that it denies to gays and lesbians because transsexuals can be "read as reinforcing rather than subverting the boundary between masculinity and femininity." *Patriarchy*, *supra* note 37, at 1993. The point is weak, given *M.T.*'s unrepresentativeness and the plethora of cases suggesting that transsexuals, even if postoperative, cannot attain state recognition of their psychological sex.

70. See, e.g., *In re Ladrach*, 513 N.E.2d 828 (Ohio Misc. 2d 1987) (court denying an application for marriage of postoperative MTF to a male). Unless courts take posi-

language<sup>71</sup> used by the court is also absent from other court opinions on this subject.

*Frances B. v. Mark B.*, illustrates the fate of the preoperative transsexual in the context of marriage.<sup>72</sup> In that case the plaintiff filed a motion to have her marriage to an FTM preoperative—who had nonetheless submitted to a mastectomy and a hysterectomy—a nullity. Instead of focusing on the defendant's sexual identity, the court focused on his ability to function sexually and procreatively as a male:

Assuming, as urged, that defendant was a male entrapped in the body of a female, the record does not show that the entrapped male successfully escaped to enable defendant to perform male functions in a marriage. . . . While it is possible that defendant may function as a male in other situations and in other relationships, defendant cannot function as a husband by assuming male duties and obligations inherent in the marriage relationship. . . . Apparently, hormone treatments and surgery have not succeeded in supplying the necessary apparatus to enable defendant to function as a man for purposes of procreation.<sup>73</sup>

On this basis, the court granted the plaintiff's motion to declare her marriage a nullity.<sup>74</sup>

The emphasis on sexual function in these cases reveals that only preoperative anatomically male or female transsexuals can marry persons of the opposite anatomical sex. Of anatomical males, it is possible that only those who have not yet begun the process of sex reassignment can marry, since estrogen can render male genitals ill-suited for intercourse. The result for postoperatives is not so auspicious. They cannot marry at all. On the one hand they cannot marry persons of the same chromosomal though opposite anatomical sex,

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tions similar to the one espoused in *M.T.*, the case will probably remain an anomaly. In short, *M.T.* does not inspire confidence. See generally John Dwight Ingram, *A Constitutional Critique of Restrictions on the Right to Marry—Why Can't Fred Marry George—or Mary and Alice at the Same Time?*, 10 J. OF CONTEMP. L. 33, 51 (1984) (reasoning that the focus on sexual capacity may not withstand an equal protection challenge).

71. For example, "Such recognition will promote the individual's quest for inner peace and personal happiness, while in no way disserving any societal interest, principle of public order or precept of morality." *M.T.*, 355 A.2d at 211.

72. *Frances B. v. Mark B.*, 355 N.Y.S.2d 712 (Sup. Ct. 1974).

73. *Frances B.*, 355 N.Y.S.2d at 717.

74. See *Frances B.*, 355 N.Y.S.2d at 717.

since in most jurisdictions transsexuals' sex, even post-surgery, is determined, on the basis of chromosomes, to be the same as their prospective spouses'.<sup>75</sup> Such a marriage would be a nullity. On the other hand, an attempt to marry someone of the same anatomical though opposite chromosomal sex would also fail, since such a marriage would likewise be nullity,<sup>76</sup> consummation being quite impossible absent the requisite genitalia.<sup>77</sup>

Although the reliance, or lack of reliance, on medical authority may be one factor involved in the different outcomes, another, and possibly related, factor might be the distinguishing factors presented by the cases. In a case of medical necessity, a person in distress needs intervention in order to be relieved of that distress. In a family law case, though, and, demonstrated below, in cases implicating prisoners' rights or employment discrimination proscriptions, the transsexual's place in societal institutions, interacting with other people and forming a part of the social fabric, is at issue.<sup>78</sup> Juridical judgment implies

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75. See, e.g., *Anonymous v. Anonymous*, 325 N.Y.S.2d 499 (Sup. Ct. 1971). Compare *M.T. v. J.T.*, 355 A.2d 204 (N.J. Super. 1976), with *In re Ladrach*, 513 N.E.2d 828 (Ohio Misc. 1987).
76. See *Anonymous v. Anonymous*, 325 N.Y.S.2d 499 (Sup. Ct. 1971) (nullifying marriage between males, despite male petitioner's belief that preoperative MTF was female at time of marriage and subsequently submitted to sex reassignment surgery).
77. Such a result obtained in the case of *Cossey v. United Kingdom*, 184 Eur. Ct. H.R. (ser. A) (1990). Caroline Cossey, an MTF postoperative, claimed her human rights were infringed because she was not allowed under British law to change the sex on her birth certificate, with the result that she could not marry a man in Great Britain. The case was referred by the European Commission on Human Rights to the European Court of Human Rights, which ruled that her human rights had not been infringed because she was still a man, and the European Convention on Human Rights protects traditional marriages. Cossey remarked, "I can't marry legally. I could consummate a marriage with a man but it wouldn't be legal. I could marry a woman legally but I couldn't consummate the marriage so it could would [sic] be null and void, which is really silly." Karin Davies, *Court Rules Transsexual is Still a Man*, UPI, Sept. 28, 1990, available in LEXIS, Nexis Library, UPI File. In preparation for her legal challenge to Great Britain's refusal to amend her birth certificate and allow her to marry a man, Cossey submitted to a medical examination which verified that her vagina "was large enough to accommodate a penis." COSSEY, *supra* note 23, at 151.
78. Recall that in *Doe v. State, Department of Public Welfare*, the court disapproved the welfare administration's standard of medical necessity which conditioned receipt of medical assistance benefits on a showing that surgery to be paid for with those benefits would eliminate the patient's disability and render him self-supporting. See *Doe v. State, Dep't of Pub. Welfare*, 257 N.W.2d 816, 821 (Minn. 1977). The standard essentially required the full integration of the patient into society, post-surgery. One wonders, if the standard had been approved, whether benefits for transsexual surgery would have been granted as well, in light of the courts' prevention of transsexuals'

that to recognize that men become women and women become men via surgical intervention threatens to rend that fabric.

### B. Parental Rights

In the area of parental rights, courts seek to maintain the binary system of sex classification by severing, selectively, transsexuals' access to their children. By denying MTF postoperative transsexuals their fundamental right to be parents<sup>79</sup> and granting that same right to FTM postoperative transsexuals,<sup>80</sup> courts purport to evaluate the best interest of the children in these cases, while actually singling out MTF transsexuals for greater censure than their FTM counterparts.

In *Daly v. Daly*,<sup>81</sup> a postoperative MTF, father to a young girl, challenged a lower court's termination of her parental rights. The lower court had issued the order for termination on the basis that the father posed the risk of serious emotional or mental injury to her daughter if visitation was permitted.<sup>82</sup> Though the father did not request visitation privileges—she was instead willing to forgo them to retain parental rights—the Supreme Court of Nevada gave credence to the lower court's view that termination of parental rights was justified given the risk of serious emotional harm to the child.<sup>83</sup> The court concluded that "Suzanne [is] a selfish person whose own needs, desires and wishes were paramount and were indulged without regard to their impact on the life and psyche of the daughter."<sup>84</sup>

In *Cisek v. Cisek*,<sup>85</sup> a case remarkably similar to *Daly*, a postoperative MTF father's visitation rights were terminated. Although the trial court had refused to terminate the father's visitation rights, the appellate court reversed, noting that the evidence showed the potential

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integration into society in the cases of marriage, prisoners' rights, and employment discrimination.

79. See *M. L. B. v. S. L. J.*, \_\_\_ U.S. \_\_\_, 117 S. Ct. 555, 566 (1996) ("In contrast to loss of custody, which does not sever the parent-child bond, parental status termination is 'irretrievabl[y] destructi[ve]' of the most fundamental family relationship.") (citation omitted).
80. Compare *Daly v. Daly*, 715 P.2d 56 (Nev. 1986) with *Christian v. Randall*, 516 P.2d 132 (Colo. Ct. App. 1973).
81. *Daly v. Daly*, 715 P.2d 56 (Nev. 1986).
82. See *Daly*, 715 P.2d at 58.
83. See *Daly*, 715 P.2d at 59.
84. *Daly*, 715 P.2d at 59.
85. *Cisek v. Cisek*, No. 80 C.A. 113, 1982 WL 6161 (Ohio Ct. App. July 20, 1982).

for mental harm and that "common sense" indicated the potential for social harm.<sup>86</sup> The court then queried whether the father's change of sex was "simply an indulgence of some fantasy[.]"<sup>87</sup>

The language of these cases contains an eerie parallel to *Lamb v. Maschner*,<sup>88</sup> a prisoners' rights case in which the plaintiff inmate was described by the court as taking "an 'apparent delight in defying conventions, rules and regulations'" and whose "medical history indicates that he is a nonconformist,"<sup>89</sup> and *Supre v. Ricketts*,<sup>90</sup> in which prison officials "opined that Supre's conduct was calculated and manipulative."<sup>91</sup> The image of the transsexual thus portrayed is that of a frivolous person who pays no heed to social order or conventions and whose antics are essentially a call for attention. This language is violently contrary to the language of medical necessity employed in the cases on the availability of public funding and private insurance for sex reassignment surgery<sup>92</sup> and contrasts as well with the view of Judge Richard Posner:

[W]e should expect the converted transsexual to engender less shock than the transvestite. (I believe this is true.) Transsexual conversion, requiring as it does surgical and hormonal treatments, is not facile impersonation. It is painful, time-consuming, expensive—and irreversible. Transsexualism does not imply that we can change our sexual identity by changing our clothes.<sup>93</sup>

Responding to Posner, Kenji Yoshino has remarked:

Transsexualism threatens settled sexual expectations less [than transvestism] because it asks more of the body of the person who engages in it. The painful and irreversible dues that must be paid for such a subversion deter all but those who have

86. See *Cisek*, 1982 WL 6161, at \*2.

87. *Cisek*, 1982 WL 6161, at \*2. A similar outcome obtained in *J.L.S. v. D.K.S.*, in which the appellate court reversed the trial court's determination, supported by expert testimony, that joint custody by the MTF father and the mother was in the best interests of the children. See *J.L.S. v. D.K.S.*, 943 S.W.2d 766 (Mo. Ct. App. 1997).

88. *Lamb v. Maschner*, 633 F. Supp. 351 (D. Kan. 1986).

89. *Id.* at 354.

90. *Supre v. Ricketts*, 792 F.2d 958 (10th Cir. 1986).

91. *Id.* at 967.

92. See *supra* notes 24–37 and accompanying text. See also *Farmer v. Haas*, 990 F.2d 319, 321 (7th Cir. 1993) ("The defendants did not and do not deny that transsexualism is not a frivolous 'life style' choice but a genuine psychiatric disorder for which a prisoner is entitled to receive medical or psychiatric treatment.")

93. RICHARD A. POSNER, *SEX AND REASON* 27 (1992).

good reasons to engage in it. Transsexualism achieves a kind of moral seriousness because it cannot be a matter of mere play.<sup>94</sup>

Neither Posner's nor Yoshino's theory is consistent with the views propounded in *Daly*, *Cisek*, *Lamb*, and *Supre* in which the dues paid by the transsexual achieved anything but a moral seriousness.<sup>95</sup> Despite the pain and irreversibility undertaken by the transsexual to integrate mind and body, the legal system's settled sexual expectations are undermined to the extent that denial to transsexuals of integration into the social fabric, on the basis of chromosomal disharmony with the other indicia of sex, appears inevitable. The "asking more of the body" entailed by transsexualism is precisely *why* it is more subversive than is transvestism: judicial preoccupation is with the body, not the costume.<sup>96</sup> That transsexuals have "good reasons" for altering their bodies is an issue only in the medical necessity cases; aside from that, the judiciary, as case law makes clear, views the transsexual as subversive and

94. Yoshino, *supra* note 9, at 1829–30.

95. Cf. MARY RUSSO, *THE FEMALE GROTESQUE: RISK, EXCESS AND MODERNITY* 3 (1994) (describing function of grotesque images incorporated within Christian art during the Renaissance as "mere fanciful decoration without moral import").

96. Since the law focuses on the body, not on gender, the point made in *Patriarchy*, that the law favors the transsexual because of "the transsexual's concern with correcting her gender transgression" by undergoing sex reassignment, is weak. *Patriarchy*, *supra* note 37, at 1992. This focus on the body is not limited to the courts. Gay transsexuals have met resistance from gays and lesbians who believe that a transsexual is not really gay if s/he is attracted to individuals who have genitals the transsexual was not born with. See Elvia R. Arriola, *Law and the Gendered Politics of Identity: Who Owns the Label "Lesbian"?* 8 HASTINGS WOMEN'S L.J. 1, 3, 12 n. 36 (1997) (describing women who formed support group "with membership limited to women who had been born into a female body" and lesbians at the Michigan Womyn's Music Festival who excluded transsexual lesbians because they were not "legitimately" born into female bodies"). But see Phyllis Frye, *NLGLA Affirms BI and TG Incorporation in Its By-Laws: ILGA Too!*, Aug. 6, 1997 (press release) (on file with author) (reporting that the Board of Directors of the National Lesbian and Gay Law Association affirmed Bisexual and Transgender incorporation in its by-laws); *The Gay, Lesbian, & Bisexual Speakers Bureau of Boston, Mission Statement Now Includes T's*, April 18, 1997 (press release) (on file with author) (reporting expansion of mission statement to include educating about the lives and experiences of transgendered persons); *Gender PAC, N.O.W. Passes TransInclusion*, July 31, 1997 (press release) (on file with author) (reporting passage by the National Organization for Women, after three years of debate, of a transgender inclusion resolution); *National Gay and Lesbian Task Force, Thirty-Two States Gather for Historic Lesbian/Gay/Bisexual/Transgender Movement Meeting; Federation of State Groups Launched*, July 22, 1997 (press release) (on file with author) (Federation Mission statement includes "to facilitate cooperation and communication among organizations whose primary mission is to seek state legislative change that benefits lesbian, gay, bisexual and transgender persons").

“at play.” Unlike transsexualism, transvestism does not entail an alteration of body parts and thus, to critics of transsexualism, is not grotesque in its essence. Thus, no erection of judicial barricades against the encroachment of the excrescences and protuberances of the grotesque is required. This state of affairs renders transsexuals, in the view of the courts, at best more subversive than transvestites. Otherwise judicial negation of their identities and of their participation in society would be unnecessary.

### *C. Castration and the Female Father*

One salient point of concern in cases involving the status of transsexuals in family law is the judiciary's preoccupation with the “castration” which takes place in sex reassignment surgery for MTFs.<sup>97</sup> In describing sex reassignment surgery in *Corbett*, Judge Ormrod commented, “I have been at some pains to avoid the use of emotive expressions such as ‘castration’ and ‘artificial vagina’ without the qualification ‘so-called’ because the association of ideas connected with these words or phrases are so powerful that they tend to cloud clear thinking.”<sup>98</sup>

In the United States, while courts have characterized transsexualism as a nonconformist ploy for attention, the same courts have focused on plaintiffs being “what remains of a man”<sup>99</sup> and a “vestigial parent.”<sup>100</sup> More specifically, the *Daly* court concluded that Suzanne Daly had brought the wrath of society upon herself; by “discard[ing] his fatherhood,” Suzanne “in a very real sense . . . terminated her own parental rights.”<sup>101</sup> Both of these descriptions focus squarely on what the MTFs left behind in their transition from anatomically male to anatomically and psychologically female.

In a similar vein, nearly twenty years after *Corbett*, Judge Ormrod, in a letter to Henry Finlay, referred to the “fascination shown by some judges and academic lawyers with the legal consequences of constructing a so-called artificial vagina (the rectum serves almost as well or better!). But what of female/male transsexuals. Surely all of us males would blanch at an artificial non-functioning appendage. I

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97. See *supra* note 23.

98. *Corbett v. Corbett*, 2 W.L.R. 1306, 1310 (P.1970).

99. *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1087 (7th Cir. 1984).

100. *Daly v. Daly*, 715 P.2d 56, 59 (Nev. 1986).

101. *Daly*, 715 P.2d at 59.



prefer chromosomes."<sup>102</sup> This passage suggests that shock alone has led the judiciary to rule that chromosomes are preferable to outward anatomy for the purposes of establishing sexual identity. With regard to the "castration" of MTFs, an explanation for the shock and fear occasioned by it appears in Freud's "Fetishism:" "[I]f a woman ha[s] been castrated, then [a man's] own possession of a penis [is] in danger . . . ."<sup>103</sup> Judith Shapiro has noted some theorists' view that transsexuals' focus on genitals is itself fetishistic, but she argues that "transsexuals are, in fact, conforming to the culture's criteria for gender assignment."<sup>104</sup>

Transsexualism, then, and, more particularly, the recognition of MTFs' sexual identity, embodies the promise of institutionalized castration. Castration for the courts does not represent alignment of one's body with one's psychological sex, but a failure of the body to "be situated on either side of the sexual paradigm[:] implicit in it are a Female *beyond* (perfection), and a Male *short of it* (being castrated)."<sup>105</sup> Thus, Suzanne Daly, like La Zambinella the castrato in *Sarrasine*, "is marked both by perfection and by deficiency."<sup>106</sup> On the one hand, she is a woman, "perfect" insofar as having achieved congruence of her psychological (inward) and genital (outward) sexes, but at the same time, and most importantly for the courts, "she is sub-man, castrated, deficient, definitively *less*."<sup>107</sup> Legal recognition under this set of circumstances is impossible.<sup>108</sup>

There is the lingering sense, though, that the judiciary's opposition to inclusion of transsexuals in the social fabric is motivated by

102. Finlay, *supra* note 18, at 508.

103. 21 SIGMUND FREUD, *Fetishism*, in THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 152,153 (James Strachey trans., 1961). See also Twardy, *supra* note 38, at 295 (quoting "San Martin," CNCrim. y Correc. [1996] L.L. 605, 613 (Arg.) ("The nature of the crime must also be considered because the act per se constitutes a grievous assault on the man in his capacity as a man, and in more general terms, an absolute disregard for the social [natural] law—the one above all the norms of [positive] law and morality—: the preservation of the species.")).

104. Judith Shapiro, *Transsexualism: Reflections on the Persistence of Gender and the Mutability of Sex*, in BODY GUARDS, *supra* note 18, at 248, 260.

105. BARTHES, *supra* note 3, at 72–73.

106. BARTHES, *supra* note 3, at 72.

107. BARTHES, *supra* note 3, at 72.

108. *Sarrasine* emphasizes the horror of the discovery that a supposed female is in fact a castrato: "Monster! You who can give life to nothing. For me, you have wiped women from the earth." HONORÉ DE BALZAC, *SARRASINE*, reprinted in BARTHES, *supra* note 3, app. at 252.

more than just disapprobation of frivolity and fear of the social sanctioning of the loss of collective genitals. Kenji Yoshino, invoking an image of transsexuals as modern-day sorcerers, has remarked that "[t]ranssexuals violate the corollary [one body, one sex] by surgically changing from one sex to another, obtaining special knowledge of how it is to operate both as a man and a woman in society."<sup>109</sup> Adrienne Hiegel, writing on the Americans with Disabilities Act's explicit exclusion of sexual minorities as reflective of the Act's endorsing a moral tradition of intolerance, has remarked that "[l]egal penalties and cultural taboos punish transgressions that threaten the social order built on this system of exclusive bodies, making the notion of perversion indispensable to our culture."<sup>110</sup> Perhaps the explanation of the judiciary's stance with respect to transsexuals encompasses a bit of both of these; the judiciary's ultimate understanding of transsexualism centers not only upon its potential for societal disruption, but also upon its potential to sunder civilization.

In *Totem and Taboo*<sup>111</sup> and its continuation *Moses and Monotheism*,<sup>112</sup> Freud examines the underpinnings of human social organization via a narration of the mythic origins of civilization and the concomitant taboos essential to its maintenance. Taboos are "forbidden action[s] for which there exists a strong inclination in the unconscious,"<sup>113</sup> and according to Freud, they derive from a significant event which occurred in the context of what he terms the primal horde. According to the theory, the sons of the ruler of the primal horde banded together and killed their father whom they resented for keeping the women of the horde to himself. The sons feared that their desiring the women would arouse the father's jealousy with the result that they would be "killed or castrated or driven out."<sup>114</sup> The murder of the father, which amounts to original sin<sup>115</sup> in this mythic

109. Yoshino, *supra* note 9, at 1829.

110. Adrienne L. Hiegel, Note, *Sexual Exclusions: The Americans with Disabilities Act as a Moral Code*, 94 COLUM. L. REV. 1451, 1484 (1994).

111. SIGMUND FREUD, *TOTEM AND TABOO: RESEMBLANCES BETWEEN THE PSYCHIC LIVES OF SAVAGES AND NEUROTICS* (A.A. Brill trans., 1927) [hereinafter *TOTEM AND TABOO*].

112. 23 SIGMUND FREUD, *Moses and Monotheism*, in *THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD* (James Strachey trans., 1964) [hereinafter *Moses and Monotheism*].

113. *TOTEM AND TABOO*, *supra* note 111, at 56.

114. *Moses and Monotheism*, *supra* note 112, at 81.

115. "[T]he state of sin that according to Christian theology characterizes all human beings as a result of Adam's fall." MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 820

context,<sup>116</sup> is motivated by great temptation, but results in guilt and an urgency to atone for the criminal act. Atonement lies in the veneration of a totem, an emblem of the father's mythic force. Desecration of this totem becomes taboo, and its commission must be atoned for through punishment. "In these regulations [against killing or injuring the totem] are to be seen the first beginnings of a moral and social order."<sup>117</sup> Nonetheless, the temptation to desecrate the totem arises from the "return of the repressed," of which guilt is the precursor.<sup>118</sup> Freud characterizes the temptation as a contagion: individuals who violate the taboo arouse envy and carry the dangerous propensity to tempt others to follow suit.<sup>119</sup> Herein lies the specter of social dissolution "which must be punished or expiated by all the members of society lest it harm them all."<sup>120</sup> Addressing this temptation requires measures which will maintain "the new order which succeeded the father's removal. Otherwise a relapse into the earlier state would have become inevitable."<sup>121</sup> Whoever *voluntarily* submits to castration threatens this relapse.<sup>122</sup> Thus, "[t]he one-sex model can be read . . . as an exercise in preserving the Father, he who stands not only for order but for the very existence of civilization itself."<sup>123</sup>

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(10th ed. 1993) [hereinafter WEBSTER'S]. See also TOTEM AND TABOO, *supra* note 111 at 268 ("In the Christian myth man's original sin is undoubtedly an offence against God the Father, and if Christ redeems mankind from the weight of original sin by sacrificing his own life, he forces us to the conclusion that this sin was murder.").

116. See *Moses and Monotheism*, *supra* note 112, at 86.

117. *Moses and Monotheism*, *supra* note 112, at 119.

118. See *Moses and Monotheism*, *supra* note 112, at 86, 127.

119. See TOTEM AND TABOO, *supra* note 111, at 57.

120. TOTEM AND TABOO, *supra* note 111, at 59. See also BARTHES, *supra* note 3, at 66 ("Antithesis [ ] cannot be transgressed with impunity . . . [I]n copying woman, in assuming her position on the other side of the sexual barrier, the castrato will transgress morphology, grammar, discourse, and because of this abolition of meaning Sarrasine will die."); Twardy, *supra* note 38, at 305 (quoting "San Martin," CNCrim. y Correc. [1966] L.L. 605, 613 (Arg.) ("Mankind would subsist although every man in this world were to have his arms cut off, were to lose his property, his honor and his fatherland. However, if an act such as [sex reassignment surgery] were allowed to go unpunished—a gap would be opened into which the whole human race could fall.")).

121. MOSES AND MONOTHEISM, *supra* note 112, at 119.

122. See MOSES AND MONOTHEISM, *supra* note 112, at 122.

123. Defined as a model of sex classification based on the "self-evident greater potency of the male over the female." THOMAS LAQUEUR, MAKING SEX: BODY AND GENDER FROM THE GREEKS TO FREUD 58 (1990).

The image of the transsexual in contemporary jurisprudence comprises the images of a castrating woman, a castrated man, and in *Daly* and *Cisek*, the image of a female father. The deployment by MTFs of the image of the transsexual into the social consciousness invokes the danger of permitting those who submit voluntarily to castration to weaken the underpinnings of society. It is precisely this submission to the will of the mythical castrating father that social codes, set up to atone for the murder of that father, seek to suppress.<sup>124</sup> Thus, in *Daly*, while “vestigial parent” conveys the fact of parenthood, it at the same time masks the sexual identity of the father. In *Corbett*, Ormrod evaded the issue by characterizing the view that a father can become female as absurd:

If the “assignment” to the female sex is made after the operation, then the operation has changed the sex. From this it would follow that if a 50 year old male transsexual, married and the father of children, underwent the operation, he would then have to be regarded in law as a female and capable of “marrying” a man. The results would be nothing if not bizarre.<sup>125</sup>

Bizarre, maybe, but in the end nonetheless true: with advances in science, the “castrated” MTF postoperative is fully capable of procreating.<sup>126</sup>

Notably, the social punishment imposed on the MTF fathers in *Daly* and *Cisek* was not inflicted upon the male mother in *Christian v. Randall*.<sup>127</sup> In that case the FTM custodial mother was undergoing sex reassignment, had changed her name and had remarried. The father petitioned for custody of their four daughters. This petition was granted based solely on the mother’s transsexualism, but the appellate court reversed, noting the “high quality of the environment and home life” that the mother offered the children and the lack of evidence

124. *But see* JANICE G. RAYMOND, *TRANSEXUAL EMPIRE: THE MAKING OF THE SHE-MALE* 79, 81–82, 87–88 (1979) (understanding transsexualism to be about men producing women that more adequately fit male stereotypes of femininity).

125. *Corbett v. Corbett*, 2 W.L.R. 1306, 1325 (P. 1970).

126. *See Hage, supra* note 14, at 110. (“It should be noted that modern reproductive methods such as sperm storage, ovum storage, in vitro fertilisation [sic], and use of surrogate mothers do not preclude a transsexual from procreating as a member of the original sex, even after the date of sex reassignment surgery.”).

127. *Christian v. Randall*, 516 P.2d 132 (Colo. Ct. App. 1973).

suggesting the mother's relationship with the children had been adversely affected or that they were likely to suffer emotional harm.<sup>128</sup>

*Christian* demonstrates that the legal system is not as concerned with the grotesque qualities of transsexual bodies per se as it is with the social upheaval posed by—and which has resulted in the taboo against—castration and the assumption of female fatherhood.<sup>129</sup> As we have seen, medical authority, deferred to by the law, considers the transsexual tempted, if not compelled, to become the opposite anatomical sex and thereby to achieve congruence between anatomical and psychological sexual characteristics. While the legal system agrees that the temptation is great, it operates to discourage and penalize its indulgence, ensuring that a weakening of societal foundations not ensue. Both the *Daly* and *Cisek* opinions reveal the operation of this theory; since the urge to cross sexual boundaries by submitting to castration is tempting, its indulgence must entail some form of authoritative curtailment of liberty, which could presumably also serve as a deterrent to the transgression. Whether this result today is due to the fundamental male horror at castration or due to the sense of guilt over the murder of the symbolic father-ruler are questions warranting further discussion. For the law, in any court, indulging the compulsion constitutes commission of the prohibited act of transgressing sexual boundaries; such a transgression must be punished.

The significance of these cases is great. The courts' stance ultimately poses the larger question of whether the will to transgress sexual boundaries, embodied in the image of transsexualism, would not be tempting for more people if the curtailment of liberty resulting from its indulgence were removed. Such an outcome, demanding a fundamental reconceptualization of societal order, may be a major factor in the law's lack of compassion for transsexuals.

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128. See *Christian*, 516 P.2d at 134.

129. For an alternative explanation see RAYMOND, *supra* note 124, at 27–28, 173 (positing that the patriarchy uses FTMs as tokens providing a smokescreen for the truth of the transsexual phenomenon). Compare Case's view that effeminate men are less likely to recover under Title VII than are masculine women. See 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, 47 (1995). But see *X, Y and Z v. United Kingdom*, Eur. Ct. H.R. (Apr. 22 1997) <<http://www.hcour.coe.fr/eng/XYZ.html>> (no violation of human rights to deny official recognition of the fatherhood of a post-operative FTM whose long-term female partner bore a child by donor insemination).

### *D. Prisoners' Rights*

Cases involving transsexualism and prisoners' rights offer further evidence of how the judiciary defers to medical authority in some cases and ignores it in others. While medical discourse concludes that sex reassignment is the most promising treatment option for transsexuals, focusing on the individual transsexual's needs, the discourse in transsexual prisoners' rights cases focuses alternatively on the societal interest in a secure prison environment. This focus is of course not unique to cases involving transsexual prisoners. Nearly all prisoners' challenges to the conditions of prison life involve, in the end, a balancing of rights versus risks.<sup>130</sup> In the main, courts apply a rational relationship analysis, with a high degree of deference to prison officials' discretion, in such cases.<sup>131</sup>

Transsexual prisoners' rights cases involve MTFs who are in need of estrogen and at risk of assault in the prison population. Under Federal Bureau of Prisons policy, preoperative transsexuals are housed with those of the same biological sex, postoperatives are housed with those of their reassigned sex.<sup>132</sup> Even though the cases in this area do not focus squarely on the sexual identity of postoperative transsexuals, they are nonetheless analogous to the marriage cases in that they illustrate how, from a judicial standpoint, transsexuals threaten to rend the social fabric—either of the prison, by creating a volatile and unstable environment, or of the institution of marriage, by seeking legal recognition of their psychological sex.

#### 1. Denial of Estrogen

An issue common in transsexual prisoners' rights cases is whether prison officials' denial of estrogen treatment constitutes cruel and unusual punishment in violation of the Eighth Amendment. The

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130. *See, e.g.*, *Bell v. Wolfish*, 441 U.S. 520, 540 (1979); *Pell v. Procunier*, 417 U.S. 817, 822–23 (1974) (evoking the balancing between prisoners' constitutional rights and institutional objectives, namely security, institutional order and discipline, and prison officials' discretion in determining what regulation the attainment of those objectives warrants). *See generally* COLUMBIA HUMAN RIGHTS LAW REVIEW, A JAILHOUSE LAWYER'S MANUAL (3d ed. 1992) [hereinafter *JAILHOUSE LAWYER'S MANUAL*].

131. *See, e.g.*, *Bell*, 441 U.S. at 557 (applying Fourth Amendment balancing test to room-search rule).

132. *See* *Farmer v. Brennan*, 511 U.S. 825, 829 (1994).

standard for analyzing this issue, announced by the Supreme Court in *Estelle v. Gamble*,<sup>133</sup> is difficult to satisfy: the prisoner must establish prison officials' "deliberate indifference to serious medical needs."<sup>134</sup> Although courts have found that transsexualism constitutes a serious medical need,<sup>135</sup> the judiciary has concluded that transsexual prisoners have no constitutional right to estrogen therapy<sup>136</sup> provided that some other treatment option is available.<sup>137</sup> Prison officials need only provide the transsexual inmate with *some* form of treatment, e.g., counseling or even testosterone replacement, at their discretion.<sup>138</sup>

Transsexual inmates have launched several unsuccessful actions to compel prison officials to provide them with estrogen.<sup>139</sup> In *Meriwether v. Faulkner*, the Seventh Circuit considered the plight of a preoperative MTF who had undergone nine years of estrogen treatment, resulting in "chemical castration," and surgical alteration of her facial structure, breasts and hips. The inmate, denied estrogen by prison officials, filed suit challenging the available medical care. The Court of Appeals, reversing the District Court, held that gender dysphoria was a serious medical need<sup>140</sup> and cited several cases in which courts "expressly rejected the notion that transsexual surgery is properly characterized as cosmetic surgery, concluding instead that such surgery is medically necessary for the treatment of transsexualism."<sup>141</sup> Since the transsexual inmate was receiving *no* medical treatment in prison, the court found her claim valid, declaring that "a transsexual inmate is constitutionally entitled to some type of medical

133. *Estelle v. Gamble*, 429 U.S. 97 (1976).

134. *Id.* at 104.

135. *See supra* notes 24–36 and accompanying text. *See also Meriwether v. Faulkner*, 821 F.2d 408, 413 (7th Cir. 1987).

136. *See Bowring v. Godwin*, 551 F.2d 44, 48 (4th Cir. 1977) (holding a prisoner has no constitutional right to preoperative hormone treatment and sex change operation).

137. *See Brown v. Zavaras*, 63 F.3d 967, 970 (10th Cir. 1995); *Meriwether*, 821 F.2d at 413.

138. *See Long v. Nix*, 86 F.3d 761, 766 (8th Cir. 1996) (psychotherapy as an alternative to tranquilizers); *Supre v. Ricketts*, 792 F.2d 958, 963 (10th Cir. 1986) (testosterone replacement as an alternative to estrogen); *Lamb v. Maschner*, 633 F. Supp. 351, 353–4 (D. Kan. 1986) (mental health treatment as an alternative to hormone treatment).

139. As was the case in *Meriwether*, these claims are invariably brought under 42 U.S.C. § 1983.

140. *See Meriwether*, 821 F.2d at 413.

141. *Id.* at 412.

treatment,"<sup>142</sup> but adding the caveat that "she does not have a right to any particular type of treatment such as estrogen therapy . . . ."<sup>143</sup>

*Supre v. Ricketts*<sup>144</sup> was the case of a transsexual inmate who was driven to mutilate her genitals to the point where her testicles had to be surgically removed. *Supre's* development of breast tissue<sup>145</sup> while in prison and her acts of self mutilation led prison officials to label her, chillingly, "a difficult management problem"<sup>146</sup> and to decide that testosterone replacement was an appropriate medical treatment. The court deferred to the discretion of the prison officials,<sup>147</sup> thus adhering to the principle that estrogen treatment is not required in a prison setting. In a particularly humane dissent, Circuit Judge Stephanie Seymour found *Supre*:

. . . no ordinary transsexual, but one driven to acts of self-emasculatation. Prison officials put off her pleas for estrogen even though she mutilated herself repeatedly and attempted suicide. Such a failure to act raises an inference of deliberate indifference . . . .<sup>148</sup>

In *Farmer v. Carlson*,<sup>149</sup> Dee Farmer, a preoperative MTF who had undergone bodily changes as a result of the estrogen therapy<sup>150</sup> brought suit for denial of estrogen.<sup>151</sup> The court granted summary judgment in favor of the prison officials,<sup>152</sup> deferring to the informed medical judgment of the prison doctors: "the proper treatment for people who have a normal genetic complement . . . remains firmly in the providence of psychotherapy, not in hormonal or surgical manipulation."<sup>153</sup> The doctors in the case had further concluded that prescription of estrogen for Farmer posed a health risk.<sup>154</sup> Upon transfer to a different prison, Farmer was diagnosed as a transvestite, not a transsexual, and thus received no medical treatment for her

142. *Meriwether*, 821 F.2d. at 412.

143. *Id.* at 413.

144. *Supre v. Ricketts*, 792 F.2d 958 (10th Cir. 1986).

145. Termed "gynecomastia." See *Farmer v. Carlson*, 685 F. Supp. 1335, 1337 (M.D. Pa. 1988).

146. *Supre*, 792 F.2d at 961.

147. See *Supre*, 792 F.2d at 963.

148. *Supre*, 792 F.2d at 966-67.

149. *Farmer v. Carlson*, 685 F. Supp. 1335 (M.D. Pa. 1988).

150. See *id.* at 1337.

151. See *id.* at 1338.

152. See *Carlson*, 685 F. Supp. at 1346.

153. *Id.* at 1340.

154. See *Carlson*, 685 F. Supp. at 1340.



transsexualism.<sup>155</sup> The appellate court reversed the district court's grant of summary judgment for the prison officials,<sup>156</sup> but a subsequent jury trial resulted in a verdict against Farmer.<sup>157</sup> Further litigation by Farmer revealed that while in prison she had successfully obtained contraband estrogen, but had not developed breasts.<sup>158</sup>

## 2. Administrative Segregation and Assault

The series of claims brought by Dee Farmer has triggered much controversy and illustrates two other issues facing transsexuals in prison—their placement in protective custody and the risk of assault they run by remaining in the general prison population.<sup>159</sup>

Placement in administrative segregation is meant to reduce the risk of assault<sup>160</sup> or to, in effect, quarantine inmates carrying communicable

155. See *Farmer v. Haas*, No. 90-1088, 1991 WL 26456, at \*3 (7th Cir. Feb. 14, 1991).

156. See *Farmer v. Haas*, 990 F.2d 319, 320 (7th Cir. 1993), cert. denied, 510 U.S. 963 (1993).

157. See *id.*, at 320.

158. See *Farmer v. Brennan*, 511 U.S. 319, 825–29 (1994) (noting that although Farmer did not develop breasts while in prison, overall, she nonetheless projected a decidedly feminine appearance).

In *Phillips v. Michigan Department of Corrections*, the court deemed prison officials' refusal to continue a transsexual life inmate's estrogen therapy a probable Eighth Amendment violation and ordered the officials to provide estrogen pending the outcome of a trial. See *Phillips v. Michigan Dep't of Corrections*, 731 F. Supp. 792, 801 (W.D. Mich. 1990), *aff'd without opinion*, 932 F.2d 969 (6th Cir. 1991). This district court decision is not reflected in more recent case law in this area, however, and plays the role that *M.T.* does in the marriage context. Moreover, in *Phillips*, the court had before it evidence of the physical injury suffered by denying estrogen from one whose body had been significantly altered by years of hormone therapy.

159. See *Brennan*, 511 U.S. 825; *Haas*, 990 F.2d 319; *Farmer v. Haas*, 1991 WL 26456, at \*1; *Farmer v. Hawk*, No. 94-CV-2274(GK), 1996 WL 525321 (D.D.C. Sept. 5, 1996); *Carlson*, 685 F. Supp. 1335. For commentary on *Farmer v. Brennan*, see John Boston et al., Legal Commentary, *Farmer v. Brennan: Defining Deliberate Indifference Under the Eighth Amendment*, 14 ST. LOUIS U. PUB. L. REV. 83 (1994); Stacy Lancaster Cozad, Note, *Cruel But Not So Unusual: Farmer v. Brennan and the Evolving Standards of Decency*, 23 PEPP. L. REV. 175 (1995); Marjorie Rifkin, *Farmer v. Brennan: Spotlight on an Obvious Risk of Rape in a Hidden World*, 26 COLUM. HUM. RTS. L. REV. 273 (1995); Jason D. Sanabria, Note and Comment, *Farmer v. Brennan: Do Prisoners Have Any Rights Left Under the Eighth Amendment?*, 16 WHITTIER L. REV. 1113 (1995).

160. See, e.g., *Meriwether v. Faulkner*, 821 F.2d 408, 417 (7th Cir. 1987) ("Given her transsexual identity and unique physical characteristics, her being housed . . . in a general population cell would undoubtedly create . . . 'a volatile and explosive situation.'").

disease.<sup>161</sup> While such segregation is meant to afford protection to inmates at risk of assault, it often entails a drastic curtailment of privileges which might include denial of use of the law library, decreased eligibility for work detail, and housing in physical surroundings inferior to those enjoyed by the general prison population.<sup>162</sup> Thus, inmates have launched challenges to their administrative segregation on the basis of due process and equal protection,<sup>163</sup> alleging that they have a protected liberty interest in being confined in the general prison population rather than in restrictive segregation and that they have been the target of an arbitrary and unreasonable classification. These challenges have largely failed, however, the judiciary having decided that a prisoner has no liberty interest in remaining in the general population, since "less amenable and more restrictive quarters for nonpunitive reasons is well within the terms of confinement ordinarily contemplated by a prison sentence."<sup>164</sup> With respect to equal protection claims, the court applies the rational basis test and inevitably concludes that the classification is reasonably related to the professional exercise of prison officials' judgment in promoting legitimate security interests.<sup>165</sup>

Whereas placement in administrative segregation is consistent with a prison sentence, assault is not.<sup>166</sup> In contrast to administrative segregation, "[b]eing violently assaulted in prison is simply not 'part of the penalty that criminal offenders pay for their offenses against society,'"<sup>167</sup> and "prison officials have a duty under the [Eighth] and

161. See, e.g., *Hawk*, 1996 WL 525321, at \*1 (inmate challenged constitutionality of Bureau of Prisons' policy of segregation of HIV-positive inmates from the general prison population).

162. See *JAILHOUSE LAWYER'S MANUAL*, *supra* note 130, at 405.

163. See, e.g., *Farmer v. Carlson*, 685 F. Supp. 1335, 1338 (M.D. Pa. 1988) (inmate challenged her placement, for four and one-half months, in administrative segregation).

164. *Hewitt v. Helms*, 459 U.S. 460, 468 (1983).

165. See, e.g., *Carlson*, 685 F. Supp. at 1344.

166. See *Brennan*, 511 U.S. at 832. The *Brennan* court said:

In its prohibition of "cruel and unusual punishments," the Eighth Amendment places restraints on prison officials, who may not, for example, use excessive physical force against prisoners. The Amendment also imposes duties on these officials, who must provide humane conditions of confinement; prison officials must ensure that inmates receive adequate food, clothing, shelter, and medical care, and must "take reasonable measures to guarantee the safety of the inmates."

*Brennan*, 511 U.S. at 832 (citations omitted).

167. *Brennan*, 511 U.S. at 834 (quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)).

[Fourteenth] amendments to protect prisoners from violence at the hands of other prisoners.’”<sup>168</sup> The duty, more specifically, is “‘to exercise reasonable care to provide reasonable protection from an unreasonable risk of harm.’”<sup>169</sup> This unreasonable risk of harm is established where a plaintiff shows that there “was a ‘strong likelihood that violence will occur.’”<sup>170</sup> Normally, an inmate will adduce evidence regarding the basis of his fear of being assaulted. The court then undertakes an analysis of the reasonableness of this fear.<sup>171</sup> To establish fear of this dimension, “‘an inmate must show more than simple anxiety,’”<sup>172</sup> though the standard does not require the prisoner to have already been victimized.<sup>173</sup>

Targets of sexual assault are often young, effeminate and newly admitted.<sup>174</sup> Thus, transsexuals are at risk of assault in prison, not only because they are perceived to be transsexual, but because their “appearance . . . departs from traditional notions of an acceptable masculine demeanor.”<sup>175</sup> For transsexual inmates, the right to be free from assault dovetails with the issue of protective custody. Very generally, there are those prisoners who require protective custody because they fear assault, and those who do not desire protective custody, whether they fear assault or not, because protective custody is usually far less desirable than being housed in the general population.

The risk of assault also dovetails with prison officials’ denial of estrogen. While the natural effeminacy of a prisoner cannot likely be changed, the feminizing effects of estrogen, including gynecomastia, can be averted or undone to a degree by simple denial of access to estrogen therapy. Masculinization can be achieved by the prescription of a regimen of testosterone replacement. Denial of estrogen to

168. *Purvis v. Ponte*, 929 F.2d 822, 825 (1st Cir. 1991) (alteration in original) (quoting *Leonardo v. Moran*, 611 F. 2d 397, 398–99 (1st Cir. 1979)).

169. *Purvis*, 929 F.2d at 825 (quoting *Lovell v. Brennan*, 728 F.2d 560, 564 (1st Cir. 1984)).

170. *Purvis*, 929 F.2d at 825 (quoting *Benson v. Cady*, 761 F.2d 335, 339–40 (7th Cir. 1985)).

171. *See, e.g., Purvis*, 929 F.2d at 825.

172. *Purvis*, 929 F.2d at 825 (quoting *Shrader v. White*, 761 F.2d 975, 979 (4th Cir. 1985)).

173. *See United States v. Gonzalez*, 945 F.2d 525, 527 (2d Cir. 1991).

174. *See Doe v. Lally*, 467 F. Supp. 1339, 1349 (D. Md. 1979).

175. *Gonzalez*, 945 F.2d at 526 (departing downward from minimum required sentence in a case involving a defendant of slight, effeminate demeanor); *see also United States v. Lara*, 905 F.2d 599, 605 (2d Cir. 1990) (finding that personal characteristics of defendant, including immature appearance and admitted bisexuality, created a peculiar vulnerability justifying a downward departure of his sentence).

transsexual inmates is attractive to prison officials presumably because sex reassignment surgery is unavailable to inmates,<sup>176</sup> and preventing a male inmate from becoming in any way feminized while housed with the male population diminishes the potential for an otherwise volatile prison setting.<sup>177</sup>

Thus, while sex reassignment surgery is deemed a medical necessity in the treatment of transsexualism, in the prison context, prison officials, vested with nearly full discretion, can not only override a transsexual's access to such surgery, but can deny access to hormones.<sup>178</sup> The required "some treatment" can be as ineffectual as counseling<sup>179</sup> or as outrageous as testosterone replacement.<sup>180</sup>

It seems that when transsexuals *are* imprisoned, they are doubly so: sex reassignment surgery is still medically necessary but in prison inappropriate and inadvisable, even in light of the fact that postoperatives are housed with those of their reassigned sex. Transsexuals in this bind will most likely have no choice but to request protective

176. See *Lamb v. Maschner*, 633 F. Supp. 351, 353–54 (D. Kan. 1986) (finding that sex reassignment surgery is inappropriate and inadvisable in a prison setting).

177. For a similar view, see Debra Sherman Tedeschi, *The Predicament of the Transsexual Prisoner*, 5 TEMP. POL. & CIV. RTS. L. REV. 27, 44 (1995).

178. See *Meriwether*, 821 F.2d at 414 (“[G]iven the wide variety of options available for the treatment of gender dysphoria and the highly controversial nature of some of those options, a federal court should defer to the informed judgment of prison officials as to the appropriate form of medical treatment.”).

179. See *COSSEY*, *supra* note 23, at 91 (relating, with regard to therapy, that “I did go back just once, after the operation. But in common with many transsexuals, I didn’t feel that therapy could offer me anything. It was my body that needed attending to, not my mind.”); Hage, *supra* note 14, at 110 (“[N]onsurgical treatment of transsexuality is generally believed to be enormously disappointing.”); HUNT, *supra* note 23, at 29 (“All the literature on the subject seems to agree that psychiatry has a zero batting average in curing transsexuals.”); ERWIN K. KORANYI, *TRANSSEXUALITY IN THE MALE: THE SPECTRUM OF GENDER DYSPHORIA* 157 (1980) (“Psychological treatment forms, be they analytical or behavioral in orientation, are effective therapeutic tools in many other instances but fail as a rule with transsexuals, who are rarely, if ever, interested in what these treatments can offer.”); JOHN MONEY, *SEX ERRORS OF THE BODY AND RELATED SYNDROMES* 85 (1994) (“Psychotherapy has proved to be ineffectual in changing the body image fixation on sex reassignment in the fully developed syndrome of transsexualism.”). *But see* Hiegel, *supra* note 110, at 1474 n.133 (maintaining, without authority, that doctors prefer psychotherapy “particularly in situations where the power relation between the doctor and the transsexual is tilted towards the doctor, as in cases of prison incarceration.”).

180. See *Supre v. Ricketts*, 792 F.2d 958, 960, 962–63 (10th Cir. 1986) (testosterone replacement therapy offered after castration of transsexual inmate).

custody, instead of being able to obtain the necessary surgery and then request a transfer to a women's facility.<sup>181</sup>

The repeated denial of estrogen to transsexual prisoners in case after case appears consistent, but it is perhaps internally *inconsistent*, masking a deeper preoccupation and concern. Looking beyond the facial, one sees that the discourse in transsexual prisoners' rights cases is multi-layered. On one level, the discourse of security, employing references to potential panic, disorder, chaos and explosive situations, seeks to ensure the stability and quiescence of the prison environment; on another level, discussion of providing disincentives to transsexuals from seeking protective custody and denying them estrogen is a discourse of erasure, suggesting that transsexualism will "take care of itself," or will be taken care of by other inmates, if ignored by prison authorities. In this way, the discourse positions the transsexual as a locus of prescribed violence, whether in the form of assault or of physical and emotional damage occasioned by the denial of estrogen.

### *E. Employment Discrimination*

Employment discrimination jurisprudence at both the federal and state levels also captures transsexuals in a discourse of exclusion from social participation. This wide net, cast using a remarkably refined system of semantic manipulations, snags all claims launched by transsexuals and reveals that no matter how a transsexual frames her discrimination claim, it will fail.<sup>182</sup> A review of the case law

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181. See *Lamb*, 633 F. Supp. at 353 (denying transfer to preoperative MTF due to the "violation of women's rights" at issue).

182. This Article will discuss the minority position advanced by the New York courts. See *infra* notes 251–258 and accompanying text. Discussion of the Americans with Disabilities Act, the Rehabilitation Act and certain state statutes, all of which *expressly* exclude transsexuals from their purview, is beyond the scope of this Article. See 42 U.S.C. § 12211(b)(1); 29 C.F.R. § 1630.3(d); 29 U.S.C. § 701 et seq.; IND. CODE § 22-9-5-6(d)(3) (1996); IOWA CODE § 225C.46(2)(b) (1997); LA. REV. STAT. ANN. § 51:2232(11)(b) (West 1996); NEB. REV. STAT. § 48-1102(9) (1996); OHIO REV. CODE ANN. § 4112.01(16)(b)(ii) (Anderson 1995).

Note that some courts have looked to these express exclusions to find that transsexualism is not a physical disability under state law. See, e.g., *Dobre v. Nat'l R.R. Passenger Corp.* ("Amtrak"), 850 F. Supp. 284, 289 (E.D. Pa. 1993); *Conway v. City of Hartford*, No. CV 950553003, 1997 WL 78585, at \*4 (Conn. Super. Ct. Feb. 4, 1997); *Sommers v. Iowa Civil Rights Comm'n*, 337 N.W.2d 470, 476 (Iowa 1983); *Holt v. Northwest Pa. Training Partnership Consortium, Inc.*, 694 A.2d 1134, 1139 (Pa. Commw. Ct. 1997). In *Conway*, in contrast to the other three cases, transsexualism was deemed a mental disorder by virtue of its being defined as

demonstrates: (1) the miscategorization of transsexualism as a matter of sexual orientation; (2) the conflation of the terms "biological," "anatomical," and "chromosomal;" (3) the misprision of the relation between "sex" and "gender;" and (4) the assumed irrelevance of references to transsexual plaintiffs' pasts and to the public's perception of their identities. The judiciary consistently betrays a willingness to deny transsexuals the protection of the sex discrimination proscriptions of Title VII of the Civil Rights Act of 1964<sup>183</sup> and of its state law analogs.

### 1. Claims Based on Transsexualism: Miscategorization

Courts have concluded that Title VII's sex discrimination prohibitions do not prohibit discrimination based on transsexualism by miscategorizing transsexualism with sexual orientation.<sup>184</sup> According to the judiciary, Congress's rejection of several bills introduced to amend Title VII to prohibit discrimination on the basis of sexual preference demonstrates the statute's use of the traditional definition of sex,<sup>185</sup>

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such in *Farmer v. Brennan*, 511 U.S. 825 (1994), and its inclusion in the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders*. See *Conway*, 1997 WL 78585, at \*5.

183. 42 U.S.C. §§ 2000e-2(a)(1) to 2000e-17.

184. See *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1084 (7th Cir. 1984), *cert. denied*, 471 U.S. 1017 (1985); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982); *Voyles v. Ralph K. Davies Med. Ctr.*, 570 F.2d 354 (9th Cir. 1978), *affg* 403 F. Supp. 456, 457 (N.D. Cal. 1975); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 663 (9th Cir. 1977); *Grossman v. Bernards Township Bd. of Educ.*, 538 F.2d 319 (3d Cir. 1976), *affg* No. 74-1904, 1975 WL 302, at \*4 (D.N.J. Sept. 10, 1975), *cert. denied*, 429 U.S. 897 (1976); *Powell v. Read's, Inc.*, 436 F. Supp. 369, 371 (D. Md. 1977) (noting that the position of the Equal Employment Opportunity Commission is that discrimination against transsexuals is not prohibited by existing law). *But see* RUTH COLKER, *HYBRID: BISEXUALS, MULTIRACIALS, AND OTHER MISFITS UNDER AMERICAN LAW* 108 (1996) (arguing that since the word "transsexual" refers to one's sex, discrimination on this basis is sex discrimination).

185. See *Ulane*, 742 F.2d at 1085-86 (enumerating unsuccessful attempts by members of Congress to amend Title VII to prohibit discrimination based upon "affectational or sexual orientation"). In *Holloway v. Arthur Anderson & Co.*, the court used a similar rationale to conclude that sex, as it is used in Title VII, is not synonymous with gender. See *Holloway*, 566 F.2d at 661-62. Some courts have determined that discrimination on the basis of sexual preference is not prohibited by Title VII's prohibition of sex discrimination. See, e.g., *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989), *cert. denied*, 493 U.S. 1089 (1990); *DeSantis v. Pac. Tel. & Tel. Co., Inc.*, 608 F.2d 327, 329-30 (9th Cir. 1979); *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979).

which by implication excludes transsexualism.<sup>186</sup> To reach this conclusion, courts embrace Webster's remarkably unilluminating definition of sex<sup>187</sup> and disregard the medical consensus that sex exists along a continuum and is thus defined with reference to several factors.<sup>188</sup> In a manner inconsistent with the broad remedial purposes of Title VII,<sup>189</sup> the courts point to legislative activity subsequent to the enactment of Title VII to frustrate claims of employment discrimination brought by transsexuals.<sup>190</sup>

In jurisdictions whose state employment discrimination statutes include sexual orientation as a prohibited basis for discrimination, courts insist that transsexualism has nothing to do with sexual orientation, thus further frustrating claims brought by transsexuals on that basis. In *Maffei v. Kolaeton Industry, Inc.*,<sup>191</sup> for example, the transsexual plaintiff, presumably aware of how federal courts were construing Congress's failure to include sexual orientation with other prohibited bases for discrimination, tied her sex discrimination claim to the *inclusion* of sexual orientation in the New York City equivalent of Title VII.<sup>192</sup> The court rejected this theory, disagreeing with the federal courts' contention that the failure of Congress to include the term "sexual orientation"<sup>193</sup> in Title VII demonstrated an intent to exclude

186. *But see* Case, *supra* note 129, at 48-49 (noting that a strict construction of the statute supports protection for transsexuals routinely appearing for work in women's attire, "if the skirts and dresses were of a sort the employer did not object to its female employees wearing").

187. 1 : either of the two major forms of individuals . . . that are distinguished respectively as female or male [,] 2 : the sum of the structural, functional, and behavioral characteristics of living things that are involved in reproduction by two interacting parents and that distinguish males and females

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WEBSTER's, *supra* note 115, at 1073.

188. *See Holloway*, 566 F.2d at 662 n.4 (9th Cir. 1977) (relying on traditional notions of sex).

189. *See* United Steelworkers of Am. AFL-CIO-CLC v. Weber, 443 U.S. 193, 215 (1979) (Blackmun, J., concurring).

190. *See, e.g., Ulane*, 742 F.2d at 1086 (using Congress's rejection of attempts to broaden the scope of Title VII as evidence that it "had a narrow view of sex in mind when it passed the Civil Rights Act"); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982) ("The fact that the proposals were defeated indicates that the word 'sex' in Title VII is to be given its traditional definition, rather than an expansive interpretation."); *Holloway*, 566 F.2d at 662 (failure to add sexual orientation shows "that Congress had only the traditional notions of 'sex' in mind").

191. *Maffei v. Kolaeton Indus., Inc.*, 626 N.Y.S.2d 391 (Sup. Ct. 1995).

192. *See* NEW YORK CITY ADMIN. CODE, § 8-107, subd. 1 (a) (1996).

193. The court defined "sexual orientation" as follows:

transsexuals.<sup>194</sup> The court remarked that “[t]here is a clear distinction between homosexuals and transsexuals.”<sup>195</sup> The court also cited *Underwood v. Archer Management Services, Inc.*,<sup>196</sup> a case brought under the District of Columbia Human Rights Act,<sup>197</sup> in which the court held that transsexuality and homosexuality are distinct.<sup>198</sup>

It is possible that the courts’ miscategorization of transsexualism with sexual orientation is inadvertent or at least based on a misapprehension of scientific discourse. The courts’ own choice of language suggests inadvertence: “This Court is ever sensitive to the need to assist those who find themselves caught in the human turmoil of a psychological sexual orientation that is in conflict with their actual anatomical sex.”<sup>199</sup>

Another explanation for this miscategorization might be the conflation of sexual orientation with gender identity in scientific literature,<sup>200</sup> or the opinion of certain medical professionals that transsexualism is the manifestation of disguised homosexuality.<sup>201</sup> Whatever the reason, “[t]he association of social gender atypicality with minority sexual orientation is used to substitute sexual orientation for sex and gender in legal analyses of sex/gender discrimination.”<sup>202</sup> By equating transsexualism with sexual orientation, the courts, in jurisdictions

[It refers to] sexual preferences and practices, i.e., the sex of a person’s sexual partner, with heterosexuals being persons sexually attracted to members of the opposite sex, homosexuals being those attracted to members of the same sex, and bisexuals attracted to both sexes.

*Maffei*, 626 N.Y.S.2d at 393.

194. See *Maffei*, 626 N.Y.S.2d at 395–96 (“Because Congress may have chosen not to include the term ‘sexual orientation’ in Title VII does not mean that it has considered and declined coverage to transsexuals.”).

195. *Maffei*, 626 N.Y.S.2d at 395.

196. *Underwood v. Archer Management Servs. Inc.*, 857 F. Supp. 96 (D.D.C. 1994).

197. D.C. CODE ANN. § 1-2501 to 1-2557 (1992 & Supp. 1997).

198. See *Underwood*, 857 F. Supp. at 98 (noting incorrectly that “courts have firmly distinguished transsexuality from homosexuality”).

199. *In re Anonymous*, 582 N.Y.S.2d 941, 942 (N.Y. City Civ. Ct. 1992).

200. See Spanier, *supra* note 47, at 344 (finding evidence of societal biases against sexual ambiguity in discourse related to cellular and subcellular biology).

201. See Shapiro, *supra* note 104, at 252; cf. STEPHEN O. MURRAY, *AMERICAN GAY* 20, 250–51 (1996) (remarking on society’s equation of homosexuality and effeminacy and its rewarding of homosexuality made invisible by the absence of gender nonconformity); Case, *supra* note 129, at 54 (arguing that discrimination against effeminate men may be overdetermined and effeminacy conflated with gayness).

202. Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of “Sex,” “Gender,” and “Sexual Orientation” in Euro-American Law and Society*, 83 CAL. L. REV. 1, 122 (1995).



whose anti-discrimination laws do not prohibit discrimination on the basis of sexual orientation, make the same substitution with respect to transsexuals and ultimately deny them, along with gays and lesbians, legal protection from employment discrimination. In jurisdictions that do include such prohibitions, transsexualism is said to be distinct from sexual orientation. Thus, no matter the wording of the statutory regime, transsexuals generally are not protected from employment discrimination on either the basis of their transsexualism or of their sexual orientation.<sup>203</sup>

## 2. Claims Based on Sex

While courts have asserted with clarity that transsexuals may assert discrimination claims based on their sex,<sup>204</sup> as opposed to their transsexualism, curious results obtain when they do. These results are based in large measure on a conflation of the terms "biological," "anatomical," and "chromosomal," a misprision of the relationship between the terms "sex" and "gender," and irrelevant attention to transsexual plaintiffs' pasts and to the public's perception of their sexual identities. When a transsexual sues for discrimination based on her sex, courts exclude all claims but those alleging discrimination on the basis of what sex the transsexual is perceived by others to be or, in the alternative, was known by others to be in the past.<sup>205</sup> Needless to say,

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203. *But see* EVANSTON, ILL., ORDINANCE 61-0-97 (June 3, 1997) (defining sexual orientation in Human Rights Ordinance as encompassing both affectional relationships and gender identity); MINNEAPOLIS, MINN., MUNICIPAL CODE § 139.10, .20 (visited Aug. 5, 1997) <[http://www.municode.com/folio.cgi/11490.nfo/query=\\*/toc/{@81}?>](http://www.municode.com/folio.cgi/11490.nfo/query=*/toc/{@81}?) (prohibiting discrimination on the basis of affectional preference and including within the definition of affectional preference "having or projecting a self-image not associated with one's biological maleness or one's biological femaleness"); *Conway v. City of Hartford*, No. CV 950553003, 1997 WL 78585, at \*7 (Conn. Super. Ct. Feb. 4, 1997) (distinguishing between transsexualism and sexual orientation and allowing the sufficiently pleaded claim of discrimination based on sexual orientation to proceed).

204. *See, e.g., Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 664 (9th Cir. 1977) ("[T]ranssexuals claiming discrimination because of their sex, male or female, would clearly state a cause of action under Title VII.>").

205. *See, e.g., James v. Ranch Mart Hardware, Inc.*, 881 F. Supp. 478, 481 (D. Kan. 1995) (granting summary judgment against an MTF who failed to allege discrimination against males); *Dobre v. National R.R. Passenger Corp. ("Amtrak")*, 850 F. Supp. 284, 287 (E.D. Pa. 1993) (stating that an MTF could not bring a claim for discrimination on the basis of being female unless the employer perceived the MTF to be female).

transsexuals are unlikely to sue for discrimination based on a sex they do not believe they are; the result is yet again that transsexuals cannot advance viable claims under anti-discrimination laws.

#### a. Conflation

In certain cases, the conflation of the terms "biological," "anatomical," and "chromosomal," dooms transsexuals' claims of discrimination. This phenomenon arises in actions brought both by preoperative and by postoperative transsexuals. In such cases, the judiciary does not disregard medical authority, but instead engages in a selective use of it, ultimately applying its own rubric to determine the sexual identity of transsexual plaintiffs.

In cases involving preoperative transsexuals, such as *Sommers v. Budget Marketing, Inc.*, the judiciary confuses the terms biology and anatomy: "Plaintiff, for the purposes of Title VII, is male because she is an anatomical male. This fact is not disputed. As the Court accepts the biological fact as the basis for determining sex, the Court finds that entry of summary judgment is appropriate."<sup>206</sup>

Although the court in *Sommers* had itself engaged in a word substitution game, it nonetheless labeled Sommers's claim that she was discriminated against "because of her status as a female . . . that is, a female with the anatomical body of a male"<sup>207</sup> a "manipulation of semantics."<sup>208</sup>

In cases involving postoperatives, the term "chromosomal" joins the conflation. In *Ulane v. Eastern Airlines, Inc.*,<sup>209</sup> a postoperative MTF pilot sued for sex discrimination. The Seventh Circuit, responding to the district court, which had reasoned that "'sex is not a cut-and-dried matter of chromosomes,'"<sup>210</sup> ruled that there was no factual basis upon which to conclude that Ulane had been discriminated against because she was female,<sup>211</sup> since her chromosomal patterns had not been and could not be surgically altered, nor had the

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206. *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 749 (8th Cir. 1982) (quoting the lower court's opinion).

207. *Sommers*, 667 F.2d at 749.

208. *Id.*, at 749.

209. *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984).

210. *Ulane*, 742 F.2d at 1084 (quoting the district court's opinion).

211. *See Ulane*, 742 F.2d at 1087.

surgery endowed her with a uterus or ovaries.<sup>212</sup> Taking chromosomal patterns as definitive of biology, the court described Ulane as “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>213</sup> Moreover, in a singular aside, the court declared that “some in the medical profession . . . conclude that hormone treatments and sex reassignment surgery can alter the evident makeup of an individual, but cannot change the individual’s *innate sex*.”<sup>214</sup>

*Ulane* is unhelpful for guiding the judiciary in determining how much “more one than the other” a transsexual is. This is in part due to the notable conflation in the opinion of the terms “chromosomes” (referring to linear, DNA-containing bodies),<sup>215</sup> “anatomical” (referring to the structure of the organism),<sup>216</sup> and “biological” (referring to an organism’s vital processes),<sup>217</sup> and in part to the *Ulane*

212. See *Ulane*, 742 F.2d at 1083 nn.5–6.

213. *Ulane*, 742 F.2d at 1087. In the District of Columbia, it is possible Ulane could have brought a claim for discrimination based on her personal appearance. See *Underwood v. Archer Management Servs., Inc.*, 857 F. Supp. 96, 98 (D.D.C. 1994) (finding the claim of postoperative MTF who “retain[ed] some masculine traits” actionable under the District of Columbia Human Rights Act) (quoting plaintiff Underwood’s Complaint); see also Case, *supra* note 129, at 49 (advancing the view that “sex-specific grooming standards violate Title VII”).

214. *Ulane*, 742 F.2d at 1083 n.6 (emphasis added). Aside from the problem of defining “innate sex,” for which Webster’s is uninformative, see WEBSTER’S, *supra* note 115, at 1073, it is significant that Sigmund Freud probably would not have been one of the medical professionals to whom the court refers:

In both sexes organs have been formed which serve exclusively for the sexual functions; they were probably developed from the same [innate] disposition into two different forms. Besides this, in both sexes the other organs, the bodily shapes and tissues, show the influence of the individual’s sex, but this is inconstant and its amount variable; these are what are known as the secondary sexual characters. Science next tells you something that runs counter to your expectations and is probably calculated to confuse your feelings. It draws your attention to the fact that portions of the male sexual apparatus also appear in the women’s bodies, though in an atrophied state, and vice versa in the alternative case. It regards their occurrence as indications of *bisexuality*, as though an individual is not a man or a woman but always both—merely a certain amount more the one than the other.

Sigmund Freud, *Femininity*, in NEW INTRODUCTORY LECTURES ON PSYCHOANALYSIS 113–14 (James Strachey trans., 1965) (alteration and emphasis in original); see also BODY GUARDS, *supra* note 18, at 3 (“[B]iological sex is . . . labile, as its chromosomal, gonadal, and secondary determinants may contest with each other.”).

215. See WEBSTER’S, *supra* note 115, at 204.

216. See WEBSTER’S, *supra* note 115, at 42.

217. See WEBSTER’S, *supra* note 115, at 115.

court's conviction that Congress intended "sex" in Title VII to refer to a plaintiff's biological sex.<sup>218</sup> The court, in an oft-cited quote, concluded that "sex, in its plain meaning, implies that it is unlawful to discriminate against women because they are women and against men because they are men,"<sup>219</sup> returning the analysis to its premises in a remarkable demonstration of circular reasoning.

#### b. Misprision

A misprision of the relation between "sex" and "gender"<sup>220</sup> has also scuttled numerous employment discrimination suits by transsexuals. In response to transsexuals' claims that since "sex" is synonymous with "gender," Title VII's discrimination prohibitions protect transsexuals,<sup>221</sup> courts have concluded that Congress had only the traditional notions of "sex" in mind when it enacted Title VII and have thus found that "sex" is distinct from "gender."<sup>222</sup>

The relation between "sex" and "gender" has been the subject of much recent scholarship.<sup>223</sup> Bernice L. Hausman marks the emergence of the term "gender" as referring to the social and cultural distinctions between the sexes in the appearance of a medical lexicon of the 1950s which had as its object the treatment of intersex.<sup>224</sup> In the 1960s Richard Green, M.D., defined gender as "the usually unshakable conviction of being male or female."<sup>225</sup> Finally, the judiciary has defined the relationship between "gender" and "sex": "The word 'gender' has acquired the new and useful connotation of cultural or

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218. See *Ulane*, 742 F.2d at 1087 ("We agree with the Eighth and Ninth Circuits that if the term 'sex' as it is used in Title VII is to mean more than biological male or biological female, the new definition must come from Congress.").

219. *Ulane*, 742 F.2d at 1085.

220. "[T]he behavioral, cultural, or psychological traits typically associated with one sex." WEBSTER'S, *supra* note 115, at 484.

221. See, e.g., *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662 (9th Cir. 1977).

222. See *Holloway*, 566 F.2d at 662-63.

223. See, e.g., BODY GUARDS, *supra* note 18; JUDITH BUTLER, BODIES THAT MATTER: ON THE DISCURSIVE LIMITS OF "SEX" (1993); GENDER TROUBLE, *supra* note 13; LAQUEUR, *supra* note 123; Case, *supra* note 129; Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1 (1995); Leslie Pearlman, Comment, *Transsexualism as Metaphor: The Collision of Sex and Gender*, 43 BUFF. L. REV. 835 (1995); Valdes, *supra* note 202.

224. See HAUSMAN, *supra* note 1, at 7-8.

225. Richard Green, *Childhood Cross-Gender Identification, in* TRANSEXUALISM AND SEX REASSIGNMENT 23, 26 (Richard Green & John Money eds., 1969).

attitudinal characteristics (as opposed to physical characteristics) distinctive to the sexes. That is to say, gender is to sex as feminine is to female and masculine to male.<sup>226</sup>

While Justice Scalia's definition posits that sex is primary to gender, gender theorists have argued that gender is primary to sex.<sup>227</sup> Katherine Franke has noted that "[u]ltimately, there is no principled way to distinguish sex from gender," since in the employment discrimination context, defining sex in biological or anatomical terms fails to account for the degree to which most differences between men and women are grounded not in biology, but in gender normativity.<sup>228</sup> Judith Shapiro has suggested that the importance of disaggregating gender and sex is to maintain the ideological operation of a fictively stable sex/gender system.<sup>229</sup> Linking the medical, judicial and theoretical viewpoints is the view that sex, socially and culturally constructed, is gender. Given that Title VII's remedial aspirations are aimed at a societal, not a biological level, Title VII is not aimed at sex at all, in either its traditional or nontraditional sense, but is in fact aimed at preventing irrelevant distinctions based on gender from being the basis of employment decisions. Current Title VII jurisprudence supports this point,<sup>230</sup> with the differential treatment of masculine women and

226. See *J.E.B. v. Alabama*, 511 U.S. 127, 157 n.1 (1994) (Scalia, J., dissenting).

227. See, e.g., GENDER TROUBLE, *supra* note 13, at viii–ix (explaining that sex masquerades as a primary condition, that it is in fact informed by gender, which only *appears* as “new” and projects sex as its requisite antecedent); HAUSMAN, *supra* note 1, at 177–79 (examining gender as a product of the demand for a culturally coherent subjectivity and as subsumed by the category sex); LAQUEUR, *supra* note 123, at 62 (explaining that, historically, differentiations of gender preceded differentiations of sex); LAQUEUR, *supra* note 123, at 11 (“[A]lmost everything one wants to *say* about sex—however sex is understood—already has in it a claim about gender.”); Franke, *supra* note 223, at 39 (theorizing that pre-given dimorphic concepts of gender lead to the discovery of facts that differentiate the sexes); *Patriarchy*, *supra* note 37, at 1993 (“In the transsexual’s case, rather than biology’s serving as the substance from which gender attributes derive, anatomical sex follows from gender. Biological sex is revealed to have no inevitable natural meaning, but only the social meaning attached to it on the basis of gender identity.”).

228. Franke, *supra* note 223, at 5.

229. See Shapiro, *supra* note 104, at 248.

230. See, e.g., *Hopkins v. Price Waterhouse*, 490 U.S. 228, 251 (1989) (““[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.”” (quoting *Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702, 707, n.13 (1978) (alterations in original) (citations omitted)).

effeminate men being only one example<sup>231</sup> of the judiciary's focus, not on chromosomes or genitalia, but on acceptable gender roles.

But courts have not discussed Title VII this way. In *Holloway*, for example, the court defined sex and gender and concluded that "sex" in Title VII does not mean gender. It supported its conclusion by pointing again to the number of failed initiatives to amend Title VII to prohibit discrimination on the basis of sexual preference and to a Ninth Circuit opinion holding that Title VII does not prohibit discrimination on the basis of homosexuality.<sup>232</sup> The *Holloway* court went on to comment that "sex" should be given its traditional definition based on the anatomical characteristics which divide organisms into males and females.<sup>233</sup>

In *Sommers v. Iowa Civil Rights Commission*, the plaintiff's theory that "because the legislature prohibited discrimination based on 'sex,' rather than on 'male or female sex,' it left open the possibility of prohibiting discrimination against persons with attributes of both sexes," was unpersuasive.<sup>234</sup> In a previous case, the district court accused Sommers of engaging in semantic manipulation and granted the defendant summary judgment.<sup>235</sup> The substitution of "gender" for "sex" in New York City's anti-discrimination regulation<sup>236</sup> likewise suggests a view that "sex" and "gender" are distinct.<sup>237</sup>

Not all courts, however, have taken such a narrow view. In *M.T.*, the court felt that sex and gender were synonymous:

Our departure from the *Corbett* thesis is not a matter of semantics. It stems from a fundamentally different understanding of what is meant by "sex" for marital purposes. The English court apparently felt that sex and gender were disparate phenomena. In a given case there may, of course, be such a difference. A preoperative transsexual is an example of that kind of disharmony, and most experts would be satisfied that the individual should be classified according to biological

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231. See Case, *supra* note 129, at 47 (noting that the exclusion of effeminate men from the purview of Title VII's sex discrimination prohibitions is odd considering they exhibit characteristics "associated with women, the subordinated group the statutory language was principally designed to protect.").

232. *Holloway*, 566 F.2d at 662 n.6.

233. See *Holloway*, 566 F.2d at 662 ("Giving the statute its plain meaning, this court concludes that Congress had only the traditional notions of 'sex' in mind.").

234. *Sommers v. Iowa Civil Rights Comm'n*, 337 N.W.2d 470, 473-74 (Iowa 1983).

235. See *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 749 (8th Cir. 1982).

236. See NEW YORK CITY ADMIN. CODE, § 8-107 (1) (1996).

237. See *Maffei v. Kolaeton Indus., Inc.*, 626 N.Y.S.2d 391, 395 (Sup. Ct. 1995).

criteria. The evidence and authority which we have examined, however, show that a person's sex or sexuality embraces an individual's gender, that is, one's self-image, the deep psychological or emotional sense of sexual identity and character. Indeed, it has been observed that the "psychological sex of an individual," while not serviceable for all purposes, is "practical, realistic and humane."<sup>238</sup>

As noted above, however, *M.T.* is an anomaly on the judicial landscape.<sup>239</sup> In making reference to semantics, however, it does recall the courts' accusing transsexual plaintiffs of engaging in semantic games in their formulation of potential Title VII claims. The disaggregation of "sex" and "gender" achieved by courts in the discrimination context is precisely such a semantic move, and it is ultimately meaningless and inappropriate in the Title VII context. This disaggregation sends an unmistakable message of exclusion. Sex and gender, whereas perhaps not one and the same for all purposes, in the context of discrimination jurisprudence, have similar roles to play.

### c. References to Pasts and Perceptions

The judiciary's semantic choices in transsexual discrimination cases are not the only reason why transsexuals' discrimination claims fail. The answer to the question "Is the gender of a given individual that which society says it is, or is it, rather, that which the individual claims it to be?"<sup>240</sup> is, as we have seen, that not only is a transsexual's psychological sex irrelevant to courts hearing transsexuals' Title VII

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238. *M.T. v. J.T.*, 355 A.2d 204, 209 (N.J. Super. Ct. App. Div. 1976) (quoting Douglas K. Smith, Comment, *Transsexualism, Sex Reassignment Surgery and the Law*, 56 CORNELL L. REV. 963, 969-70 (1971)).

239. See *supra* notes 63-71 and accompanying text. Several municipalities have included "gender" or "gender identity" as specific prohibited bases for discrimination. See SAN FRANCISCO, CAL., ADMIN. CODE §§ 12A.1, 12A.3 (1997) (including "gender identity" in antidiscrimination ordinance and defining it as "a person's various individual attributes as they are understood to be masculine and/or feminine"); CAMBRIDGE MASS., MUN. CODE (1996) (visited Aug. 5, 1997) <<http://www.gendertalk.com/GTransgt/cambh3.htm>> (prohibiting discrimination on the basis of gender and defining gender as "the actual or perceived appearance, expression, or identity of a person with respect to masculinity and femininity"); PITTSBURGH, PA., MUN. CODE (1997) (visited Nov. 7, 1997) <<http://www.abmall.com/iclep/>> (defining sex as "the gender of a person, as perceived, presumed or assumed by others, including those who are changing or have changed their gender identification").

240. *In re Anonymous*, 293 N.Y.S.2d 834, 836 (Civ. Ct. 1968).

claims, but it is also fatal as the basis of a transsexual's sex discrimination claim. Further frustrating transsexual's claims are irrelevant references to the public's perception of transsexuals' sexual identities and to transsexual plaintiffs' past choices to undergo sex reassignment. Ironically, these factors are probably in large measure why these claims are made in the first instance; a transsexual who "passes" and whose past identity and choice to undergo reassignment are unknown may never face sex discrimination, and, if she does, the defense of transsexualism may never occur to the defendants. Transsexuals who begin sex reassignment while employed or whose past is known quickly discover that courts use these factors to reframe the issues presented and, ultimately, to undercut the viability of their claims.

In *Ulane*, in response to the district court's opinion that sex is a psychological question comprising considerations of self-perception and perception by society, the court asserted that Ulane was entitled to any personal belief about her sexual identity she desired and that "it may be that society . . . considers Ulane to be female."<sup>241</sup> Such societal perceptions were irrelevant, however, in light of the overriding fact that Ulane had "surgically altered parts of her body to make it appear to be female."<sup>242</sup> Thus, the court made clear, in its invocation of Ulane's past, that although a transsexual could state a valid Title VII cause of action on the basis of his or her reassigned sex, the discrimination could always be reframed as discrimination on the basis of transsexuality, which, as we have noted, under Title VII is no claim at all.

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241. *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1087 (7th Cir. 1984).

The court in "SRA" suggested that society may well perceive a postoperative transsexual to be her reassigned sex because the common usage of terms such as "sex change" and "sex conversion" "reflect[s] a perception that a male-to-female transsexual who has had sex reassignment surgery may appropriately be described in ordinary English as female." *Secretary, Dep't of Soc. Sec. v. "SRA,"* No. NG745 of 1992, FED No. 869/93, at 10 (Dec. 1, 1993).

242. *Ulane*, 742 F.2d at 1087. A variation on this theme appeared in *Grossman v. Bernards Township Bd. of Educ.*, No. 74-1904, 1975 WL 302, \*4 (D.N.J. Sept. 10, 1975), *aff'd*, 538 F.2d 319 (3d Cir. 1976), *cert. denied*, 429 U.S. 897 (1976), in which the court concluded that although Grossman had become a woman by means of her surgery, she was not terminated because she was a woman, but because she had changed her sex. *See also* *Conway v. City of Hartford*, No. CV 950553003, 1997 WL 78585, at \*6, \*7 (Conn. Super. Ct. Feb. 4, 1997) (accepting employer's characterization of FTM's sexual harassment claim as "discrimination on the basis of change of sex rather than sex" and concluding that Connecticut law "does not prohibit discrimination against transsexuals").



In *Dobre v. National Railroad Passenger Corp. ("Amtrak")*,<sup>243</sup> the plaintiff was hired as a man and began submitting to sex reassignment. In a unique articulation of the basis for the discrimination, Dobre asserted that she was discriminated against because of her new gender while in the process of transforming her body to conform with her psychological sexual identity. The court fought its way past the issue as framed by Dobre and determined that the claim could be actionable only if defendant Amtrak considered Dobre to be female and discriminated against her on that basis.<sup>244</sup> Since Amtrak could rebut any suggestion on Dobre's part that it perceived her to be female by noting that Dobre was hired as a man, the court concluded that any discrimination Dobre suffered was because she was perceived as a male who wanted to become a female.<sup>245</sup>

Despite the judiciary's assurance that transsexuals have valid claims under Title VII for discrimination on the basis of their re-assigned sex, "the right to claim discrimination [is limited] to those who were born into the victim class."<sup>246</sup> In *Holloway*, the court framed the issue extremely narrowly: "whether an employee may be discharged, consistent with Title VII, for initiating the process of sex transformation."<sup>247</sup> The supposed narrowing of the issue in reality encompassed preoperative, like Holloway, and postoperative transsexuals alike. Moreover, what "initiating" the process referred to was ambiguous. In dismissing Ulane's claim, the court made clear that the past could not be discarded, no matter what interventions had taken place: "even if one believes that a woman can be so easily created from what remains of a man, that does not decide this case."<sup>248</sup> In *Holloway*, the court also noted that an official of the company was of the opinion that Holloway "would be happier at a new job where her transsexualism would

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243. *Dobre v. Nat'l R.R. Passenger Corp.*, 850 F. Supp. 284 (E.D. Pa. 1993).

244. *See Dobre*, 850 F. Supp. at 287.

245. *See Dobre*, 850 F. Supp. at 287. Similarly, in *Sommers v. Iowa Civil Rights Commission*, the plaintiff was hired while already undergoing sex reassignment, but was discharged after being recognized by someone who had known her when Sommers dressed as a man. *See Sommers v. Iowa Civil Rights Comm'n*, 337 N.W.2d 470, 471 (Iowa 1983)

246. *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 664 (9th Cir. 1977) (Goodwin, J., dissenting). *See also James v. Ranch Mart Hardware, Inc.*, 881 F. Supp. 478, 481 (D. Kan. 1995) (granting summary judgment against an MTF who failed to allege discrimination against males).

247. *Holloway*, 566 F.2d at 661.

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

be unknown."<sup>249</sup> The dissenting judge, responding to these irrelevant considerations, made an appeal to common sense:

By its language, the statute proscribes discrimination among employees because of their sex. When a transsexual completes his or her transition from one sexual identity to another, that person will have a sexual classification. Assuming that this plaintiff has now undergone her planned surgery, she is, presumably, female, at least for most social purposes.<sup>250</sup>

Employment discrimination proscriptions in both the state and city of New York, which have been interpreted more broadly than Title VII,<sup>251</sup> comport in large measure with this common sense approach, with the result that transsexuals have had greater success there in advancing their sex discrimination claims. Courts in New York have found the federal cases "unduly restrictive"<sup>252</sup> in light of the "overwhelming medical evidence"<sup>253</sup> that transsexuals become their psychological sex once sex reassignment is complete. Shifting the emphasis from the fact of reassignment to reassignment's results, an approach which would have resulted in an actionable sex discrimination claim for Karen Ulane, the court in *Maffei v. Kolaeton Industry, Inc.*, entertained a postoperative FTM's hostile work environment discrimination claim.<sup>254</sup> The court concluded that a postoperative transsexual assumes a different sex and can sue for sexual harassment in the same way that non-transsexuals can when ridiculed for their secondary sexual characteristics.<sup>255</sup>

In *Rentos v. Oce-Office Systems*,<sup>256</sup> another case brought under the New York and the New York City equivalents of Title VII, a preoperative MTF's employment was terminated when she advised her employer that she needed time off to undergo sex conversion surgery. The court determined that Rentos had alleged a colorable claim of sex discrimination under the state and city human rights laws.<sup>257</sup> The court noted that Rentos, in what could be termed a semantic coup,

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249. *Holloway*, 566 F.2d at 661.

250. *Holloway*, 566 F.2d at 664 (Goodwin, J., dissenting).

251. See *Maffei v. Kolaeton Indus., Inc.*, 626 N.Y.S.2d 391, 394-396 (Sup. Ct. 1995).

252. *Maffei*, 626 N.Y.S.2d at 394.

253. *Id.* at 395.

254. *Maffei*, 626 N.Y.S.2d at 396.

255. See *Maffei*, 626 N.Y.S.2d at 396.

256. *Rentos v. Oce-Office Systems*, No. CIV. 95-7908 LAP, 1996 WL 737215, at \*2 (S.D.N.Y. Dec. 24, 1996).

257. See *Rentos*, 1996 WL 737215, at \*2.

had assiduously tracked the language in *Maffei*, "quotation marks and all," in framing the issues of her claim.<sup>258</sup>

Other jurisdictions show few signs of adopting these minority positions.<sup>259</sup> For a multiplicity of reasons, sex discrimination claims advanced by transsexuals are not cognizable. Although courts purport to welcome such claims if transsexuals allege discrimination on the basis of their anatomical sex prior to sex reassignment, preoperatives and postoperatives are, in the main, psychologically incapable of doing this.<sup>260</sup> The realm of non-liability thus created for employers is total: under *Dobre*, employers who hire transsexuals prior to sex reassignment can easily claim that the employees were perceived to be their anatomical sex; under *Sommers*, in the case of postoperatives, the discovery of the fact of sex reassignment is enough to create dispositive perceptions on the part of employers that the employee is in fact a member of the opposite sex. The result curiously requires plaintiffs not only to prove that they were perceived to be the sex upon the basis of which they claim discrimination, but rests as well on the assumption that discrimination never occurs unless the perpetrator actively perceives the person to be the sex she wishes to discriminate against. Perhaps the best, and as yet untested approach to these types of claims, then, would be to advance transsexuals' discrimination claims upon two theories, one for discrimination based on one sex, and another for discrimination based on the other sex. The judiciary, though, already gifted with an impressive track record of beating back transsexuals' claims of employment discrimination via a discourse scripted with semantic manipulation, may well already be endowed with the rhetorical wherewithal to continue its campaign of exclusion in response to this new strategy.

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258. *Rentos*, 1996 WL 737215, at \*8.

259. There is some indication that the tide may be turning in the federal courts. See *Miles v. New York Univ.*, No. 94 CIV. 8685 WK, 1997 WL 626891, \*1-2 (S.D.N.Y. Oct. 7, 1997) (allowing Title IX sexual harassment claim to proceed where MTF, though undergoing sex reassignment during tenure in academic program, was perceived as female).

260. See Franke, *supra* note 223, at 35 ("According to the traditional view, the sexed body—one's inside—is immutable, whereas gender identity—one's outside—is mutable. Yet for the transgendered person, the sexed body—one's outside—is regarded as mutable while one's gendered identity—one's inside—is experienced as immutable."). But see *Karen T. v. Michael T.*, 484 N.Y.S.2d 780, 781 (Fam. Ct. 1985) (FTM postoperative asserted his chromosomal sexual identity enabling him to disclaim responsibility for providing child support for his adopted children, since under the law he could not be the father of the children by virtue of being female).

*F. Changes of Name and Gender Marker on Birth Certificates*

While categorization as one sex or another and exclusion from society constitute coercive forces over which transsexuals ultimately have little control, recognition of a name befitting their psychological sexual identity is a privilege the judiciary is willing to grant, albeit with caution and a caveat. At common law "an individual [could] assume any name, absent fraud, or an interference with the rights of others."<sup>261</sup> The change required no judicial approval and was accomplished merely by using the new name.<sup>262</sup> Although the common law rule still applies in most jurisdictions, many states have in addition adopted statutory schemes providing for judicial oversight of changes of name. These court-approved name changes receive an "aura of propriety and official sanction," in that the proceeding is memorialized by the issuance of the Court's order.<sup>263</sup> In such proceedings, the court evaluates the potential of the new name to deceive or defraud society.<sup>264</sup>

Given the foregoing, postoperative transsexuals may obtain changes of name;<sup>265</sup> preoperatives may as well, if they can produce proof of their transsexuality and will not use the change of name to claim that their sex reassignment is complete.<sup>266</sup> In general, however, a transsexual, whether pre- or postoperative, has no right to an alteration of the gender marker on her birth certificate,<sup>267</sup> and courts even question their authority to grant such a request.<sup>268</sup> Cases in this area

261. *In re Anonymous*, 293 N.Y.S.2d 834, 835 (Civ. Ct. 1968).

262. *See In re Anonymous*, 587 N.Y.S.2d 548, 548 (Civ. Ct. 1992); *In re Anonymous*, 582 N.Y.S.2d 941, 941 (Civ. Ct. 1992).

263. *Anonymous*, 587 N.Y.S.2d at 548.

264. *See Anonymous*, 587 N.Y.S.2d at 548.

265. *See, e.g., In re Anonymous*, 293 N.Y.S.2d 834 (Civ. Ct. 1968).

266. *See, e.g., In re Anonymous*, 314 N.Y.S.2d 668 (Civ. Ct. 1970). But for cases holding that a change of name is not permitted until sex reassignment surgery, see *In re Richardson*, 23 Pa. D. & C.3d 199 (1982); *In re Dowdrick*, 4 Pa. D. & C.3d 681 (1978); *In re Dickinson*, 4 Pa. D. & C.3d 678 (1978).

267. *See, e.g., TENN. CODE ANN. § 68-3-203(d)* (1996) ("The sex of an individual will not be changed on the original certificate of birth as a result of sex change surgery.")

268. *See, e.g., Anonymous v. Mellon*, 398 N.Y.S.2d 99, 101-02 (Sup. Ct. 1977) (demonstrating little concern for the possibility of fraud but nonetheless concluding that Department of Health's refusal to change sex designation on birth certificate was reasonable given "ambiguity" of transsexuals' sex); *Hartin v. Director of the Bureau of Records and Statistics*, 347 N.Y.S.2d 515, 518 (Sup. Ct. 1973) ("[T]he power of regulating birth certificates lies solely within the jurisdiction of the Board of Health . . ."); *Anonymous*, 293 N.Y.S.2d at 835 (mentioning a civil court has no jurisdiction

reflect a concern that society not be defrauded by an avoidable misapprehension of an individual's sex.

In *Anonymous v. Weiner*,<sup>269</sup> a New York court refused a postoperative MTF an order for a change of the sex designated on her birth certificate from "male" to "female." In a curious amalgam of deference to medical authority and a concern for societal perceptions of transsexual persons, the court referred to a statement of the New York Academy of Medicine, which, assuming a juridical stance, concluded "the desire of concealment of a change of sex by the transsexual is outweighed by the public interest for protection against fraud."<sup>270</sup> The Academy's preoccupation with fraud, then, focused on the transsexual's state of mind and not on her outward appearance or successful reassignment. Nor was it, oddly, tied to the idea that birth certificates are public records announcing facts as they were observed at a particular point in time.<sup>271</sup>

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to order alteration of a birth certificate); *Anonymous v. Weiner*, 270 N.Y.S.2d 319, 323 (Sup. Ct. 1966) (deferring to Board of Health where "the nature of the problem posed . . . requires a specialized training and skill for which the Board is uniquely equipped"); *K. v. Health Div., Dep't of Human Resources*, 560 P.2d 1070, 1072 (Or. 1977) (commenting that the legislature should decide whether transsexuals may obtain new birth certificates upon completion of sex reassignment), *rev'g* 552 P.2d 840 (Or. Ct. App. 1976); *Cossey v. United Kingdom*, 184 Eur. Ct. H.R. (ser. A) 5 (1990). *But see* ARIZ. REV. STAT. § 36-326(A)(4) (1993); CAL. HEALTH & SAFETY CODE § 103430 (West 1996); D.C. CODE ANN. § 6-217(d) (1981); GA. CODE ANN. § 31-10-23(e) (1996); HAW. REV. STAT. ANN. § 338-17.7(a)(4)(B) (Mitchie 1996); IOWA CODE § 144.23(3) (1994); LA. REV. STAT. ANN. § 40:62(A) (West 1992); MASS. ANN. LAWS ch. 46, § 13 (Law Co-op. 1993); MICH. COMP. LAWS. § 333.2831(c) (1978); NEB. REV. STAT. § 71-604.01 (1996); N.J. STAT. ANN. § 26:8-40.12 (West 1996); N.M. STAT. ANN. § 24-14-25(D) (Mitchie 1978); N.C. GEN. STAT. § 130A-118(b)(4) (1983); UTAH CODE ANN. § 26-2-11 (1995); VA. CODE ANN. § 32.1-269(E) (Mitchie 1997); WIS. STAT. ANN. § 69.154(4)(B) (West 1993); 10 GUAM CODE ANN. § 3222(e) (1995) (all expressly permitting either amendment or reissuance of birth certificate where sex reassignment surgery has been performed and, in some states, a change of name has been obtained). Florida and Texas remain vague with respect to whether this procedure is possible. Florida's statute refers to correcting "misstatements, errors, or omissions occurring in the birth record." FLA. STAT. § 382.016 (1995). Texas' statute applies "to complete or correct a record that is incomplete or proved by satisfactory evidence to be inaccurate." TEX. STAT. § 191.028(b) (1988). *See also* *Van Oosterwijck v. Belgium*, 40 Eur. Ct. H.R. (ser A) at 12 (1980) (European Commission on Human Rights case advancing the view that a violation of Article 8 occurs when a state signatory refuses to rectify sex recorded in the civil status of a female who became a male).

269. *Anonymous v. Weiner*, 270 N.Y.S.2d 319 (1966);

270. *Weiner*, 270 N.Y.S.2d at 322.

271. *See Cossey v. United Kingdom*, 184 Eur. Ct. H.R. (ser. A) 5 (1990) ("An entry in a birth register and the certificate derived therefrom are records of facts at the time of

In *In re Anonymous*,<sup>272</sup> a postoperative MTF successfully sought a change of name from an obviously male name to an obviously female name. The court based its ruling, after a lengthy discussion of sex reassignment surgery, on the applicant's sexual capacities. Finding "her' physiological orientation . . . complete," the court noted the petitioner's incapacity ever again to function as a male either procreatively or sexually and her capability of having sexual relations as a woman.<sup>273</sup> But beyond this focus on sexual capacity was something more: the petitioner was "impossible to distinguish . . . from any other female."<sup>274</sup> Thus, the possibility of fraud, thought by the Academy of Medicine to be inherent in the transsexual's desire to hide the fact of sex reassignment, actually lay on the other side:

It would seem to this court that the probability of so-called fraud, if any, exists to a much greater extent when the birth certificate is permitted, without annotations of any type, to classify this individual as a "male" when, in fact, as aforesaid, the individual comports himself as a "female."<sup>275</sup>

Thus, the change of name cases, seemingly attempting to address the concerns of transsexual self-actualization and participation in society, are in fact focused on the potential of transsexuals to create societal unrest and general disruption. Given that a postoperative who is indistinguishable from any female is unlikely to create such disturbances, a change of name is appropriate.<sup>276</sup>

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birth."); *cf. K.*, 560 P.2d at 1072 (deferring to the legislature, but commenting that the view that a birth certificate is an historical record of the facts as they existed at the time of birth is equally as plausible as the view that birth certificates are records of facts as they currently exist).

272. *In re Anonymous*, 293 N.Y.S.2d 834 (Civ. Ct. 1968).

273. *Anonymous*, 293 N.Y.S.2d at 836.

274. *Anonymous*, 293 N.Y.S.2d at 838.

275. *Anonymous*, 293 N.Y.S.2d at 838.

276. *But see Franke, supra* note 223, at 61 n.255 (explaining that the desire to see and interpret difference is "fueled by a desire to *tell the difference*, to guard against a difference that might otherwise put the identity of one's own position in question.") (quoting MARJORIE GARBER, *VESTED INTERESTS: CROSS DRESSING & CULTURAL ANXIETY* 130 (1992)). Franke further explains:

In these cases, the power to name is delegated to a medical or administrative authority; so long as that agent acts according to the rules governing his or her office, a court will not second guess that designation or allow the individual so labeled to do so. . . . Once the body is read, two things happen: text is subordinated to interpretation, and later re-readings are not permitted—narrative time suddenly stops. As such, the birth attendant's

Focus on the transsexual applicant's sexual capacities and outward appearance led the court to grant a request for a change of name to a preoperative MTF in *In re Anonymous*.<sup>277</sup> In that case, the transsexual had undergone medical treatment, albeit not genital surgery, which had made her appear female and which had rendered her "unable to engage in male procreative activities."<sup>278</sup> The court applied a visual inspection test, granted the request, and expressly forbade the applicant from relying on the order as evidence that she was no longer anatomically male—the implication being that such a use of the order would constitute fraud.<sup>279</sup>

The court appeared to overlook the possibility that the applicant's feminine appearance and male sexual incapacity could potentially be reversed by the cessation of her preoperative regimen. This possibility was vigorously pursued in two 1992 cases,<sup>280</sup> in which the criteria for evaluating the permissibility of a name change became proof of the applicant's transsexualism and of the irreversibility and completely permanent nature of her decision to live as a female.<sup>281</sup> The court held that the applicant had failed to make an adequate showing, via medical and psychiatric evidence, as to whether she was a transvestite or a transsexual and, if a transsexual, whether she had undergone a sex change operation.<sup>282</sup> "[W]ithout such supportive evidence," stated the court, "the change of name from a 'male' name to a 'female' name would be fraught with danger of deception and confusion and contrary to the public interest."<sup>283</sup> Public perception and an appeal to medical authority again merged as the court explained why it could not issue the order:

The Court's controlling responsibility is to insure against the possibility that its Order will lend legal credence to confusing or misleading the public in its dealings with the petitioner. Without a competent medical and psychiatric evaluation of

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declaration of the baby's sex is performative rather than descriptive, creating rather than describing the child's sex.

Franke, *supra* note 223, at 53.

277. *In re Anonymous*, 314 N.Y.S.2d 668 (Civ. Ct. 1970).

278. *Anonymous*, 314 N.Y.S.2d at 669.

279. *See Anonymous*, 314 N.Y.S.2d at 668–70.

280. *See In re Application of Anonymous*, 587 N.Y.S.2d 548 (Civ. Ct. 1992); *In re Anonymous*, 582 N.Y.S.2d 941 (Civ. Ct. 1992).

281. *See Application of Anonymous*, 587 N.Y.S.2d at 548.

282. *See Application of Anonymous*, 587 N.Y.S.2d at 548.

283. *Application of Anonymous*, 587 N.Y.S.2d at 549.

the petitioner, granting the relief requested may be contrary to the public interest as well as harmful to petitioner's present mental status.<sup>284</sup>

In *In re Eck*,<sup>285</sup> a preoperative MTF medically classified as a transsexual, who had assumed the appearance of a woman for many years, and who was undergoing hormone therapy in preparation for sex reassignment surgery, requested a change of name. Remarking that "it is inherently fraudulent for a person who is physically a male to assume an obviously 'female' name for the sole purpose of representing himself to future employers and society as a female,"<sup>286</sup> the trial court denied the request. The appellate court reversed, finding no inherent fraud in the choice of an obviously "female" name:

[W]e perceive that the judge was concerned about a male assuming a female identity in mannerism and dress. That is an accomplished fact in this case, a matter which is of no concern to the judiciary, and which has no bearing upon the outcome of a simple name change application.<sup>287</sup>

In contrast to the cases discussed above, no mention was made in *In re Eck* of the possibility that the applicant would use the order as evidence that her anatomical sex had in fact been changed.

In seeming contrast to the cases excluding transsexuals from participation in society, the change of name cases appear at first blush to indicate a solicitude on the part of the courts to help transsexuals find their way along the sexual continuum to a place within the legal scheme of binary sex classification and thus within society at large. In this way, the change of name cases may remind one of cases discussing the medical necessity of sex reassignment surgery and the availability of public funds to allow indigent transsexuals to pay for such surgery. Any resemblance between the two groups of cases, however, is purely superficial. Naming the grotesque body is permissible, not because of any relief it affords the person named, but because, ultimately, the

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284. *Anonymous*, 582 N.Y.S. 2d at 942. The aftermath of the case was *In re Rivera*, 627 N.Y.S.2d 241 (Civ. Ct. 1995), in which the same preoperative petitioned again, this time submitting medical and psychiatric affidavits attesting to her transsexualism. The court granted the petition, following *In re Anonymous*, 314 N.Y.S.2d 668 (Civ. Ct. 1970), and admonished the applicant not to use the name as any evidence that she was no longer anatomically male.

285. *In re Eck*, 584 A.2d 859 (N.J. Super. Ct. App. Div. 1991).

286. *Eck*, 584 A.2d at 860.

287. *Eck*, 584 A.2d at 861.



name masks the grotesque by removing from view the potentially explosive discontinuity between the name and the named. Thus, naming in these cases is not performed for the benefit of the transsexual, but for the benefit of the world around her. In this way, the courts position the grotesque body as "recuperative, a sort of safety valve in the service of dominant ideology,"<sup>288</sup> ignoring the extent to which the transsexual body is nonetheless "subversive, that which exceeds and refuses that ideology."<sup>289</sup>

The change of name cases reveal that the dominant ideology is better served by allowing name changes, especially in cases where the transsexual "passes." Since transsexuals cannot be segregated from society, quarantined as it were, some accommodation must be made for the sake of public order.<sup>290</sup> The results of the visual inspection test in the change of name cases relieves the concern about fraud via the recognition that society is less disrupted by allowing the change. Once a transsexual has begun a departure from one sexual category, courts attempt to speed him or her to the new category so as to prevent societal disequilibrium,<sup>291</sup> bypassing the category of nonpersons currently occupied by hermaphrodites.<sup>292</sup>

The same benefit is not present in the change of birth certificate cases. In these cases, the courts are more preoccupied with anatomy than with appearance, a focus which explains why some states allow a change of the birth certificate, but only where some sort of surgical intervention has taken place. This is precisely what distinguishes such

288. BODY GUARDS, *supra* note 18, at 9.

289. BODY GUARDS, *supra* note 18, at 9.

290. See, for example, the discussion of changes of name for transsexuals, *supra* notes 261–287, and accompanying text.

291. "[T]he limbo of no finality in [transsexuals'] documents without genital surgery is incredibly onerous." Correspondence with Phyllis Randolph Frye, June 7, 1997 (on file with author).

292. See Ann Rosalind Jones & Peter Stallybrass, *Fetishizing Gender: Constructing the Hermaphrodite in Renaissance Europe*, in BODY GUARDS, *supra* note 18. Jones and Stallybrass discuss the position of hermaphrodites:

There have been two dominant trends in the analysis of [the hermaphrodite]. In the first, the hermaphrodite is read as the problem which a binary logic attempts to erase. In this reading, androgyny is the necessary irritant in the production and stabilization of a systematic division of gender. In the second, the hermaphrodite is understood as the vanishing point of all binary logics, a figure which embodies the dissolution of male and female as absolute categories.

Jones & Stallybrass, *supra* at 80.

cases from transvestism where no accommodation is made, since no bodily alterations take place.<sup>293</sup>

What, then, explains certain courts' willingness to alter the gender marker on the birth certificates of transsexuals who have not undergone sex reassignment surgery?<sup>294</sup> In these rare cases courts recognize, just as they do in the change of name cases, that "transsexual and transgender males can live as women and females can live as men with or without surgery."<sup>295</sup> But in the change of name cases, focus is placed on presentation, while with respect to birth certificates, the focus is placed on the state of the body.

These rare cases, however, are consistent with that focus on the body since in them lies the recognition that hormone therapy, even absent sex reassignment surgery, can permanently alter the contours of the body. For example, for MTFs, estrogen therapy, designed to achieve partial castration and hormonal feminization, if pursued long-term, achieves the lasting effects of testicular atrophy, gynecomastia, and reduction in size of the penis to the point of its resembling a hyperextended clitoris.<sup>296</sup> Similarly, for FTMs the vocal cords are permanently thickened, the muscles increase in size, and the clitoris develops into what resembles a small penis.<sup>297</sup> Reversal of these transformations is often not possible absent surgical intervention.<sup>298</sup> For an MTF, a mastectomy may be necessary; for an FTM, facial hair can only be removed by electrolysis and breast augmentation is required.<sup>299</sup> In short, the effects of hormone therapy cannot be reversed in the sense that in terminating hormone therapy the transsexual returns to his or her prior state. Thus the test in cases where pre-operative

293. See *Patriarchy*, *supra* note 37, at 1990-93.

294. Phyllis Randolph Frye, Executive Director of the International Conference on Transgender Law and Employment Policy, pioneered the procedure of changing the gender marker on birth certificates prior to sex reassignment surgery. See Louis H. Swartz, *Legal Responses to Transsexualism: Scientific Logic Versus Compassionate Flexibility in the U.S. and the U.K.*, IV PROCEEDINGS FROM THE FOURTH INT'L CONFERENCE ON TRANSGENDER LAW AND EMPLOYMENT POLICY A-1-16 (1995); Phyllis Randolph Frye, Freedom From the Have-To of the Scalpel, in PROCEEDINGS FROM THE FIFTH INT'L CONFERENCE ON TRANSGENDER LAW AND EMPLOYMENT POLICY, July 1996, at 29-38 [hereinafter Scalpel].

295. MacKENZIE, *supra* note 1, at 1.

296. See Phyllis Randolph Frye, Non-Operative TS: Clitoral Hypertrophy, in PROCEEDINGS FROM THE SECOND INT'L CONFERENCE ON TRANSGENDER LAW AND EMPLOYMENT POLICY, Aug. 1993, at 108.

297. See Scalpel *supra* note 294, at 35.

298. See Scalpel, *supra* note 294, at 38.

299. Correspondence with Phyllis Randolph Frye, June 23, 1997 (on file with author).

transsexuals are able to obtain alterations of their birth certificates is not one of visual inspection at all, as in the change of name cases, but is one recognizing that the road "back" from irreversible hormone therapy is "very arduous and not taken lightly."<sup>300</sup> Faced with irreversible hormonal alterations, some courts are unprepared to deny transsexuals a gender marker which reflects the transformation of their bodies via hormone therapy.<sup>301</sup>

### CONCLUSION

The divergence of the legal outcomes faced by transsexuals lies, at least in part, in the different approaches the medical and legal establishments take toward transsexuals. Though law and medicine agree on the medical necessity of sex reassignment surgery for transsexuals,

300. Correspondence with Phyllis Randolph Frye, June 23, 1997 (on file with author).

301. These procedures raise the question whether recognition of a transsexual's "new" sex on official documents will permit marriage when the fact of sex reassignment is known. The question has not been litigated, but some feel that recognizing such unions would be tantamount to permitting same-sex marriages, forbidden at present in all states. See Arriola, *supra* note 96, at 22 n.79. The opposite view has also been advanced. See Catherine Kunkel Watson, Note, *Transsexual Marriages: Are They Valid Under California Law?*, 16 SW. U. L. REV. 505, 529 (1986) (where a statute permits alterations to birth certificates for post-operative transsexuals, and where procedural requirements guard against fraud, "[t]o argue that the legislature intended to deny the transsexual the right to marry or that such denial of a fundamental right would serve an important state interest in these circumstances would require an absurd straining of logic.").

In a case pending in California, a postoperative FTM with a constructed penis, testicles and "a range of sexual function" is being sued for divorce and sole custody of the couple's child conceived by donor insemination. The wife's argument is that FTMs are chromosomally female and that therefore the marriage is null, "since California law prohibits same-sex marriage." See Jeanne McDowell, *What are Dads Made of? A California Child-Custody Case May Hinge on the Father's Gender—He Used to Be a Woman*, TIME, July 7, 1997, at 36. The FTM in this case was incapable of obtaining a birth certificate modification under Cal. Stat. § 103430, because she was born in New York, but the court, responding to the wife's motion for summary judgment, determined that California would recognize the husband's male sex nonetheless. See Interview with Shannon Minter, National Center for Lesbian Rights (Nov. 25, 1997) (on file with author). In Colorado, Governor Romer vetoed a prohibition on same-sex marriage bill after Dianna L. Cicotello, an MTF who underwent sex reassignment after marrying a woman, testified before a legislative committee that the proposed law would nullify her marriage and that of others similarly situated. See John Sanko, *Romer Vetoes Gay Wedding Ban; Governor Sees Measure as Threat to Common Law Marriages in State*, ROCKY MTN. NEWS, June 6, 1997, at 4A; John Sanko, *Senate Panel Approves Bill to Ban Gay Marriages; Bill Supporters Accused of Pandering to Right Wing*, ROCKY MTN. NEWS, March 5, 1997, at 9A.

they differ on who the transsexual becomes post-surgery.<sup>302</sup> While the medical establishment sees disorder *before* sex reassignment, the legal establishment continues to see disorder *after* reassignment. The difference may lie simply in the fact that the medical establishment considers psychological criteria in the determination of sex, while the legal establishment is not so prone. The resulting focus on congruence of selected sexual indicia finds medicine in a position opposite to that of law, which views postoperative transsexuals as incongruent individuals whose freedoms should be curtailed. Legally the transsexual is kept in a state of limbo, able to obtain sex reassignment surgery, except while in prison, sometimes able to change her name, but unable to marry, unable to sue for employment discrimination, and, for MTFs, incapable of maintaining parental rights. In the prison context, where freedoms taken for granted on the outside are routinely curtailed, not only may transsexuals be denied estrogen, they may be compelled to seek the protection of administrative segregation. In all these ways, the legal system defines the transsexual body and its place in the world as decidedly other and unworthy of participation in societal institutions.

An examination of why courts take unfavorable positions towards transsexuals reveals what lies behind these outcomes. Working within a paradigm positing a rigid view of mutually exclusive sexes, the courts are incapable of coping with the medical proposition that sex operates along a continuum. In the view of the courts, the transsexual body is not "finished;" its duality lies in its refusal to be male or female. This is perhaps understandable in the case of a preoperative transsexual undergoing a regimen of feminizing or masculinizing hormones and engaging in cross-dressing. Regarding the postoperative, the courts betray a preoccupation with what is missing from the body. To the courts, both bodies are grotesque by virtue of their subversion of traditional sexual categories and definitions.<sup>303</sup> Faced with these

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302. *But see* HAUSMAN, *supra* note 1, at 193 ("To advocate th[e] use [of sex reassignment] one must accede to the facticity of gender and its status as the master signifier of sex. In other words, one must believe in the simulation as real.").

303. Richard Weisberg has noted the ability of a legal discourse of the grotesque to challenge and undo a discourse of exclusion. *See* Richard Weisberg, *The Hermeneutic of Acceptance and the Discourse of the Grotesque, With a Classroom Exercise on Vichy Law*, 17 *CARDOZO L. REV.* 1875, 1876 (1996) (examining judicial responses to antebellum slave laws and anti-Jewish laws in Vichy France). I do not (yet) see the deployment of a discourse of the grotesque in response to persecution in the context of transsexualism, as does Weisberg in the context of the antebellum South and Vichy France, but rather a classical response which sees transsexualism as grotesque and problematizes its existence through a system of binary sexual coding.

uncertainties, the law is unprepared to confront the crossing over of boundaries presented by the phenomenon of transsexualism. This may in fact be one reason why the transsexual's "new" sex is so often denied legal recognition.

Yet, explaining judicial rejection of the transsexual body by pointing to the classical underpinnings of the legal system is ultimately unsatisfactory, leaving nagging questions in its wake. Certainly the very idea that one sex can change into another challenges the imagination, but the disproportion between the degree to which transsexuals challenge the sexual order adhered to by the law and the degree to which they are systematically denied basic rights as result of that challenge suggests that the explanation for this state of affairs is more than mere judicial disapproval. The explanation may well lie more buried. The theories of Bakhtin, Freud and Barthes bring to light that the ridicule and horror engendered by transsexuals lies in their ability to explode settled social expectations and to destabilize the very social framework within which the law moves.

Such deeply rooted aversion to the presumed threat transsexuals pose to the social order seems almost insurmountable. Overcoming this aversion may only be achieved through small strides toward assuring that transsexuals eventually are allowed, particularly by the courts, to claim their true sexual identity. A nascent jurisprudence of transsexualism imbued with the courage to accept that sexual identity lies along a continuum and with a view toward reworking societal institutions for the good of all can be the first step. §