


5-4-1998

# The Legal Construction of Gender

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## Recommended Citation

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**The Legal Construction of Gender**

Trena Lee Klohe

Submitted to Prof. Sherry Wolf  
4 May 1998

# The Legal Construction of Gender

## I. Introduction

### A. *Statement of Purpose*

Concepts of sex and gender pervade our legal system at all levels. The criminal law, for example, defines certain offenses in terms of the sex of the parties. Thus rape is traditionally defined as a crime committed by a man upon a woman,<sup>1</sup> and sodomy laws expressly or in practice proscribe certain forms of conduct only if they are engaged in by a man and a man, or a woman and a woman.<sup>2</sup> A great number of civil liberties actions also center on sexual categories, as in past voting rights struggles<sup>3</sup> and in present-day sex-based discrimination claims.<sup>4</sup>

These are merely a few of the most obvious examples of the prevalence of binary sexual categories in our legal framework, a phenomenon so recognizable that it could probably go without saying.<sup>5</sup> However, the law has rarely attempted an explicit definition of the categories of "male" and "female" upon which so much reliance is placed. The distinction has effectively been regarded as self-evident.

The question of who is male and who is female under the law nonetheless has analytical significance. Further, it has important consequences in terms of social norms enforced both directly and indirectly through legal mechanisms: a gendered society insists that males conform to

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<sup>1</sup> See 65 AM. JUR. 2D *Rape* §§ 1-1.5 (1997).

<sup>2</sup> See, e.g., TEX. PENAL CODE ANN. § 21.06(a) (West 1997) ("A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex.").

<sup>3</sup> See generally Sandra Day O'Connor, *The History of the Women's Suffrage Movement*, 49 VAND. L. REV. 657 (1996).

<sup>4</sup> See generally Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1 (1995).

<sup>5</sup> But see, e.g., Hasan Shafiqullah, *Shape-Shifters, Masqueraders, and Subversives: An Argument for the Liberation of Transgendered Individuals*, 8 HASTINGS WOMEN'S L.J. 195, 220-21 (1997) (discussing "renewed interest in asserting the male/female binary" given the actual instability of the categorical model of two discrete, mutually exclusive sexes).

standards of "masculinity," and females to those of "femininity." Those who exhibit gender atypicalities may be subject to legally permitted discrimination or to outright legal sanction.<sup>6</sup>

The existence of biologically, psychologically and socially transgendered persons challenges commonplace notions about "the sexes." The entry of transgendered persons and their concerns into the legal arena has forced the law on occasion to examine its usually implicit assumptions about sex and gender. This paper explores the following questions: is sex truly an "immutable characteristic" for all legal purposes? If not, at what point and under what circumstances does the law acknowledge a change from one sex to the other? This paper also examines the legal enforcement of gendered social norms. Such norms are frequently at odds with personal experience, and all of us may be subjected to legal scrutiny of our gender performance.<sup>7</sup>

#### B. *Discussion of Terms*

Although the terms "sex" and "gender" are often used interchangeably by the courts, it is frequently useful to distinguish between the two concepts. This paper will use "sex" to refer to the principally biological characteristics which determine a person's status as male or female. "Gender," in turn, will be used to refer to the social characteristics associated with each sex, expressed in expectations regarding dress, occupation and other behavioral traits.<sup>8</sup> As Justice Antonin Scalia has observed, "[t]he word 'gender' has acquired the new and useful connotation of

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<sup>6</sup> See discussion *infra* Part III.

<sup>7</sup> See 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. 3, 48 (1995); see also Shafiqullah, *supra* note 5, at 224-25.

<sup>8</sup> See Valdes, *supra* note 7, at 21-22, for a more detailed introduction to the distinct concepts of sex and gender, and to the conflation of the two.

cultural or 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 is to male."<sup>9</sup>

Sex assignment typically occurs at the time of a person's birth, based upon the attending physician's anatomical assessment of the child. In the words of a New York court:

A child is born. The doctor examines the child, perhaps carefully, perhaps only in a perfunctory manner. In any event, the doctor decides that the child is a "male." He fills out the birth certificate, which is duly recorded with the Department of Health, designating such child as a "male." For statistical purposes, and as far as society is concerned, this child is a "male."<sup>10</sup>

Ordinarily, this presents no difficulties, though the birth of a hermaphrodite (one with both male and female organs) or a pseudo-hermaphrodite (one with female organs that appear to be male) sometimes renders an anatomical test inadequate.<sup>11</sup> As a New York court has observed, "[h]ormone imbalance, psychiatric disturbances, and physical misdevelopment are among the factors which give rise to the cases of uncertainty of sexual definition in particular individuals."<sup>12</sup>

Modern approaches weigh several biological determinants, many of which are subject to medical intervention, to evaluate sex assignments. In addition to anatomy, these include chromosomal makeup, reproductive capacity and endocrine levels. Also considered are the individual's psychological identity and "acceptability by others."<sup>13</sup> However, there is wide

<sup>9</sup> *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419, 1436 n.1 (1994) (Scalia, J., dissenting).

<sup>10</sup> *In re Anonymous*, 293 N.Y.S.2d 834, 836-37 (Civ. Ct. 1968).

<sup>11</sup> *See, e.g., id.* at 837.

<sup>12</sup> *In re Anonymous*, 314 N.Y.S.2d 668, 669 (Civ. Ct. 1970).

<sup>13</sup> *Anonymous v. Mellon*, 398 N.Y.S.2d 99, 101 (Sup. Ct. 1977). *See also* Edward S. David, Comment, *The Law and Transsexualism: A Faltering Response to a Conceptual Dilemma*, 7 *CONN. L. REV.* 288, 290-291 (1975):

A listing of the recognized indicia relevant to the sex classification of an individual would include the following:

1. Sex chromosome constitution.
2. Gonadal sex.

disagreement as to the importance of each factor. Sex assignment by anatomy carries presumptive validity at the time of an individual's birth, but not necessarily following elective surgical intervention. In such cases, to determine "true" sex, some decision-makers have directly or indirectly privileged a chromosomal test.<sup>14</sup> Others, asserting that reliance upon any one factor can be misleading, suggest that conflicting factors must be balanced in some way.<sup>15</sup> Commentators have advocated a presumption in favor of an individual's psychological identity, regardless of physical characteristics.<sup>16</sup> Finally, some authorities have looked to the "harmonization" of anatomy and psychological identity.<sup>17</sup>

The non-biological factors in this calculus, psychological and social identity, are really questions of gender. Francisco Valdes has persuasively analyzed the relationship of sex and gender as a "deductive" and "intransitive" paradigm in our present culture and legal system.<sup>18</sup> By "deductive," he means that gender categorization follows presumptively from one's sex assignment. Intransitivity concerns society's expectation that each sex correlate uniformly with one "correct"

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3. Sex hormonal pattern.
  4. Internal sex organs other than gonads.
  5. External genitalia.
  6. Secondary sexual characteristics.
  7. Apparent sex (the sex others presume you are and therefore the sex role in which you are reared).
  8. Psychological sex (the sex you consciously feel yourself to be). Also called "gender identity."

<sup>14</sup> See, e.g., *In re Ladrach*, 513 N.E.2d 828, 830, 832 (Ohio P. Ct. 1987). It should be noted that courts emphasizing a chromosomal "test" have rarely relied upon actual laboratory analysis of an individual's chromosome pattern. Instead, as in *Ladrach*, they infer that a given pattern (corresponding to external genitalia) existed at the time of the person's birth, and presume that this pattern has not in fact changed.

<sup>15</sup> See *Anonymous v. Mellon*, 398 N.Y.S.2d at 101.

<sup>16</sup> See, e.g., David, *supra* note 13, at 292.

<sup>17</sup> See *M.T. v. J.T.*, 355 A.2d 204 (N.J. Super. Ct. App. Div. 1976); *In re Anonymous*, 293 N.Y.S.2d 834, 837 (Civ. Ct. 1968).

<sup>18</sup> Valdes, *supra* note 7, at 40.

gender: "gender's manifest fluidity among the populace . . . is adamantly denied and consistently repressed by dominant sex/gender forces."<sup>19</sup>

Despite the existence of gender intransitivity as a social principle, as Valdes' observation suggests, a significant minority of the population consistently refuses or fails to comply with gender norms. Transgendered people are those who deliberately cultivate a social identity in the "opposite" gender, that is to say, in the gender which does not correspond to their sex assignment at birth. Others may simply be "gender atypical."<sup>20</sup> Aggressive women, for example, or men with long hair or delicate mannerisms, may be viewed as inappropriate in their social behavior. In fact, "cross-dressing," or transvestism, has been given a clinical and sometimes even a criminal meaning.<sup>21</sup>

Transsexualism has been defined in clinical terms as "[a] rare psychiatric disorder in which a person feels persistently uncomfortable about his or her anatomical sex."<sup>22</sup> It concerns the belief that one's physical identity (sex assignment) does not accurately reflect one's psychological identity (gender). Late twentieth-century advancements in medical technology, in the form of hormone therapy and "sex reassignment" surgical techniques, have enabled transsexuals to seek "treatment" for their "dysphoria."<sup>23</sup> The availability of such "sex change" procedures, which temporarily or

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<sup>19</sup> *Id.*

<sup>20</sup> *See id.* at 25-26.

<sup>21</sup> *See* discussion *infra* Part III.A.

<sup>22</sup> THE AMERICAN MEDICAL ASSOCIATION ENCYCLOPEDIA OF MEDICINE 1006 (1989), *cited in* Farmer v. Brennan, 511 U.S. 825, 829 (1994).

<sup>23</sup> *See* David, *supra* note 13, at 293 (citations omitted):

The treatment procedure is complex and a course of treatment usually lasts several years in an active phase and continues for many years of hormonal maintenance. The basic stages involve using hormones to effect the desired secondary sexual characteristics and surgical alteration to change the genitals. The surgical technique is most successful in changing anatomical males to females. The male organs are removed and an artificial vagina constructed, leaving the patient

permanently alter some but not all of the biological components of sex,<sup>24</sup> is responsible for the emergence of litigation to resolve individuals' sex status.

### C. *Summary of Analysis*

This paper reviews the resolution of sexual and gender identity questions in a selected variety of legal contexts. First, it examines U.S. jurisdictions' willingness to provide legal documentation of a change in sexual or gender identity in the form of modified birth certificates and/or court-ordered changes of name.<sup>25</sup> Many states have made statutory provision for the issuance of birth certificates, under carefully prescribed circumstances, designating a new sex. A number of jurisdictions have devised *ad hoc* administrative or judicial procedures for the issuance of "corrected" or "amended" birth certificates to some transsexuals, while still others have refused to allow for any such compromise. Though concerned with the prospect of "fraud" upon the public,<sup>26</sup> courts have frequently accommodated the wishes of transsexuals desiring a change of name to one associated with their adopted gender. In the absence of legislative action, however, the same courts have been reluctant to provide declaratory or equivalent relief acknowledging a permanent and comprehensive change in sex status.

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capable of normal coitus and even orgasm. While a male organ can be constructed for the female-to-male transsexual the result to date is less satisfactory since erection is so far impossible.

The majority of sources cited in this paper involve male-to-female transsexuals (MTFs) rather than female-to-male transsexuals (FTMs). For purposes of the discussion, all references to transsexuals should be assumed to relate to MTFs unless indicated otherwise. The terms "pre-operative" and "post-operative" will refer to sex (genital) reassignment surgery, and not to other surgical interventions such as breast implants.

<sup>24</sup> Surgery, for example, may remove gonads or alter the characteristics of one's genitalia, but it will not affect one's chromosomal makeup. Similarly, hormone therapy may alter one's secondary sexual characteristics without regard to the presence or absence of particular sexual organs.

<sup>25</sup> See discussion *infra* Parts II.A-B.

<sup>26</sup> See, e.g., *In re Anonymous*, 587 N.Y.S.2d 548, 548 (Civ. Ct. 1992).



Because sex impinges upon so many rights, privileges and obligations in this country,<sup>27</sup> courts and other entities have nonetheless been called upon to determine the legal sex of transsexuals for the purposes of a given case. Disputed marriages are an especially important area in which such a finding must be made, and this paper looks closely at marital controversies involving transsexuals.<sup>28</sup> With only one unambiguous exception, U.S. courts have not recognized changes in sex for marital purposes. At the same time, many transsexuals may have succeeded in marrying under their adopted identities, without ever having encountered legal challenge.

This paper also examines at some length the classification of prisoners in our nations' sex-segregated penal systems.<sup>29</sup> Although formal policies regarding transsexuals exist in some jurisdictions, placement decisions are typically made without such guidance and are consequently inconsistent. Pre-operative transsexual prisoners have occasionally been placed in women's prisons. More frequently, though they may be granted continued access to female hormones and "women's" clothing, they are placed in men's facilities. Either solution has difficulties. In men's prisons in particular, transsexuals have been vulnerable both to sexual assault by other inmates and to the abuses of "protective" segregation from the rest of the prison population.

The prisoner cases<sup>29</sup> most vividly illustrate the strain which transgendered realities place on a legal system invested in binary sexual divisions. Although the system has shown some limited

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<sup>27</sup> See, e.g., *In re Anonymous*, 314 N.Y.S.2d at 669-70:

The results which may be gained by societal acceptance, if such were to occur, are manifest. Among these are retirement at the age of 62 instead of age 65 under the rules and regulations of the Social Security Administration, improved ratings for life insurance purposes, the automatic right of exclusion from jury duty, possible marital benefits and rights of inheritance which differ, in some States and nations, according to the sex of the person.

Although many of these distinctions between "the" sexes are no longer made, this list of sex-linked benefits suggests the pervasive importance that sexual classifications have held in our legal system.

<sup>28</sup> See discussion *infra* Part II.C.

flexibility in dealing with persons who have succeeded in harmonizing their physical and psychological identities through surgical intervention, it remains largely hostile to "lesser" forms of gender non-conformity. The second major subsection of this paper explores some of the manifestations of such hostility. It discusses criminal prohibitions against "cross-dressing" and reviews the enforcement of sex-based double standards in employment, prisons and schools,<sup>30</sup> devoting special attention to Title VII jurisprudence involving transsexual and other gendered (as opposed to sex-based) claims.<sup>31</sup> The courts' persistent refusal to extend Title VII protections to sexual minorities<sup>32</sup> has served at times to prevent even the slightly gender atypical from obtaining redress against employment discrimination. Some states, however, have chosen to provide greater protections than those offered under federal law.

Ultimately, the law tolerates the existence of a legal limbo for transsexuals.<sup>33</sup> This limbo has many contours, and is based upon society's continued investment in a binary model of sex and gender. This model also ensures that other forms of gender atypicality will continue to be regulated through legal and other mechanisms. At the same time, limbo represents a degree of accommodation with gender ambiguity.

## II. Legal Recognition of Sex/Gender Identity Changes

The most immediate, practical legal difficulty confronting a transsexual is the probable incongruity between her chosen social identity and her personal documents. These include

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<sup>29</sup> See discussion *infra* Part II.D.

<sup>30</sup> See discussion *infra* Parts III.A, B.

<sup>31</sup> See discussion *infra* Part III.C.

<sup>32</sup> These sexual minorities would include, for example, lesbians, gay men and bisexuals as well as pre- and post-operative transsexuals.

<sup>33</sup> See Jeannine S. Haag and Tami L. Sullinger, *Transsexuals in Limbo: The Search for a Legal Definition of Sex*, 31 MD. L. REV. 236 (1971).

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passports, driver's licenses, professional licenses, and birth and baptismal records. Since birth certificates are required for the issuance of most other personal identification documents, and may facilitate the issuance of marriage licenses,<sup>34</sup> they are central to the establishment of a new legal identity. Changes of name (i.e., from a typically "male" name to a typically "female" name) also play an important role. Some vital records authorities have adopted formal or informal policies on the administrative level allowing transsexuals to obtain birth certificates with a new name and/or sex designation.<sup>35</sup> It is likely that many transsexuals have benefited from these provisions and made virtually unnoticed transitions into legal womanhood. A growing number of states have, by statute, expressly authorized the issuance of new or amended birth certificates.<sup>36</sup> Not surprisingly, however, birth certificate issuance and legal sex have become objects of litigation in others.

#### A. *Birth Certificates: Change of Sex Designation*

Although precise data are difficult to obtain,<sup>37</sup> a number of states are known to have issued new or amended birth certificates to post-operative transsexuals outside of a specific statutory or judicial mandate. *Ladrach*, for example, asserts that "twelve states [beyond three at the time with specific statutes] have permitted a post-operative change of sex designation on birth records."<sup>38</sup> The states are not named. David cites earlier, although conflicting, sources which indicate that either fifteen or twenty-five states had done so by about 1973. He also

<sup>34</sup> See, e.g., *In re Ladrach*, 513 N.E.2d 828, 831 (Ohio P. Ct. 1987):

It seems obvious to the court that if a state permits such a change of sex on the birth certificate of a post-operative transsexual, either by statute or administrative ruling, then a marriage license, if requested, must issue to such a person provided all other statutory requirements are fulfilled.

<sup>35</sup> See discussion *infra*, text accompanying notes 41, 54.

<sup>36</sup> See *infra* note 55.

<sup>37</sup> "Because transsexualism is a new area . . . legal reactions in many cases take place below the levels reported in the standard literature." David, *supra* note 13, at 301. This observation remains valid over two decades later.

observes that four states were omitted from updated versions of one of the lists. "Were favorable decisions accomplished for the first few applicants, perhaps in dealing with a low level clerk, and then, with a few more applicants and a little publicity, did the door close?"<sup>39</sup> Legislative guidance is a prerequisite for stability in this area.<sup>40</sup>

New York's experience illustrates the variety and changeability of administrative approaches to this issue. At some time prior to October 1965, the appropriate authority in New York City (specifically, the Director of the Bureau of Records and Statistics of the Department of Health) is known to have issued amended birth certificates to three transsexuals.<sup>41</sup> Subsequently, however, the Director sought guidance from the Board of Health in formulating a policy on the subject.<sup>42</sup> The Board in turn solicited recommendations from the New York Academy of Medicine, which concluded *inter alia* that "male-to-female transsexuals are still chromosomally males while ostensibly females" and expressed its opposition to changes of sex on birth certificates. The Board unanimously endorsed the Academy's recommendations, and passed a resolution on October 13, 1965 stating that "it is the sense of the Board of Health that the Health Code not be amended to provide for a change of sex on birth certificates in cases of transsexuals."<sup>43</sup> The succeeding Director's consequent refusal to issue amended birth certificates to transsexuals survived challenge in *Anonymous v. Weiner*.

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<sup>38</sup> *Ladrach*, 513 N.E.2d at 830. The three states cited were Arizona, Louisiana and Illinois.

<sup>39</sup> David, *supra* note 13, at 301.

<sup>40</sup> *Cf. Ladrach*, 513 N.E.2d at 832 ("[I]t is this court's opinion that the legislature should change the statutes, if it is to be the public policy of the state of Ohio to issue marriage licenses to post-operative transsexuals.").

<sup>41</sup> *See Anonymous v. Weiner*, 270 N.Y.S.2d 319, 324 (Sup. Ct. 1966).

<sup>42</sup> *Id.* at 321.

<sup>43</sup> *Id.* at 321-22.

The Academy recommendations cited in *Anonymous v. Weiner* continue to be regarded favorably by some courts,<sup>44</sup> but have been criticized in others, including its own.<sup>45</sup> In any event, the city Health Code eventually was amended in 1971. The new policy represented a compromise: upon presenting proof of reassignment surgery and a court-ordered name change, post-operative transsexuals would now receive a birth certificate with no sex designation at all. This policy too withstood attempts to compel the Director to record an actual change from male to female.<sup>46</sup> Effectively, the new policy allowed the Bureau of Records and Statistics, as well as reviewing courts, to avoid responsibility for making an official determination of an applicant's sex.

A jurisdiction's receptiveness to amending birth certificates for transsexuals depends to some degree on the nature of its existing vital statistics laws. Most states have statutory provisions allowing for some types of birth certificate modification. John Holloway has observed that such provisions generally fall into two categories.<sup>47</sup> "Correction" statutes permit the amendment of birth certificates upon a showing that the original records were in some way incorrect.<sup>48</sup> "Alteration" statutes, in turn, may allow for more general modification of birth record data.<sup>49</sup> The type of statute prevailing in a given state can have practical consequences for transsexuals seeking to document their adopted sex/gender identity:

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<sup>44</sup> See, e.g., *Ladrach*, 513 N.E.2d at 830; *Hartin v. Director*, 347 N.Y.S.2d 515, 517 (Sup. Ct. 1973).

<sup>45</sup> See *Anonymous v. Mellon*, 398 N.Y.S.2d 99, 102 (Sup. Ct. 1977); *In re Anonymous*, 293 N.Y.S.2d 834, 838 (Civ. Ct. 1968) ("This Court is in complete disagreement with the conclusion reached by the learned committee.").

<sup>46</sup> See *Anonymous v. Mellon*, 398 N.Y.S.2d at 101-102; *Hartin*, 347 N.Y.S.2d at 517-18 (citing New York City Health Code § 207.05(a)(5)).

<sup>47</sup> John P. Holloway, *Transsexuals - Their Legal Sex*, 40 U. COLO. L. REV. 282, 288 (1968).

<sup>48</sup> See, e.g., TEX. HEALTH & SAFETY CODE ANN. § 191.028(b) (West 1998): "An amending certificate may be filed to complete or correct a [birth] record that is incomplete or proved by satisfactory evidence to be inaccurate. . . ."

<sup>49</sup> See, e.g., S.D. CODIFIED LAWS § 34-25-51 (Michie 1997): "A certificate or record registered under this chapter may be amended in accordance with regulations adopted by the secretary of health. . . ."



The surgically converted transsexual will have a far better chance of obtaining the amendment or change of his birth certificate in those states which have alteration statutes than in those whose statutes limit changes to "corrections." In the latter, the burden is on the transsexual of proving that the original registration was erroneous.<sup>50</sup>

The *Ladrach* court, for example, explicitly premised its denial of the petitioner's application for a new birth certificate on the observation that no error had been made initially. "It is the position of this court that the Ohio correction of birth record statute . . . is strictly a 'correction' type statute . . . . There was no error in the designation of Edward Franklin Ladrach as a 'Boy' in the category of 'sex' on his birth certificate."<sup>51</sup>

Where the statutes are ambiguous, courts have taken varied approaches. In *K. v. Health Division*, the Oregon Court of Appeals upheld a lower court's order directing the Health Division to issue the FTM petitioner a birth certificate indicating his new name and sex.<sup>52</sup> The state Supreme Court overruled the order, however.

The majority of the Court of Appeals . . . appears to view a "birth certificate" as a record of facts as they presently exist, and thus as a record subject to change by order of a court by the issuance of a "new birth certificate" upon proof of any subsequent changes in the facts as recorded in the original birth certificate, including subsequent changes in sex.

In our opinion, it is not for this court to decide which view is preferable. On the contrary, we hold that this is a matter of public policy to be decided by the Oregon legislature.<sup>53</sup>

In contrast, a federal court in Connecticut has held that the state must show a substantial state interest in refusing to amend a transsexual's birth certificate, in order to survive an Equal Protection

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<sup>50</sup> Holloway, *supra* note 47, at 289.

<sup>51</sup> *In re Ladrach*, 513 N.E.2d 828, 831 (Ohio P. Ct. 1987). See also *Gajovski v. Gajovski*, 610 N.E.2d 431, 432 (Ohio Ct. App.), *cert. denied* 577 N.E.2d 660 (Ohio 1991) ("[I]n the contemplation of Ohio jurisprudence, one's gender at birth [sic] is one's gender throughout life.").

<sup>52</sup> *K. v. Health Division*, 552 P.2d 840, 845 (Or. App. 1976), *rev'd* 560 P.2d 1070 (Or. 1977).

challenge. Connecticut's Commissioner of Health had previously amended birth certificates for other reasons, without express statutory authority.<sup>54</sup>

Twenty-one states and the District of Columbia now have statutes formally authorizing post-operative transsexuals to obtain new or amended birth certificates designating them as members of their adopted sex. Each of these states, at a minimum, requires some evidence that a genital reassignment has been successfully completed.<sup>55</sup> Most of them also require a court order and/or proof of a legal name change.<sup>56</sup> The latter requirement appears to serve no substantial purpose beyond soothing the public, by encouraging transsexuals to maximize the congruence between their post-surgical anatomy and the social indices of gender identity.<sup>57</sup>

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<sup>53</sup> *K. v. Health Division*, 560 P.2d 1070, 1072 (Or. 1977) (footnote omitted). Oregon's vital statistics laws now make explicit provision for the issuance of amended birth certificates to post-operative transsexuals. See *infra* note 55.

<sup>54</sup> *Darnell v. Lloyd*, 395 F.Supp. 1210, 1213-14 (D. Conn. 1975).

<sup>55</sup> See ALA. CODE § 22-9A-19(d) (1997); Ariz. Rev. Stat. Ann. § 36-326(A)(4) (West 1997); CAL. HEALTH & SAFETY CODE § 103425 (West 1998); COLO. REV. STAT. ANN. § 25-2-115(4) (West 1998); D.C. CODE ANN. § 6-217(d) (1997); GA. CODE ANN. § 31-10-23(e) (1997); HAW. REV. STAT. ANN. § 338-17.7(a)(4)(B) (Michie 1997); IOWA CODE ANN. § 144.23(3) (West 1998); KY. REV. STAT. ANN. § 213.121(5) (Banks-Baldwin 1998); LA. REV. STAT. ANN. § 62 (West 1998); MD. CODE ANN., HEALTH-GEN., § 4-214(b)(5) (1997); MASS. GEN. LAWS ANN. ch. 46, § 13(e) (West 1998); MICH. COMP. LAWS ANN. § 333.281(c) (West 1998); MO. ANN. STAT. § 193.215(9) (West 1998); NEB. REV. STAT. § 71-604.01 (1997); N.J. STAT. ANN. § 26:8-40.12 (West 1998); N.M. STAT. ANN. § 24-14-25(D) (Michie 1997); N.C. GEN. STAT. § 130A-118(b)(4) (1997); OR. REV. STAT. § 432.235(4) (1997); UTAH CODE ANN. § 26-2-11 (1997); VA. CODE ANN. § 32.1-269(E) (Michie 1997); WIS. STAT. ANN. §§ 69.15(4)(b), (c) (West 1998); but see TENN. CODE ANN. § 68-3-203(d) (1997) ("The sex of an individual will not be changed on the original certificate of birth as a result of sex change surgery.").

<sup>56</sup> For a typical statute of this kind, see GA. CODE ANN. § 31-10-23(e); but see, e.g., HAW. REV. STAT. ANN. § 338-17.7(a)(4)(B) (requiring only a physician's affidavit that surgery has made the registrant's original sex designation incorrect).

<sup>57</sup> Such statutes ask transsexuals, in effect, to embrace gender stereotypes and to "erase" a specifically transgendered identity, see Leane Renee, *Impossible Existence: The Clash of Transsexuals, Bipolar Categories, and Law*, 5 AM. U. J. GENDER & L. 343, 373 (1997), as a prerequisite to legal recognition. At the very least, they reflect a belief that changing one's name can be as radical or necessary an intervention as changing one's anatomy.



B. *Name Changes*

Many people, of course, choose to adopt a new name without any need of prompting from the state. An individual is generally free in our legal tradition to assume a new name at will.<sup>58</sup> However, judicial orders of change of name have certain advantages,<sup>59</sup> and they are frequently sought by transsexuals seeking to facilitate the creation and social acceptance of their adopted gender identity. On the whole, both pre- and post-operative transsexuals have obtained legally recognized changes of name with comparative ease.

Some jurisdictions, including those hostile to birth certificate sex designation changes, have articulated a policy favoring the grant of a court-ordered name change in the absence of clearly fraudulent intent.<sup>60</sup> Other courts have expressed a more general, broadly defined concern with fraud, however. New York courts have occasionally required applicants for a court-ordered name change to supply outside documentation of their transsexual status and the "irreversibility" of their decision to live as a female.

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 petitioner.

Without a competent medical and psychiatric evaluation of petitioner, granting the relief requested may be contrary to the public interest as well as harmful to petitioner's present mental status.<sup>61</sup>

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<sup>58</sup> "Under common law, a person may use any name at will as long as there is no fraud, misrepresentation or interference with the rights of others." In re *Anonymous*, 587 N.Y.S.2d at 548.

<sup>59</sup> "The advantages of obtaining court approval of a change of name are that the court order sets a definite date on which the new name is to be assumed, it gives the name change an 'aura of propriety and official sanction' and makes it a matter of public record." *Id.*

<sup>60</sup> See, e.g., *In re Ladrach*, 513 N.E.2d 828, 829 (Ohio P. Ct. 1987) ("The court believes that so long as there is no intent to defraud creditors or deceive others and the applicant has acted in good faith, then the petition should be granted.")

<sup>61</sup> *In re Anonymous*, 582 N.Y.S.2d 941, 941 (Civ. Ct. 1992). See also *In re Anonymous*, 587 N.Y.S.2d at 548.

Upon receipt of such proof, the courts have had no further difficulty granting the request for a name change.<sup>62</sup> Nonetheless, they remain reluctant to take a firm stand regarding the applicant's ultimate status. More than one New York name change case contains language to the effect that "the order shall not be used or relied upon by petitioner as any evidence or judicial determination that the sex of the petitioner has in fact been changed."<sup>63</sup>

### C. *Marriage Rights*

Undoubtedly, many marriages involving transsexuals are contracted and consummated without ever reaching the attention of the courts.<sup>64</sup> Where the validity of such a marriage has been litigated, it is often in the context of divorce or support proceedings; presumably, the issue would never have arisen in the absence of a conflict between the spouses themselves. In at least one case, though, the Army initiated legal action against a couple in regard to their allegedly invalid marriage, despite the fact that it had never been challenged in a state forum.<sup>65</sup> When such marriages are tested in court, however, they are highly unlikely to be recognized. Furthermore, marriage licenses are unlikely to be issued to known transsexuals seeking to marry opposite their adopted sex.<sup>66</sup>

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<sup>62</sup> See *In re Rivera*, 627 N.Y.S.2d 241, 241 (Civ. Ct. 1995) (granting petitioner's change of name from William Rodriguez Rivera to Veronica Rodriguez). Rivera was the previously unsuccessful petitioner in *In re Anonymous*, 587 N.Y.S.2d 548.

<sup>63</sup> *In re Anonymous*, 314 N.Y.S.2d 668, 670 (Civ. Ct. 1970). See also, e.g., *Rivera*, 627 N.Y.S.2d at 241.

<sup>64</sup> "Transsexuals are in fact getting married and doing so with ease." David, *supra* note 13, at 324.

<sup>65</sup> *Von Hoffburg v. Alexander*, 615 F.2d 633 (5th Cir. 1980).

<sup>66</sup> Hereinafter, for lack of a more accurate yet still economical term, these actual and attempted unions will be referred to as "transsexual marriages."

With the fragile exception of Hawaii,<sup>67</sup> U.S. jurisdictions have held unanimously that marriage is the legal union of one man with one woman.<sup>68</sup> In the typical case, then, the validity of a transsexual marriage hinges upon the question of whether or not the bride is lawfully a "woman." With one exception, courts confronting this question have declined to offer such recognition.

The first U.S. case to address transsexual marriage leaves the question largely open. In *Anonymous v. Anonymous*,<sup>69</sup> the plaintiff, a non-commissioned officer in the U.S. Army, sought a declaratory judgment regarding his marital status. The parties had met "on a street in Augusta, Georgia" and, shortly afterward, took part in a marriage ceremony in Texas. The intoxicated plaintiff did not discover until after the ceremony that his bride had male organs. According to the court, "[h]e immediately left the bed, 'got drunk some more' and went to the bus station."<sup>70</sup> Within a month he was sent overseas; in his absence, the defendant underwent reassignment surgery. Based on these facts, the court found "that the defendant was not a female at the time of the marriage ceremony"<sup>71</sup> and that the ceremony itself was thus "a nullity."<sup>72</sup> Although the court

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<sup>67</sup> Litigation in Hawaii may soon lead to the recognition of same-sex marriages. See *Baehr v. Miike*, No. CIV. 91-1394, 1996 WL 694235, at \*21 (Haw. Cir. Ct. Dec. 3, 1996) (finding no proof of compelling state interest which would be prejudiced by permitting same-sex marriage). However, Hawaii voters will consider a state constitutional amendment in November 1998 which would discourage or prevent such recognition. See Mark Strasser, *Statutory Construction, Equal Protection, and the Amendment Process: On Romer, Hunter, and Efforts to Tame Baehr*, 45 BUFF. L. REV. 739, 739 (1997).

<sup>68</sup> See, e.g., *Dean v. District of Columbia*, 653 A.2d 307 (D.C. 1995); *Gajovski v. Gajovski*, 610 N.E.2d 431, 433 (Ohio Ct. App. 1991); *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App. 1974); *Anonymous v. Anonymous*, 325 N.Y.S.2d 499, 500 (Sup. Ct. 1971). In anticipation of an outcome favorable to same-sex couples in Hawaii, Congress and a number of states have enacted legislation aimed at avoiding recognition of same-sex marriages from other jurisdictions. E.g., Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996); 1997 Ark. Acts 144; 1996 Ga. Laws 1025 § 1; 1996 Mich. Pub. Acts 334 § 1; see Mark Strasser, *Loving the Romer Out for Baehr: On Acts in Defense of Marriage and the Constitution*, 58 U. PITT. L. REV. 279 (1997).

<sup>69</sup> 325 N.Y.S.2d 499.

<sup>70</sup> *Id.* at 499.

<sup>71</sup> *Id.* at 500.

expressed doubt as to whether surgery could "change a person into a true female,"<sup>73</sup> it did not propose a definitive answer to that question.

A subsequent New York case<sup>74</sup> also found invalid a transsexual marriage involving an FTM husband, determining that a divorce was inappropriate because the parties could never have been married legally. Reassignment surgery had taken place prior to the wedding date, but the court found this insufficient to convert the defendant legally from female to male. Although the same court had earlier permitted the defendant "to assume the name Mark in place and stead of Marsha,"<sup>75</sup> facilitating his social identification as a male, it was unwilling to recognize a change of sex for marital purposes. The court expressed particular concern about the defendant's lack both of male gonads and of a penis: "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>76</sup> More recently, an Ohio court expressed its opinion that "true sex" coincides permanently with the anatomical determination made at birth, and called upon the legislature to determine otherwise:

[T]his court concludes that there is not 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.

. . . it is this court's opinion that the legislature should change the statutes, if it is to be the public policy of the state of Ohio to issue marriage licenses to post-operative transsexuals.<sup>77</sup>

The court clearly hesitated to set a precedent for transsexual marriage.

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<sup>72</sup> *Id.* at 501.

<sup>73</sup> *Id.* at 500.

<sup>74</sup> *B v. B*, 355 N.Y.S.2d 712 (Sup. Ct. 1974).

<sup>75</sup> *Id.* at 714.

<sup>76</sup> *Id.* at 717.

A federal court, when confronted with the issue of transsexual marriage, altogether avoided reaching the merits of the case.<sup>78</sup> The details of *Von Hoffburg* nonetheless warrant consideration. The marriage question arose within the context of a proceeding challenging the plaintiff's dismissal from the U.S. Army. The plaintiff, formerly known as Marie Sode, had married a Kristian Von Hoffburg while on active duty in the state of Alabama. Subsequently, Kristian Von Hoffburg obtained a dependent military identification card, and Marie Von Hoffburg applied for and received a Basic Allowance for Quarters (BAQ) at the rate for married persons. The Army began a criminal investigation, however, after learning that Kristian Von Hoffburg was an FTM transsexual and Army veteran previously known as Linda Bowers. Following the investigation, the Army declared the marriage a nullity, terminated the plaintiff's BAQ payments, and eventually ordered her discharge on the grounds of "homosexual tendencies."<sup>79</sup> The elimination board specifically determined that "Kristian L. Von Hoffburg is a biological female,"<sup>80</sup> although the validity of the marriage was not challenged within the Alabama courts.<sup>81</sup> The Fifth Circuit Court of Appeals declined to resolve the matter, instead dismissing the suit for failure to exhaust administrative remedies.<sup>82</sup>

In each of the foregoing cases, the courts resisted making a definitive finding regarding a transsexual's legal sex for marriage purposes. In the marriage context, only one court has

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<sup>77</sup> *In re Ladrach*, 513 N.E.2d 828, 832 (Ohio P. Ct. 1987).

<sup>78</sup> *Von Hoffburg v. Alexander*, 615 F.2d 633, 636 (5th Cir. 1980).

<sup>79</sup> *Id.* at 635-36.

<sup>80</sup> *Id.* at 636 n.7.

<sup>81</sup> *Id.* at 635 n.2.

<sup>82</sup> *Id.* at 640, 641.

conclusively resolved the matter in favor of a transsexual party. In *M.T. v. J.T.*,<sup>83</sup> a New Jersey court affirmed a lower court's order of support and maintenance against a husband in favor of his transsexual spouse. The court did not dispute "the fundamental premise in this case that a lawful marriage requires the performance of a ceremonial marriage of two persons of the opposite sex,"<sup>84</sup> but instead found that the wife had legally become female through irreversible medical intervention.<sup>85</sup>

Unlike the *B v. B* court, which stressed procreative function, the *M.T. v. J.T.* court was impressed with the plaintiff's sexual capacity. The court observed that she could no longer function sexually as a male, while noting affirmatively that she had acquired a fully serviceable "artificial" vagina. In fact, it offered an elaborate description of M.T.'s post-surgical anatomy:

The examination of plaintiff before the operation showed that she had a penis, scrotum and testicles. After the operation she did not have those organs but had a vagina and labia which were "adequate for sexual intercourse" and could function as any female vagina, that is, for "traditional penile/vaginal intercourse." The "artificial vagina" constructed by such surgery was a cavity, the walls of which are lined initially by the skin of the penis, often later taking on the characteristics of normal vaginal mucosa; the vagina, though at a somewhat different angle, was not really different from a natural vagina in size, capacity and "the feeling of the walls around it." Plaintiff had no uterus or cervix, but her vagina had a "good cosmetic appearance" and was "the same as a normal female vagina after a hysterectomy."<sup>86</sup>

The court explicitly rejected the hypothesis that "true sex" is determined irrevocably at birth, holding instead that a transsexual's sex must be recognized according to the congruence of anatomy and gender made possible by successful surgery.<sup>87</sup>

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<sup>83</sup> 355 A.2d 204 (N.J. Super. Ct. App. Div.), *cert. denied*, 364 A.2d 1076 (N.J. 1976).

<sup>84</sup> *Id.* at 207.

<sup>85</sup> *Id.* at 211.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 209.

The New Jersey court's willingness to embrace *M.T. v. J.T.*'s transsexual plaintiff and her claim for spousal support<sup>88</sup> may be due in part to the clear absence of fraud in the case. The record indicated that M.T. and her husband had lived together for a number of years prior to their marriage, that the husband was fully aware of her "condition" during that time, and that he himself had paid for her reassignment surgery. Their wedding took place over a year after the operation, and the husband continued to support her for another two years before abandoning their shared home.<sup>89</sup> This contrasts sharply with the circumstances of *Anonymous v. Anonymous* and *B v. B*, in which the plaintiffs each felt that they had been deceived about the sex of their transsexual spouses.<sup>90</sup> The *M.T.* court found the prospect of fraud far less troubling. "The potential for fraud . . . is effectively countered by the apt observation of the trial judge here: 'The transsexual is not committing a fraud upon the public. In actuality she is doing her utmost to remove any false facade.'<sup>91</sup>

#### D. *Prisoner Classification and Placement*

The determination of a person's official sex has presented a vexing problem for penal authorities in the exercise of their responsibility over transgendered inmates. Such prisoners are regarded as especially vulnerable to assault within male prisons, and as a threat to security and/or privacy in female facilities. At the same time, the segregation of transsexual inmates from the general prison population may raise Eighth Amendment concerns. The Eighth Amendment has

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<sup>88</sup> See *id.* at 211: "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."

<sup>89</sup> *Id.* at 205. The court's decision may also have been influenced by principles of estoppel.

<sup>90</sup> *Anonymous v. Anonymous*, 325 N.Y.S.2d 499, 499 (Sup. Ct. 1971); *B v. B*, 355 N.Y.S.2d 712, 713 (Sup. Ct. 1974). The Army's position in *Von Hoffburg v. Alexander* also indicates its concern that the plaintiff had sought marital benefits dishonestly. See 615 F.2d 633, 635 (5th Cir. 1980).

<sup>91</sup> 355 A.2d at 210.



also been invoked by prisoners seeking access to hormone therapy or other treatment for their "gender dysphoria."<sup>92</sup> Because of their effect on secondary sex characteristics and indices of gender, decisions regarding medical and psychiatric treatment remain intimately involved with prisoner classification policies.

Prison officials may not lawfully act with "deliberate indifference" towards an inmate's serious medical need. Under *Estelle v. Gamble*, to do so constitutes cruel and unusual punishment in violation of the Eighth Amendment.<sup>93</sup> Courts in several jurisdictions have recognized transsexuality as a serious medical condition subject to the *Estelle* rule.<sup>94</sup> However, they have also held that "although prison officials must provide treatment to address the medical needs of transsexual prisoners, the law [does] not require prison officials to administer estrogen or provide any other particular treatment."<sup>95</sup> Transsexual inmates, typically pre-operative, have consequently had mixed success in compelling prisons to provide them with estrogen therapy.

Many prisoners have been denied access to female hormones in favor of alternative "treatments" for gender dysphoria. Thus, for example, the plaintiff in *Supre* (whose testicles had been surgically removed following several attempts at "self-mutilation") was initially scheduled for testosterone replacement therapy and mental health treatment rather than the estrogen therapy she requested.<sup>96</sup> The plaintiff's request for female hormones in *Lamb v. Maschner* was similarly denied;

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<sup>92</sup> On gender dysphoria, see generally DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 532-38 (4th ed. 1994) [hereinafter DSM-IV].

<sup>93</sup> 429 U.S. 97, 104 (1976).

<sup>94</sup> See, e.g., *Brown v. Zavaras*, 63 F.3d 967, 970 (10th Cir. 1995); *White v. Farrier*, 849 F.2d 322, 325 (8th Cir. 1988); *Meriwether v. Faulkner*, 821 F.2d 408, 413 (7th Cir.), cert. denied 484 U.S. 935 (1987).

<sup>95</sup> *Brown*, 63 F.3d at 970, citing *Supre v. Ricketts*, 792 F.2d 958, 963 (10th Cir. 1986).

<sup>96</sup> 792 F.2d at 960.



her placement in a State Security Hospital was found to be constitutionally satisfactory evidence of mental treatment.<sup>97</sup>

In addition, prison officials have frequently attempted to evade their constitutional obligations to transgendered inmates by arguing that a given prisoner is not a "true transsexual."<sup>98</sup> Thus, in many of the lawsuits, opposing experts will argue fine diagnostic points purporting to distinguish (for example) the transsexual from the transvestite from the sufferer of "gender identity disorder of adolescence or adulthood, nontranssexual type" (GIDAANT).<sup>99</sup> According to the diagnostic manuals, GIDAANT differs from transsexuality in that the patient does not suffer from the same "persistent preoccupation" with altering her primary and secondary sex characteristics.<sup>100</sup> "Mere" transvestism or "transvestic paraphilia," in turn, involves crossdressing as sexual stimulation rather than as "a form of confident self-expression of female identity."<sup>101</sup> The constitutional safeguards for transsexual prisoners rely heavily on the technicalities of a clinical, disease-oriented model of their gender identity.

Despite the narrowness of these protections, at least one court has been willing to require prisons to provide estrogen to a properly diagnosed transsexual inmate. In *Phillips*, the court granted the plaintiff's motion for a preliminary injunction ordering corrections officials to continue

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<sup>97</sup> 633 F.Supp. 351, 354 (D. Kansas 1986).

<sup>98</sup> See, e.g., *Long v. Nix*, 877 F.Supp. 1358, 1362-63 (S.D. Iowa 1995); *Phillips v. Michigan Dep't of Corrections*, 731 F.Supp. 792, 795 (W.D. Mich. 1990), *aff'd* 932 F.2d 969 (6th Cir. 1991).

<sup>99</sup> See *Phillips*, 731 F.Supp. at 796, citing the DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (3d ed., rev., 1987) [hereinafter DSM-III-R] published by the American Psychiatric Association. The court held that a GIDAANT diagnosis, like transsexuality, was sufficient to establish "serious medical need." *Id.* at 800.

<sup>100</sup> DSM-III-R, *supra* note 99, at 76-77. As a clinical category, GIDAANT has since been subsumed, with Transsexualism, into the more general "Gender Identity Disorder." DSM-IV, *supra* note 92, at 532-38.

<sup>101</sup> *Long*, 877 F.Supp. at 1363. Cf. *Star v. Gramley*, 815 F.Supp. 276, 278 n.2 (C.D. Ill. 1993): ("Gramley further notes that the plaintiff is not a transsexual and has no medically documented need to wear women's clothing."); DSM-IV, *supra* note 92, at 536 (defining "Transvestic Fetishism").

her estrogen therapy, which had been interrupted after her incarceration.<sup>102</sup> The plaintiff's case in *Phillips* had a heightened degree medical urgency, which the court took into consideration, because she had been receiving estrogen prescriptions for approximately sixteen years prior to her arrest and conviction. She had also undergone various procedures short of genital reassignment, such as electrolysis and breast implant surgery, to enhance her female appearance. Her withdrawal from estrogen caused a variety of adverse effects, including vomiting, discomfort and bruising due to a reduction in breast tissue, and depression, as well as the reversal of secondary female characteristics.<sup>103</sup> *Meriwether* involved a very similar plaintiff also undergoing severe estrogen withdrawal symptoms.<sup>104</sup> Although that court upheld her right to receive medical treatment generally, however, it declined to require estrogen therapy or any other specific form of treatment such as reassignment surgery.<sup>105</sup>

Many transsexual inmates have nonetheless received hormone treatment in prison without any court intervention.<sup>106</sup> These prisoners may or may not receive permission to wear "female" clothing and cosmetics as well.<sup>107</sup> Although beneficial to the medical and psychological well-being of the affected inmates, such measures also ensure the continued existence of a prison subpopulation containing individuals who exhibit female characteristics but often retain full or partial male genitalia. In a penal system divided sharply into designated male and female

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<sup>102</sup> 731 F.Supp. at 794, 801.

<sup>103</sup> *See id.* at 793-794.

<sup>104</sup> *Meriwether v. Faulkner*, 821 F.2d 408, 410 (7th Cir.), *cert. denied* 484 U.S. 935 (1987).

<sup>105</sup> *Id.* at 413.

<sup>106</sup> Some have also succeeded in obtaining hormones by having them smuggled into prison. *See Farmer v. Brennan*, 511 U.S. 825, 829 (1994).

<sup>107</sup> *See, e.g.,* *Lucrecia v. Samples*, No. C-93-3651-VRW, 1995 WL 630016, at \*1 (N.D.Cal. Oct. 16, 1995) (permission to wear "female" clothing granted at one male facility and denied at another).

facilities,<sup>108</sup> this greatly problematizes the question of prisoner placement. As argued in *White*, "the State has a legitimate interest in not having a male with female breasts in a male prison and in not placing persons with functional male genitals in a female prison."<sup>109</sup>

From the existing body of case law, it appears that transsexuals in transition are nearly always placed in male rather than female prisons. However, there is a widespread perception that such prisoners are particularly vulnerable to, or even invite, sexual assault.<sup>110</sup> So far, viable solutions to this problem have remained elusive. Transsexuals assaulted in prison have occasionally filed Eighth Amendment suits against guards and officials for their failure to protect them from attack.<sup>111</sup> The very same plaintiffs, though, may raise similar constitutional objections when subjected to ostensibly protective segregation.<sup>112</sup>

On occasion, pre-operative transsexuals have in fact been placed in women's prisons.<sup>113</sup> This too has difficulties. In at least one lawsuit, a female prisoner alleged violations of her privacy

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<sup>108</sup> The *Lamb* court perceives the matter bluntly: "A male prisoner cannot be housed in a women's prison." *Lamb v. Maschner*, 633 F.Supp. 351, 353 (D. Kansas 1986).

<sup>109</sup> *White v. Farrier*, 849 F.2d 322, 327 (8th Cir. 1988), citing Brief of Appellant at 26-27.

<sup>110</sup> "Gramley asserts that allowing an inmate to wear women's garments and makeup in an all-male prison could provoke and/or promote homosexual activity or assault." *Star v. Gramley*, 815 F.Supp. 276, 278 (C.D. Ill. 1993). See also *Farmer*, 511 U.S. at 830; *Meriwether*, 821 F.2d at 417; *Long v. Nix*, 877 F.Supp. 1358, 1361 (S.D. Iowa 1995).

<sup>111</sup> See, e.g., *Farmer*, 511 U.S. at 830.

<sup>112</sup> See *id.* at 861 n.1 (Thomas, J., concurring in the judgment):

When petitioner was taken out of general prison population for security reasons at USP-Lewisburg, he [sic] asserted that he "d[id] not need extra security precautions" and filed suit alleging that placing him in solitary confinement was unconstitutional. . . . Petitioner's present claim, oddly enough, is that leaving him in general prison population was unconstitutional because it subjected him to a risk of sexual assault.

See also *Meriwether*, 821 F.2d at 417-18 ("Plaintiff's claim that the defendants have deliberately failed to protect her from sexual assault is somewhat in conflict with her desire not to remain in administrative segregation indefinitely.").

<sup>113</sup> See, e.g., *Lucrecia v. Samples*, No. C-93-3651-VRW, 1995 WL 630016, at \*2 (N.D.Cal. Oct. 16, 1995).

and other constitutional rights based upon her placement with a transsexual cellmate in the county jail. The cellmate, Cheyenne Lamson, was 6'1" and had anatomically intact male genitalia. She had been living for several years as a woman, however, was receiving estrogen treatment, and had "virtually no capacity to function sexually as a male."<sup>114</sup> Because the defendant jail officials had placed Lamson with female inmates upon the advice of a physician, and because "the contours of [the constitutional right to privacy] are not clear when it comes to the determination of where to house transsexuals," the court held that the defendants were entitled to qualified immunity on the charge of invasion of privacy. At the same time, it recognized that "[t]he Jail's solution may not have been ideal."<sup>115</sup>

Policy approaches to the treatment and placement of transsexual prisoners may not always be formulated in advance.<sup>116</sup> Nonetheless, some prison systems have devised formal guidelines. For example, "[i]t is the policy of the [Federal] Bureau of Prisons to maintain the transsexual inmate at the level of change existing upon admission to the Bureau."<sup>117</sup> It is also federal policy "to incarcerate preoperative transsexuals with prisoners of like biological sex,"<sup>118</sup> an apparent reference to at-birth anatomical designation. Some states, such as Colorado, have formally studied the problem and adopted similar guidelines.<sup>119</sup> Such policies offer a convenient bright line to

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<sup>114</sup> Crosby v. Reynolds, 763 F.Supp. 666, 667 (D. Maine 1991).

<sup>115</sup> *Id.* at 669-70.

<sup>116</sup> *See id.* at 669: "Jail authorities, obviously, do not frequently address such a quandary; well thought out and articulated policies were, therefore, not available."

<sup>117</sup> Bureau of Prisons Health Service Manual § 6803, *cited in* Cuoco v. Quinlan, No. 91 Civ. 7279 (LMM), 1992 WL 350755, at \*4 (S.D.N.Y. Nov. 16, 1992).

<sup>118</sup> Farmer v. Brennan, 511 U.S. 825, 829 (1994).

<sup>119</sup> *See* *Supre v. Ricketts*, 792 F.2d 958, 960-61 (10th Cir. 1986) (discussing the "Transsexual Policy Development Workshop" conducted in January 1983).

corrections officials faced with the "quandary"<sup>120</sup> of where to house a transsexual prisoner. They do not resolve the tension between binary sex designations and transgendered reality, however, and they do not address the pervasive problem of gendered violence among inmates.<sup>121</sup>

### III. Gender Atypicality and Legal Pressure to Conform

The clinical understanding of transsexuality remains heavily invested in the binary, either-or model of sex, and in the one-to-one mapping of sex to a corresponding gender.<sup>122</sup> Thus, transsexuality is understood as simply an inversion of this norm. "A transsexual believes that he is the victim of a biologic accident, cruelly imprisoned within a body incompatible with his real sexual identity."<sup>123</sup> This helps to explain why courts and legislatures have been slightly more receptive to the needs of transsexuals after the completion of reassignment surgery. The harmonization of one's physical attributes with one's adopted gender identity restores the illusion of a well-ordered world symmetrically divided into masculine males and feminine females. The "gender atypical" - that is, individuals whose social characteristics fail in varying degrees to conform to those expected of their sex - upset the tidy boundaries prescribed by such a model. The law frequently finds ways to punish gender atypical people for their variance from the norm. More passively, it continues to tolerate many forms of private discrimination against transsexuals and

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<sup>120</sup> See *supra*, note 116.

<sup>121</sup> See Renee, *supra* note 57, at 383-88, for a proposal advocating the classification and placement of prisoners according to a multiple-criterion model of gender identity, rather than according to genital attributes; see also Debra Sherman Tedeschi, *The Predicament of the Transsexual Prisoner*, 5 TEMP. POL. & CIV. RTS. L. REV. 27, 44-47 (1995).

<sup>122</sup> The court's discussion in one of New York's *Anonymous* cases illustrates the confusing sex and gender permutations exposed by transgendered persons in a binary environment. "[The transsexual's] social sex is determined by his anatomical sex. But again, by definition, his psychological sex, as distinguished from his anatomical sex, is that of the opposite sex." In re *Anonymous*, 293 N.Y.S.2d 834, 837 (Civ. Ct. 1968).

<sup>123</sup> THE MERCK MANUAL OF DIAGNOSIS AND THERAPY 1434 (14th ed. 1982), cited in *Meriwether*, 821 F.2d at 412 n.5.

corrections officials faced with the "quandary"<sup>120</sup> of where to house a transsexual prisoner. They do not resolve the tension between binary sex designations and transgendered reality, however, and they do not address the pervasive problem of gendered violence among inmates.<sup>121</sup>

### III. Gender Atypicality and Legal Pressure to Conform

The clinical understanding of transsexuality remains heavily invested in the binary, either-or model of sex, and in the one-to-one mapping of sex to a corresponding gender.<sup>122</sup> Thus, transsexuality is understood as simply an inversion of this norm. "A transsexual believes that he is the victim of a biologic accident, cruelly imprisoned within a body incompatible with his real sexual identity."<sup>123</sup> This helps to explain why courts and legislatures have been slightly more receptive to the needs of transsexuals after the completion of reassignment surgery. The harmonization of one's physical attributes with one's adopted gender identity restores the illusion of a well-ordered world symmetrically divided into masculine males and feminine females. The "gender atypical" - that is, individuals whose social characteristics fail in varying degrees to conform to those expected of their sex - upset the tidy boundaries prescribed by such a model. The law frequently finds ways to punish gender atypical people for their variance from the norm. More passively, it continues to tolerate many forms of private discrimination against transsexuals and

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<sup>120</sup> See *supra*, note 116.

<sup>121</sup> See Renee, *supra* note 57, at 383-88, for a proposal advocating the classification and placement of prisoners according to a multiple-criterion model of gender identity, rather than according to genital attributes; see also Debra Sherman Tedeschi, *The Predicament of the Transsexual Prisoner*, 5 TEMP. POL. & CIV. RTS. L. REV. 27, 44-47 (1995).

<sup>122</sup> The court's discussion in one of New York's *Anonymous* cases illustrates the confusing sex and gender permutations exposed by transgendered persons in a binary environment. "[The transsexual's] social sex is determined by his anatomical sex. But again, by definition, his psychological sex, as distinguished from his anatomical sex, is that of the opposite sex." In re *Anonymous*, 293 N.Y.S.2d 834, 837 (Civ. Ct. 1968).

<sup>123</sup> THE MERCK MANUAL OF DIAGNOSIS AND THERAPY 1434 (14th ed. 1982), cited in *Meriwether*, 821 F.2d at 412 n.5.



others. This is especially true in institutional settings such as school, prison and the workplace. There are exceptions to the law's approval of institutional bias, however.

A. *Cross-dressing Statutes*

Many jurisdictions have retained criminal prohibitions against "cross-dressing." One such ordinance reads: "[a]ny person who shall appear in a public place . . . in a dress not belonging to his or her sex, with intent to conceal his or her sex, . . . shall be fined not less than twenty dollars nor more than five hundred dollars for each offense."<sup>124</sup> The language of intentional concealment echoes the concern with "fraud" that recurs throughout transgender jurisprudence. Apparently, the law fears that "inappropriate" gender behavior will confuse or mislead the observer as to a person's "true" sex.<sup>125</sup> For some reason, we are obsessed with knowing in which of two sexual categories everyone belongs, and expect gender to signal the answer.

Cross-dressing statutes have become difficult to enforce against transsexuals, however. In *City of Columbus v. Zanders*, for example, the court found that the defendant, as a "true transsexual" subject to irresistible compulsion, could not form the criminal intent required for conviction under the Columbus ordinance.<sup>126</sup> The Supreme Court of Illinois in *Wilson* found Chicago's ordinance to be unconstitutional as applied to transsexual defendants undergoing pre-operative therapy. It declined, though, to declare the ordinance unconstitutional on its face.<sup>127</sup>

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<sup>124</sup> Municipal Code of the city of Chicago, § 192-8, cited in *City of Chicago v. Wilson*, 389 N.E.2d 522, 523 (Ill. 1978).

<sup>125</sup> *Cf. People v. Simmons*, 357 N.Y.S.2d 362, 365 (Crim. Ct. 1974): "We may accept as a fact that apparently the human species is the only one in which true gender can be more or less successfully concealed."

<sup>126</sup> 266 N.E.2d 602, 603-04 (Mun. Ct. Ohio 1970). According to the court, "the true transsexual suffers from a mental defect over which he [sic] has little practical control." *Id.* at 606.

<sup>127</sup> 389 N.E.2d at 525.

In reaching these conclusions, the courts revisit the arguments distinguishing "genuine" transsexuals from other gender non-conformists. The *Simmons* court, before finding New York's criminal impersonation statute inapplicable to cross-dressing, devoted the first part of its opinion to speculation about the defendant's clinical status:

His accoutrement may mean that he is a transvestite, that is, a person who achieves sexual stimulation from cross-dressing . . . . Or he may be a transsexual, an individual with the anatomy of one sex, who believes so firmly that he belongs to the other sex that he is obsessed with a compulsion to alter his appearance, social status and even his body to conform to the 'rightful' gender.

However, *Simmons* may be a pseudotransvestite, 'an overt homosexual who uses cross-dressing solely for purposes of enticement.'

Finally, the defendant may fit none of the foregoing descriptions and may merely employ dress as a device to facilitate the practice of sodomy for pay.<sup>128</sup>

The *Zanders* court likewise took pains to distinguish its transsexual defendant from homosexuals and from transvestites.<sup>129</sup>

Even while ruling in favor of transsexual defendants in cross-dressing cases, then, the courts have generally upheld the states' right to criminalize the conduct. The ordinances have been defended, for example, as devices to prevent criminal or "inherently antisocial" behavior.<sup>130</sup> Similarly, quoting favorably from *Zanders*, the court in *Simmons* held that "[t]he state has power to prohibit cross-dressing when it is associated with criminal misconduct or bears a real and substantial relation to public health, safety, morals, or general welfare."<sup>131</sup> The states retain the power to monitor their citizens' clothing choices for gender conformity.

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<sup>128</sup> 357 N.Y.S.2d at 363 (internal citations omitted).

<sup>129</sup> See *Zanders*, 266 N.E.2d at 603, 605.

<sup>130</sup> *City of Chicago v. Wilson*, 389 N.E.2d 522, 524 (Ill. 1978). See also *Zanders*, 266 N.E.2d at 604 ("common sense and experience discloses that this ordinance has a real and substantial relation to the public safety and general welfare").

<sup>131</sup> 357 N.Y.S.2d at 365.



B. *Double Standards in Institutional Settings*

Outside of criminal prosecution, institutions such as prisons and schools also exercise a great deal of authority over the clothing and grooming choices of their members (i.e., inmates and students). For example, as evident from the discussion above, prisons frequently restrict inmate access to cosmetics and "feminine" clothing. Such regulations are defended as matters of "legitimate security concerns."<sup>132</sup> Schools offer similar rationales for their grooming and dress codes, as in *Harper v. Edgewood Board of Education*: "the school board's dress regulations are reasonably related to the valid educational purposes of teaching community values and maintaining school discipline."<sup>133</sup>

Security concerns are repeatedly cited in litigation concerning hair-length regulation in the prison context. Many state prison systems have grooming standards requiring male inmates to maintain their hair shorter than a given length, typically above the collar.<sup>134</sup> State and federal courts have frequently upheld these regulations, even weighed against fundamental constitutional interests such as freedom of religion.<sup>135</sup> Among the penological interests sometimes cited in support of hair length measures is that of "reducing homosexual attractiveness of inmates."<sup>136</sup> This concern

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<sup>132</sup> *Star v. Gramley*, 815 F.Supp. 276, 278 (C.D. Ill. 1993). See also *Long v. Nix*, 877 F.Supp. 1358, 1366 (S.D. Iowa 1995); *Lamb v. Maschner*, 633 F.Supp. 351, 353 (D. Kansas 1986).

<sup>133</sup> 655 F.Supp. 1353, 1355 (S.D. Ohio 1987).

<sup>134</sup> See, e.g., *Iron Eyes v. Henry*, 907 F.2d 810, 811, 811 n.3 (8th Cir. 1990) (referring to prison grooming regulations in Missouri).

<sup>135</sup> This is a much-litigated area; hair-length regulations have been subjected in particular to recurring challenges by Native American, Rastafarian and other inmates who experience them as a burden on the free exercise of their religions. Such claims rarely prevail, even where the plaintiff's religious convictions and sincerity are not in question. See, e.g., *Mosier v. Maynard*, 937 F.2d 1521, 1525 n.2 (10th Cir. 1991) (observing that "prisoners have been singularly unsuccessful . . . in challenging grooming codes").

<sup>136</sup> *Swift v. Lewis*, 901 F.2d 730, 731 (9th Cir. 1989). See also *Powell v. Estelle*, 959 F.2d 22, 24 (5th Cir. 1992); *Harman v. Ohio Dep't of Corrections*, 600 N.E.2d 314, 316 n.2 (Ohio Ct. App. 1991).

suggests the conflation of sexual orientation with gender,<sup>137</sup> given the still-prevailing stereotype that long hair is a feminine characteristic, and echoes the belief that feminized men are natural or likely targets of sexual attack while incarcerated.<sup>138</sup>

Other justifications offered in support of hair length regulation in prison, such as reducing inmates' opportunities to conceal contraband,<sup>139</sup> are apparently gender neutral. Female inmates have not ordinarily been subject to the same restrictions as their male counterparts, however. At least one state, while establishing very specific hair length standards for male prisoners, requires that females merely conform to "community standards" in this regard.<sup>140</sup> Male inmates have generally been unsuccessful in convincing courts that this differential treatment violates their right to equal protection under the law. One court, dismissively and without further explanation, simply categorized the security needs for male and female prisoners as "differen[t]."<sup>141</sup>

Just as courts have deferred to administrative determinations of penological interests in the prison context, they have also been largely deferential to school officials' perceptions of pedagogical interests.<sup>142</sup> In a recent case, for example, the Supreme Court of Texas found that the state's non-discrimination statute did not prevent its school districts from enforcing grooming codes

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<sup>137</sup> See Valdes, *supra* note 7, at 51-55.

<sup>138</sup> See *supra* note 110; see also Richard F. Storrow, *Naming the Grotesque Body in the "Nascent Jurisprudence of Transsexualism,"* 4 Mich. J. Gender & L. 275, 308 ("Targets of sexual assault [in prison] are often young, effeminate and newly admitted.").

<sup>139</sup> See, e.g., *Iron Eyes*, 907 F.2d at 814.

<sup>140</sup> See *Longstreth v. Maynard*, 961 F.2d 895, 899 (10th Cir. 1992) (referring to the Oklahoma Department of Corrections' Inmate Grooming Code).

<sup>141</sup> *Williams v. Wilkinson*, 134 F.3d 373, 1997 WL 809971 at \*\*4 (6th Cir. 1997) (unpublished disposition). *But cf.* *Rourke v. N.Y. State Dep't of Correctional Services*, 603 N.Y.S.2d 647, 650 (upholding Native American correction officer's right to a religious exemption from compliance with departmental hair length limitations, noting that purported state interest in strict uniformity was inconsistent with its application of different hair length standards to male and female officers).

<sup>142</sup> See generally, e.g., *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266-67 (1988).

which treated males and females differently.<sup>143</sup> The plaintiff, an eight-year-old boy, had been suspended from school for growing a slender "rat tail" which extended below his collar. No similar hair length limitation was imposed on girls.<sup>144</sup> The school principal specifically told the boy's mother "that the purpose of the rule was to enforce the notion that boys should look like boys and girls should look like girls."<sup>145</sup> In turn, the court expressed concern that granting Toungate's discrimination claim would prevent schools from maintaining separate restroom facilities or "prohibit[ing] males from wearing dresses."<sup>146</sup>

The *Harper* case addressed exactly such a prohibition. After two high school students "cross-dressed" to attend their senior prom (she in a tuxedo, he in a dress and fur cape), school officials had them forcibly removed from the event. The students sued the school district on a number of grounds, including alleged violations of their constitutional rights to freedom of expression, due process, and equal protection of the laws.<sup>147</sup> A federal district court, however, rejected all their claims. "The school dress code does not differentiate based on sex. The dress code requires all students to dress in conformity with the accepted standards of the community."<sup>148</sup> Further, the court found no "invidiously discriminatory animus" behind the officials' behavior since "[n]either homosexuals, nor transvestites, nor those in sympathy with them are a 'class' within the

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<sup>143</sup> Board of Trustees of Bastrop Indep. Sch. Dist. v. Toungate, 958 S.W.2d 365, 366 (Texas 1997) (citing TEX. CIV. PRAC. & REM. CODE § 106.001(a)). *But cf.* Alabama & Coushatta Tribes of Texas v. Trustees of the Big Sandy Indep. Sch. Dist., 817 F.Supp. 1319, 1333-34 (E.D. Texas 1993) (finding district grooming code limiting hair length of male students unconstitutional as applied to Native Americans whose religious beliefs required them to wear long hair).

<sup>144</sup> *Id.* at 366-67.

<sup>145</sup> *Id.* at 375 (Spector, J., dissenting).

<sup>146</sup> *Id.* at 369 (citing Dodge v. Giant Food, Inc., 488 F.2d 1333, 1336 (D.C. Cir. 1973)).

<sup>147</sup> Harper v. Edgewood Bd. of Educ., 655 F.Supp. 1353, 1354 (S.D. Ohio 1987).

<sup>148</sup> *Id.* at 1356.

meaning of [the statute regarding conspiracy to deny equal protection.]"<sup>149</sup> It saw fit to make this observation even though neither of the students evidently was alleged to have been a homosexual, a transvestite or a "sympathizer" in any formal sense.

C. *Title VII*<sup>150</sup>

Even where an animus against sexual and gender minorities is established, those minorities may not always have protection against discrimination. This is certainly true in the employment context. A series of federal cases has established that transsexuals, like homosexuals, do not constitute a protected class under Title VII anti-discrimination provisions.<sup>151</sup> According to the courts, "Title VII focuses on discrimination because of the *status* of sex or because of sexual stereotyping, rather than on discrimination due to a *change* in sex."<sup>152</sup> In *Ulane*, the plaintiff pilot was left without a remedy for discrimination despite having received a new birth certificate under Illinois law as well as a new FAA pilot's certificate acknowledging her as female. The court explained this by stressing that any discrimination against Ulane occurred "not because she is female, but because [she] is a transsexual."<sup>153</sup>

This jurisprudence has also been used to uphold employment discrimination based on less pronounced atypicalities. Thus, in *Smith v. Liberty Mutual Insurance Co.*, the court found no Title VII violation where the defendant admittedly refused to hire a qualified male job applicant because

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<sup>149</sup> *Id.*

<sup>150</sup> Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1982), as amended.

<sup>151</sup> *E.g.*, *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1086-87 (7th Cir. 1984), *cert. den.* 471 U.S. 1017 (1985); *Powell v. Read's*, 436 F. Supp. 369, 371 (D. Md. 1977); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659 (9th Cir. 1977); *Voyles v. Ralph K. Davies Medical Ctr.*, 403 F. Supp. 456, 457 (N.D. Calif. 1975), *aff'd* 570 F.2d 354 (9th Cir. 1978). *See generally* David M. Neff, Note, *Denial of Title VII Protection to Transsexuals: Ulane v. Eastern Airlines, Inc.*, 34 DEPAUL L. REV. 553 (1985).

<sup>152</sup> *Powell*, 436 F. Supp. at 371 (emphasis in original).

<sup>153</sup> *Ulane*, 742 F.2d at 1087.

the company interviewer found him "effeminate."<sup>154</sup> Noting that "Congress by its proscription of sex discrimination intended only to guarantee equal job opportunities for males and females," the court distinguished Smith's circumstances from those of someone not hired because of a company preference for females.<sup>155</sup> Similarly, *Dodge v. Giant Food, Inc.* held that "Title VII was [not] intended to invalidate grooming regulations which have no significant effect upon the employment opportunities afforded one sex in favor of the other."<sup>156</sup> These precedents effectively authorize discrimination based on atypical gender attributes, as opposed to sex status.

The same reasoning adopted in *Smith* and *Dodge* has granted employers, like prisons and public schools, a great deal of leeway to require their employees to adhere to separate, sex-based dress codes and grooming standards. Male employees can be required to keep their hair short, for example, even though this expectation is rooted in stereotype.<sup>157</sup> Gender atypical women have received somewhat greater protection than men, however. In *Price Waterhouse v. Hopkins*, the Court recognized that sex stereotyping is legally relevant to a finding of impermissible discrimination under Title VII.<sup>158</sup> Importantly, "the Court made its determination not by finding Hopkins was discriminated against because she was a woman, but because she was a woman who simply failed to exhibit the stereotypical characteristics expected of women."<sup>159</sup> Hopkins had been

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<sup>154</sup> 569 F.2d 325, 328 (5th Cir. 1978).

<sup>155</sup> *Id.* at 327.

<sup>156</sup> 488 F.2d 1333, 1337 (D.C. Cir. 1973).

<sup>157</sup> *See, e.g., Tavora v. New York Mercantile Exch.*, 101 F.3d 907, 908 (2d Cir. 1996).

<sup>158</sup> 490 U.S. 228, 250-51 (1989) (plurality opinion). Though the three dissenters emphasized their position that "Title VII creates no independent cause of action for sex stereotyping," they agreed that evidence of sex stereotyping by employers is "quite relevant to the question of discriminatory intent." *Id.* at 294 (Kennedy, J., dissenting).

<sup>159</sup> Kristine W. Holt, Comment, *Reevaluating Holloway: Title VII, Equal Protection, and the Evolution of a Transgender Jurisprudence*, 70 TEMP. L. REV. 283, 299 (1997).

refused consideration for partnership at Price Waterhouse after being advised to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."<sup>160</sup>

The Court's receptiveness to the claim in *Hopkins* depends on an inclusive reading of the term "sex," as used in Title VII. This reading broadens the concept of sex to include attributes of gender, offering the possibility of a remedy to those who have suffered discrimination based on their gender atypicalities.<sup>161</sup> *Hopkins* may be explicable as a manifestation of the special solicitude of the courts towards women in the workplace, asserted as a basis for denying relief to gender atypical men in *Smith* and *Dodge* and to transsexuals in cases such as *Holloway*.<sup>162</sup> However, a unanimous Court has recently reaffirmed the proposition that "Title VII's prohibition of discrimination 'because of . . . sex' protects men as well as women."<sup>163</sup> This decision offers some hope that persons exhibiting "cross-gendered" behavior or attributes may receive greater protection in future cases than in the past.<sup>164</sup>

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<sup>160</sup> 490 U.S. at 235 (plurality opinion) (quoting from the record below, 618 F.Supp. 1109, 1117 (1985)).

<sup>161</sup> See Holt, *supra* note 159, at 296, 299-301. In this context, the conflation of sex with gender benefits gender atypical plaintiffs. Cf. Franke, *supra* note 4 (arguing that the disaggregation of sex from gender in most Title VII jurisprudence has perpetuated injustice towards transsexuals and inequality between men and women).

<sup>162</sup> Cf. Holt, *supra* note 159, at 301 ("At what point does a non-transgendered woman such as Hopkins, who wears no make-up or jewelry, curses, and interacts with others 'aggressively,' cross the line and become a transgendered man? . . . And at what point will the courts deny her protection under Title VII?").

<sup>163</sup> *Oncale v. Sundowner Offshore Serv., Inc.*, 118 S.Ct. 998, 1001 (1998). This decision holds that same-sex sexual harassment can constitute actionable discrimination under Title VII.

<sup>164</sup> Compare one commentator's pre-*Oncale* observation that "[d]iscrimination based upon gender role identity only exists in the presence of biological diversity." Franke, *supra* note 4, at 97.



Transgendered and gender atypical plaintiffs may also find greater relief from discrimination under state legislation than under Title VII.<sup>165</sup> New York courts, for example, have consciously read that state's Civil Rights law more broadly than Title VII, despite substantial similarity between the two statutes.<sup>166</sup> The *Maffei* court found that the FTM plaintiff stated a valid discrimination claim under New York law, based on harassment he received at work. It criticized the federal precedents and observed that the state statute was intended to provide a "blanket description to eliminate all forms of discrimination, those then existing as well as any later devised."<sup>167</sup> It also predicated its decision explicitly on the language of "sex" rather than "sexual orientation."

Although . . . a person may have both male and female characteristics, society only recognizes two sexes. In the complaint plaintiff alleges that he is now a male based on his identity and outward anatomy. Being a transsexual male he may be considered part of a subgroup of men. There is no reason to permit discrimination against that subgroup under the broad antidiscrimination law of our City.<sup>168</sup>

The court thus resigned itself to the binary model, but found a way to interpret it inclusively.

*Maffei* is consistent with the only existing, on point New York precedent, *Richards v. United States Tennis Association*. *Richards* concerned the right of Dr. Renee Richards, formerly "an accomplished male tennis player," to participate in the United States Open as a woman following reassignment surgery; the tournament organizers required all women's divisions

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<sup>165</sup> *But see, e.g.*, *Board of Trustees of Bastrop Indep. Sch. Dist. v. Toungate*, 958 S.W.2d 365, 370 (E.D. Texas 1998) (reading state civil rights statute narrowly, by analogy to Title VII, so as to uphold public school grooming code which treats males differently than females).

<sup>166</sup> *Maffei v. Kolaeton Indus., Inc.*, 626 N.Y.S.2d 391, 395 (N.Y. Sup. Ct. 1995). The court's argument rests principally on the New York City rather than State statute, but observes that they are similar in all important respects but one (the city law includes a provision prohibiting discrimination based on sexual orientation). *Id.* at 392.

<sup>167</sup> *Id.* at 395 (quoting from *Brooklyn Union Gas Co. v. New York State Human Rights Appeal Bd.*, 41 N.Y.S.2d 84, 86, 89 (1976)).

<sup>168</sup> *Id.* at 396.

participants to pass a sex-chromatin test in order to play.<sup>169</sup> The court found that this prerequisite violated the state Human Rights Law and decisively rejected the defendants' reliance on a chromosome test as an exclusive tool for determining sex.<sup>170</sup> "When an individual such as plaintiff, a successful physician, a husband and father, finds it necessary for his own mental sanity to undergo a sex reassignment, the unfounded fears and misconceptions of defendants must give way to the overwhelming medical evidence that this person is now female."<sup>171</sup>

#### IV. Conclusion

Clearly, the legal system has the capacity to recognize changes in sex status for both general and specific purposes.<sup>172</sup> At the same time, it has often been reluctant to do so. This reluctance seems to be most readily overcome in cases of diagnosed transsexuals who have accomplished an anatomical change through surgery, and who have adopted traditional indices of gender (e.g., name, clothing style) corresponding to that change. Transsexuals at an intermediate stage of physical transformation are far less likely to receive legal acknowledgement of their adopted sex. In addition, along with other gender atypical people such as transvestites or the "effeminate," transsexuals remain subject to the threat of discrimination and heightened legal pressure to conform to gendered community norms. The law resists ambiguity and continues to enforce the expectation that men will signal their maleness and women their femaleness by means of readily identifiable social indicators. It still fears "fraud." The law's inconsistent response to transsexuals and their needs perpetuates a legal limbo in which many ambiguities do

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<sup>169</sup> 400 N.Y.S.2d 267, 268 (Sup. Ct. 1977).

<sup>170</sup> *Id.* at 272-73.

<sup>171</sup> *Id.* at 272.

<sup>172</sup> *Cf.* Holt, *supra* note 159, at 298 ("The only certainty that can be distilled from this jumble of conflicting precedents is that sex is a legal function, not a biological function.")



remain unresolved. Similarly, gendered stereotypes continue to be upheld in some forums even as they are discarded as "illegitimate"<sup>173</sup> in others. In the legal arena, gender is repeatedly both reconstructed and deconstructed. The resulting instability fosters a space in which the relationship of sex and gender will continue to be tested, and new boundaries mapped.

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<sup>173</sup> Price Waterhouse v. Hopkins, 490 U.S. 228, 241 (1989) (plurality opinion); *id.* at 265-67 (O'Connor, J., concurring in the judgment).