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## Identity: Societal And Legal Ramifications With Special Focus On Transsexuals

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## **Abstract**

The law is stuck on binary or categorical approaches.<sup>2</sup> One is either this or that—heterosexual or homosexual; male or female; black or white; and the list can go on and on.<sup>3</sup> This article posits that this approach should not be the way in which we categorize people's personhood

**KEYWORDS:** transsexuals, legal, focus

## IDENTITY: SOCIETAL AND LEGAL RAMIFICATIONS WITH SPECIAL FOCUS ON TRANSSEXUALS

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\* Professor Charlene L. Smith has an extensive background in the human rights area. She is the Executive Director of the Inter-American Center for Human Rights, which is located at Nova Southeastern University, Shepard Broad Law Center. The Inter-American Center for Human Rights is a response to the profound need in South Florida for an organization that is committed to furthering the civil and human rights of our diverse communities and people. Located at the crossroads of Latin America, the Caribbean, and the United States, as well as the hub of unique Haitian, Cuban, and other émigré communities, South Florida provides a compelling location to integrate human rights with domestic civil rights and community action. The Center provides law students with the opportunity to connect with other human rights organizations, write amicus briefs, and work for those representing human rights clients. While Professor Smith was at Washburn University School of Law, she and Dr. Palmer frequently partnered to organize symposiums on human rights. Their collaboration has continued even though they are now at different universities.

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“Human beings are an amalgam of identities—race and economic status, etc., etc. We [do not] live our lives as demographics or as political statements. We simply live.”<sup>1</sup>

## I. INTRODUCTION

The law is stuck on binary or categorical approaches.<sup>2</sup> One is either this or that—heterosexual or homosexual; male or female; black or white; and the list can go on and on.<sup>3</sup> This article posits that this approach should not be the way in which we categorize people’s personhood.<sup>4</sup> To give the best example of why the law should rid itself of the binary approach we purposely focus on transsexuals. They offer the best opportunity to experience how the law so often punishes them because they do not fit into one category.<sup>5</sup> While the United States is slowly accepting gay and lesbian requests for justice, that particular happenstance does not solve the problem for transsexuals.<sup>6</sup> Such a transformation for gays and lesbians can take place because it is obvious that if you are gay or a lesbian, then you are not a heterosexual, which allows the law to keep the binary approach.<sup>7</sup> In order to fully understand intersections of identity and the binary approach to law, it is necessary to first look at how classifications are brought about in the social, psychological, and biological world.<sup>8</sup> To bring life to these heady subjects, this Article shares with the reader actual stories of people who have to exist in a world enamored with categories.<sup>9</sup> Lastly, this Article explores how the

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1. Bob Minzesheimer, *This Is Ayana Mathis: And When She Heard ‘This Is Oprah Winfrey,’ Everything Changed for Debut Novelist*, USA TODAY, Jan. 31, 2013, at D1.

2. See Eric Engle, *Aristotle, Law and Justice: The Tragic Hero*, 35 N. KY. L. REV. 1, 5–6, 9 n.71 (2008). Aristotle was clearly a *dialectician*. *Id.* at 2. Inequalities are presumed unless you belong into the categories. *See id.* at 5–6, 10–11. The binary approach is Aristotle’s legacy, which permeates the law as well as other disciplines. *Id.* at 9 n.71. Others have suggested a new approach, however, still accept the binary approach but just broaden it. *See* Julie A. Greenberg, *Deconstructing Binary Race and Sex Categories: A Comparison of the Multiracial and Transgendered Experience*, 39 SAN DIEGO L. REV. 917, 919–20 (2002).

3. *See id.* at 922.

4. *See infra* Part XI.

5. Greenberg, *supra* note 2, at 920–21.

6. *See* Emily Greenhouse, *Dropping the “T”: Trans Rights in the Marriage Era*, THE NEW YORKER (Apr. 5, 2013), <http://www.newyorker.com/news/news-desk/dropping-the-t-trans-rights-in-the-marriage-era>.

7. *See* Greenberg, *supra* note 2, at 921.

8. *See infra* Parts II–IV.

9. *See infra* Part V.

law approaches transsexual identity.<sup>10</sup> It will be apparent that we should jettison the various identity categories and treat everyone as *persons*.<sup>11</sup>

## II. DEFINITIONS

Since this Article, unlike most articles, will not focus on a single category of people, it is necessary to provide the reader with the vocabulary that will be used. *Transsexual* or *transgender* includes many variations.<sup>12</sup> Various politically motivated groups use the word transsexuals as an organizing function so that the public will have a *label* to refer to a group of people advocating for their rights.<sup>13</sup> That group, however, may have a contingent of the following: Male-to-Female (“MTF”).<sup>14</sup> These folks are born with male genitalia but prefer to be considered female.<sup>15</sup> Within that group are those who have gone through gender reassignment surgery (“GRS”).<sup>16</sup> Of course, there is also Female-to-Male (“FTM”) for the women who identify as men.<sup>17</sup> There are also people who are transvestites, who dress in the manner of the opposite gender from what they are.<sup>18</sup> Included in this group are drag kings and drag queens.<sup>19</sup> One of the main points to remember is that gender identity, birth sex, and sexual orientation are different.<sup>20</sup> Because these variations exist on a sliding scale, there are those

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10. *See infra* Part VI.

11. *See infra* Part XI. Making a person identify themselves has pitfalls in that it makes a person classify themselves. Jody Lyneé Madeira, Comment, *Law as a Reflection of Her/His-Story: Current Institutional Perceptions of, and Possibilities for, Protecting Transsexuals' Interests in Legal Determinations of Sex*, 5 U. PA. J. CONST. L. 128, 165 (2002). The authors are not suggesting that anyone has to identify himself or herself; only to say that they are a person. *See infra* Part VI. Thus, gender or sexual orientation is not the question asked. *See infra* Part VI. Also, some say that allowing transsexuals to decide would undermine the law's consistency. Madeira, *supra* note 11, at 171. Such observations seem to be based on when a person could decide. *Id.* It is not necessary to pinpoint when the person who is self-identifying makes the decision. *See id.* at 172. Subjectively, the person should have the power to decide. *Contra id.* at 171. Yes, it is true judges would, at first, need training in this area. *See id.* at 172–73.

12. Laura E. Kuper et al., *Exploring the Diversity of Gender and Sexual Orientation Identities in an Online Sample of Transgender Individuals*, 49 J. SEX RES. 244, 244 (2012).

13. *Id.*

14. *Transgendered Definitions*, CONN. OUTREACH SOC'Y, <http://www.ctoutreach.org/faq.pdf>.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Transgendered Definitions*, *supra* note 14.

20. Madeira, *supra* note 11, at 171; *see also* JAMIE M. GRANT ET AL., INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION

who would prefer to adopt a name that is more inclusive of everyone.<sup>21</sup> For instance, QUILTBAG—an acronym that stands for “Queer/Questioning, Undecided, Intersex, Lesbian, Transgender/Transsexual, Bisexual, Allied/Asexual, Gay/Genderqueer”—has been suggested.<sup>22</sup> “It is meant to be a more inclusive term than [Gay-Lesbian-Bisexual-Transgender/Lesbian-Gay-Bisexual-Transsexual (“GLBT/LGBT”)] and to be more pronounceable—and memorable—than some of the other variations or extensions on the GLBT/LGBT abbreviation.”<sup>23</sup> In one study, it was found that the younger generation prefers not to put their identity in any category.<sup>24</sup> They instead champion the idea of identity being fluid and contextual.<sup>25</sup> This group also challenges “the assumption that their sexual orientation is a core feature of their sense of self.”<sup>26</sup>

The authors, however, will be using the term transsexuals as the generic term, but with the caution that all of the above folks should be included.<sup>27</sup> Indeed, the Article will show that in many instances—depending where you are on the scale of gender identity and sexual orientation—the law may be particularly tricky.<sup>28</sup>

### III. SOCIETY’S TREATMENT OF IDENTITY

While race classification has received considerable discussion and legal attention for decades, sex and gender classification systems have only recently become the subject of litigation.<sup>29</sup> As such, the traditional approach has been one of adopting a binary sex classification system instead of one that would deconstruct such a limited means of addressing human rights and privileges.<sup>30</sup> Of particular concern are people who are transsexual, who are

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SURVEY 24 (2011), available at [http://transequality.org/PDFs/NTDS\\_Report.pdf](http://transequality.org/PDFs/NTDS_Report.pdf). The authors stated that the survey respondents were sixty percent assigned male at birth, but twenty-nine percent now said male was their identity. GRANT ET AL., *supra* note 20, at 25. Forty-two percent said they were female. *Id.*

21. See Kuper et al., *supra* note 12, at 248.

22. QUILTBAG, QUEER DICTIONARY, (Mar. 16, 2011, 3:37 PM), <http://queerdictionary.tumblr.com/post/3899608042/quiltbag>.

23. *Id.*

24. Kuper et al., *supra* note 12, at 250; GRANT ET AL., *supra* note 20, at 25. Twenty-nine percent of the respondents said they were something else other than just male or female. GRANT ET AL., *supra* note 20, at 25. Also, the younger respondents identified as gender non-conforming. *Id.*

25. Kuper et al., *supra* note 12, at 250.

26. *Id.*

27. See *supra* Part II.

28. See *infra* Part III.

29. See Greenberg, *supra* note 2, at 919.

30. *Id.* at 919–20.

forced to live in a rather twilight zone of factors that create a formidable chasm even with some gays, lesbians and bi-sexuals who “fear that inclusion of transgendered individuals may result in . . . rejection of legislation that would protect GLBs from sexual orientation discrimination.”<sup>31</sup> Given the pervasive oppression and discrimination that has threaded its way through decades, the “manner in which a person’s sex[ual] [orientation] is defined has . . . significant legal consequences.”<sup>32</sup> Therein lies the compelling need to re-examine the issues and infuse hope in addressing urgent human needs.<sup>33</sup>

“Transsexuals pose a dilemma in the law both in their pre-operative and post-operative states. . . . Remedying this situation requires far-reaching changes in social perceptions and understanding[.]”<sup>34</sup> The complexities challenge legal scholars and practitioners to move beyond looking at the issue through a traditional lens to one that provides a greater view of the human landscape in everyday expression.<sup>35</sup> Our humanness compels us to do this if all of us are to reach our full potential as human beings. Reaching full potential inherently means that social equality and justice are infused throughout the lifespan of every person. In so doing, the legal system should consider the broader lens to inform.<sup>36</sup>

“Critics of bipolar categories have called for their restructuring in the hope[] of creating more inclusive categories that reflect people’s true identities.”<sup>37</sup> Yet, the very use of categories continues to perpetuate a hierarchy of power that controls the allocation, or lack thereof, of rights and privileges.<sup>38</sup> In contrast, Labman posits that “far-reaching changes in social perceptions and understandings” are needed, and further that “[t]he law has the ability to both mirror and construct social norms.”<sup>39</sup> In essence, sex becomes a fluid concept which “dissolves and simply [a] *relationship[] remain[s].*”<sup>40</sup>

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31. *Id.* at 920–21.

32. *Id.* at 928.

33. *See id.*

34. Shauna Labman, *Left in Legal Limbo: Transsexual Identity and the Law*, 7 APPEAL: REV. CURRENT L. & L. REFORM 66, 66 (2001).

35. *See id.* at 66–67.

36. *See id.* at 67, 72.

37. Rachel Haynes, Book Note, *Bisexual Jurisprudence: A Tripolar Approach to Law and Society*, 5 MICH. J. GENDER & L. 229, 229 (1999) (reviewing RUTH COLKER, HYBRID: BISEXUALS, MULTIRACIALS, AND OTHER MISFITS UNDER AMERICAN LAW (1996)). Others such as Ruth Colker champion the concept of *hybrid*, which is used to describe people who lie between bipolar legal categories. *Id.*

38. *See id.* at 231. Colker’s belief was that without categories there would be anarchy. *Id.* at 238.

39. Labman, *supra* note 34, at 66.

40. *Id.* at 72.

A. *Reconceptualizing the Issues From a Humanistic Point of View*

Relationship. It is the central life force that connects us as human beings.<sup>41</sup> Margaret S. Mahler, a world-renowned child psychoanalyst, introduced scholars of human behavior to the concept of a second birth.<sup>42</sup> That is, the emergence of a “psychological being possessing selfhood and separate identity.”<sup>43</sup> Therein is a journey of navigating life, incorporating both a sense of oneness or attachment to others as well as sense of self or who we are as individuals.<sup>44</sup> Beyond the legal arguments regarding the biology of sex and gender lie more substantial reasons for the need to look at the importance of relationships as the lynchpin of addressing the issues, rather than simply creating categories of race, sex, and gender.<sup>45</sup> In order to examine this vast and complex realm of humanness, it is helpful to have a workable framework that helps one to make sense out of this complexity.<sup>46</sup>

One effective approach is use of the biopsychosocial model.<sup>47</sup> The biopsychosocial model was introduced in the 1950s by Roy Grinker, a neurologist and psychiatrist, who coined the term.<sup>48</sup> However, this model is “associated indelibly with the name of George Engel, the internist, psychiatrist, and psychoanalyst” who “preached the indissoluble nature of mind-body links.”<sup>49</sup> “Engel championed his ideas . . . [in part] to reverse the dehumanization of medicine and disempowerment of patients.”<sup>50</sup> The model presented the philosophical view that “material lesions, life experiences, and current social situation[s] all matter in the presentation of illness.”<sup>51</sup> The elegant, powerful, and versatile nature of this model is such that other professions—including social work—adopted the framework to address the

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41. See LOUISE J. KAPLAN, *ONENESS AND SEPARATENESS: FROM INFANT TO INDIVIDUAL* 16–17 (1978).

42. *Id.* at 15–16.

43. *Id.* at 15. Mahler’s work remains a cornerstone of child development theory. See *id.* at 15, 19. Kaplan was an understudy of Mahler. See *id.* at 11.

44. Kaplan, *supra* note 41, at 16–17.

45. See Labman, *supra* note 34, at 66; Haynes, *supra* note 37, at 230.

46. See Haynes, *supra* note 37, at 230.

47. Edward Shorter, *The History of the Biopsychosocial Approach in Medicine: Before and After Engel* in *BIOPHYSICAL MEDICINE: AN INTEGRATED APPROACH TO UNDERSTANDING ILLNESS* 1, 1 (Peter White ed., 2005).

48. S. Nassir Ghaemi, *The Rise and Fall of the Biopsychosocial Model*, 195 *BRIT. J. OF PSYCHIATRY* 3, 3 (2009).

49. Shorter, *supra* note 47, at 3; see also George L. Engel, *The Need for a New Medical Model: A Challenge for Biomedicine*, 196 *SCI.* 129, 132–33 (1977).

50. Francesc Borrell-Carrió et al., *The Biopsychosocial Model 25 Years Later: Principles, Practice, and Scientific Inquiry*, 2 *ANNALS FAM. MED.* 576, 576 (2004).

51. Shorter, *supra* note 47, at 2.

complex issues of person-in-environment.<sup>52</sup> Social work has a long-standing history in social reform and social justice, valuing the worth and dignity of every human being, the importance of human relationships, and empowerment.<sup>53</sup>

B. *Attachment: The Essence of Humanness*

“Attachment theory is indispensable for understanding” the biopsychosocial interplay between person and environment.<sup>54</sup> The theory was developed by psychiatrist John Bowlby through his work with the World Health Organization concerning health implications of homelessness in children.<sup>55</sup> He concluded that the crucial element in mental health is predicated on a “warm, intimate, and continuous relationship with a caregiver.”<sup>56</sup> Human biology fosters this crucial need.<sup>57</sup> Paul MacLean, a pioneer in the study of the human brain, contends that biology of attachment “goes back 180 million years [ago], originating with the earliest mammals” and even nesting birds.<sup>58</sup> Indeed, we are biologically wired for connection.<sup>59</sup> For example, when an infant is in distress, the child emits a particular cry that brings caregiver protection, safety, and nurturing.<sup>60</sup>

The biological need for attachment crosses all geography and cultures.<sup>61</sup> Central to attachment is the need for a consistent and secure base.<sup>62</sup> “The importance of having a secure base cannot be overstated. As

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52. See Tina Maschi & Robert Youdin, *SOCIAL WORKER AS RESEARCHER: INTEGRATING RESEARCH WITH ADVOCACY* 3 (2010).

53. See *id.* at 11. Social worker Jane Addams, most famously associated with Hull House in Chicago, won the Nobel Peace Prize in 1931. *Id.* at 6, 12, 25. Hull House was an innovative settlement house that was developed in the slums of poor migrant people in the late 1880s. *Id.* at 9, 25. Leymah Gbowee—also a social worker, founder, and president of the Monrovia-based Gbowee Peace Foundation, Africa, Liberia—was selected Nobel Peace Prize winner in 2011 for her work on behalf of advancing women’s rights, conflict resolution, and working with ex-soldiers and victims of gender-based violence. See *Gender, War & Peacebuilding Study Guide*, U.S. INST. OF PEACE 1, 10, <http://www.usip.org/sites/default/files/files/NPECSG12.pdf>.

54. JON G. ALLEN, *COPING WITH TRAUMA: A GUIDE TO SELF-UNDERSTANDING* 35–36 (1995).

55. *Id.* at 36.

56. *Id.*

57. See *id.* at 36–37.

58. *Id.* at 37; see also PAUL D. MACLEAN, *THE TRIUNE BRAIN IN EVOLUTION: ROLE IN PALEOCEREBRAL FUNCTIONS* 8–9 (1990); M. Alan Kazlev, *The Triune Brain*, KHEPER, <http://www.kheper.net/topics/intelligence/MacLean.htm> (last modified Oct. 19, 2003).

59. ALLEN, *supra* note 54, at 36–37.

60. *Id.* at 36.

61. See *id.* at 38.

62. *Id.* at 37.

Bowlby says, our survival as a species has depended on it.”<sup>63</sup> A secure base is required in order for a human being to develop both individually and socially.<sup>64</sup> Without this consistent secure base, infants and children have tremendous challenges in normal psychological social development.<sup>65</sup> In fact, attachment is critical to self-regulation, or the ability to manage one’s physiology.<sup>66</sup> Witness the child in distress who runs to mother or proximate caregiver.<sup>67</sup> Recall human reaction to catastrophic events, such as natural disaster, terrorist attacks, and the like.<sup>68</sup> The most compelling need in these instances is to connect with loved ones, friends, or people who represent safety.<sup>69</sup> Connection and proximity have a calming effect both psychologically and physically.<sup>70</sup> Through attachment, comes interaction with the mother or primary caregiver and others in the social environment.<sup>71</sup> This interaction has often been referred to as *mirroring*.<sup>72</sup> Heinz Kohut’s original studies illuminated this concept.<sup>73</sup> If this interaction is positive over time, then a sense of self or self-cohesion develops.<sup>74</sup> “Over time, these [positive interactions] lead to the child’s capacity to feel pride and take pleasure in his or her accomplishments—to feel a sense of competence and efficacy.”<sup>75</sup> When interaction is inconsistent, violent, rejecting, and destructive, the sense of self is compromised.<sup>76</sup> As a result, children “become arrested in their development of an internal sense of confidence and competence. . . . [H]e mistrusts and disrespects his own internal signals and states; he doubts his own self-worth and competence.”<sup>77</sup>

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63. *Id.*

64. ALLEN, *supra* note 54, at 37–38.

65. *Id.* at 36, 38.

66. *See id.* at 36, 46.

67. *See id.* at 46.

68. *See id.* at 37, 47.

69. ALLEN, *supra* note 54, at 37. In coping with any traumatic event, safety is critical. *Id.* at 47. Even inanimate objects can provide a measure of protection and safety. *Id.* “This phenomenon of bonding to places [is referred to as] *site attachment*.” *Id.*

70. *Id.* at 36.

71. ALLEN, *supra* note 54, at 36.

72. David B. Wexler, *The Broken Mirror: A Self Psychological Treatment Perspective for Relationship Violence*, 8 J. PSYCHOTHERAPY PRAC. & RES. 129, 130 (1999).

73. *See* Jamie McLean, *Psychotherapy with a Narcissistic Patient Using Kohut’s Self Psychology Model*, PSYCHIATRY (EDGMONT), Oct. 2007, at 40, 41, <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2860525>.

74. *See* Wexler, *supra* note 72, at 130, 137.

75. *Id.* at 130.

76. *See id.*

77. *Id.* Children then often mirror in adulthood the very traits they experienced from negative interactions in their growing years. *See id.* “While insisting [the] men [and women] take full responsibility for their . . . behavior,” Wexler and others have used

Our need for attachment continues throughout our lifetime.<sup>78</sup> Interestingly, the “methods that enable one human being to enslave another are remarkably consistent.”<sup>79</sup> A universal method used to control human beings is the destruction of attachments and isolation.<sup>80</sup> “The destruction of attachments requires not only the isolation of the victim from others, but also the destruction of her internal images of connection to others.”<sup>81</sup> Thus, our biology of attachment is in play throughout the life span.<sup>82</sup> Attachment and social connection provide a nurturing stream of affirmation and belonging.<sup>83</sup> The fact that perpetrators of power universally use isolation as a weapon of control speaks to our continuing vulnerability as human beings.<sup>84</sup> Fostering attachment and affirmation is the phenomenon of mirroring and witnessing.<sup>85</sup> These two interpersonal interactions are essential to the formation of self-identity and to a sense of one’s place in the family, the community, the culture, and indeed, the larger social environment.<sup>86</sup> Consider the following:

C. *Who Am I? The Personal and Social-Cultural Self*

“Western societies, in which most of this theorizing and research has been carried out, can be characterized as cultural contexts with a strong emphasis on personal identities and individual achievements.”<sup>87</sup> Contributing to identity development is “a substantial body of research reporting on phenomena that illustrate the powerful impact of people’s social

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self-psychological principles in working with clients who have battered their family members. Wexler, *supra* note 72, at 140. Treatment programs such as Domestic Violence 2000 and Foundations for Violence-Free Living integrate these concepts. *Id.* That is *not* to say that all children experiencing deficient parenting will become abusive or neglectful. *See id.* at 131. The journey to positive adulthood is that much more arduous. *See id.* at 130.

78. *See* ALLEN, *supra* note 54, at 43–44.

79. JUDITH LEWIS HERMAN, *TRAUMA AND RECOVERY: THE AFTERMATH OF VIOLENCE—FROM DOMESTIC ABUSE TO POLITICAL TERROR* 76 (1997). “The accounts of hostages, political prisoners, and survivors of concentrations camps” as well as survivors of domestic violence “from every corner of the globe have an uncanny sameness.” *Id.* at 76–77.

80. *Id.* at 77.

81. *Id.* at 80. “Inevitably, in the absence of any other point of view, the victim will come to see the world through the eyes of the perpetrator.” *Id.* at 81.

82. *See* ALLEN, *supra* note 54, at 43–44.

83. *Id.* at 44.

84. *See* HERMAN, *supra* note 79, at 80–81.

85. Aaron H. Devor, *Witnessing and Mirroring: A Fourteen Stage Model of Transsexual Identity Formation*, 8 J. GAY & LESBIAN PSYCHOTHERAPY, no. 1-2, 2004 at 41, 46.

86. *See id.* at 46–47.

87. Naomi Ellemers et al., *Self and Social Identity*, 53 ANN. REV. PSYCHOL. 161, 162 (2002) (citation omitted).

identities on their perceptions, emotions, and behavior.”<sup>88</sup> Biology—with its compelling forces for our need of attachment—moves us into the psychological and social arenas, which are also essential elements of human development.<sup>89</sup> Biology of attachment is but one powerful factor in human development.<sup>90</sup> In addition to the universal need for attachment, the last thirty years of research indicate that human beings have “a strong biosocial preparedness for emotion expression and emotional communication in infancy.”<sup>91</sup> Herein, the phenomena of witnessing and mirroring come into play.<sup>92</sup>

### 1. Witnessing: Observing and Affirmation

“Witness: [O]bserver . . . watcher . . . provid[ing] or furnish[ing] . . . confirm[ing], corroborat[ing] . . . behold[ing].”<sup>93</sup> The concept of witnessing flows from both outside—e.g. an eyewitness providing testimony—to being watched.<sup>94</sup> In both directions, powerful forces emerge that shape the self.<sup>95</sup> Survivors of domestic violence, oppression, political imprisonment, and torture “describe being forced to stand by helplessly while witnessing atrocities committed against people they love.”<sup>96</sup> Witnessing can take on a different hue in the struggle for survival.<sup>97</sup> The death camps of the Holocaust offer such a perspective.<sup>98</sup> In the midst of terror, deprivation, and violence—direct or indirect—the need to have others know of such human experiences is paramount.<sup>99</sup> Why? “Terror dissolves the self into silence, but its aftermath . . . Horror arises and in its presence men and women are seized

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88. *Id.* at 163.

89. *See* ALLEN, *supra* note 54, at 46, 50.

90. *See* Devor, *supra* note 85, at 42.

91. György Gergely & John S. Watson, *The Social Biofeedback Theory of Parental Affect-Mirroring: The Development of Emotional Self-Awareness and Self-Control in Infancy*, 77 INT’L J. PSYCHO-ANALYSIS 1181, 1186 (1996). Cross-cultural research demonstrates that there are universal facial expressions including “anger, fear, sadness, disgust, and surprise.” *Id.*

92. *Id.* at 1188.

93. THE AMERICAN CENTURY THESAURUS 511 (1996).

94. Devor, *supra* note 85, at 46.

95. *Id.*

96. HERMAN, *supra* note 79, at 83.

97. *See* TERRENCE DES PRES, THE SURVIVOR: AN ANATOMY OF LIFE IN THE DEATH CAMPS 32–33 (1976).

98. *See id.*

99. *See id.* at 33.

by an involuntary outburst of feeling which is very much like a scream . . . .  
And in this crude cry the will to bear witness is born . . . .”<sup>100</sup>

Yet another view incorporates witnessing as essential to a sense of self.<sup>101</sup> “The effectiveness of witnesses, in part, derives from the fact that they are not like oneself and can look at us from outside of our categories of self-definition.”<sup>102</sup> Devor argues that when another person provides “appraisals which conform to one’s own sense of self, it leaves one with a feeling of having been accurately seen by others who can be assumed to be impartial.”<sup>103</sup> Devor believes that this is a critical issue for people who are transsexual.<sup>104</sup> In all of these instances, the threading element is the presence of, or being present with, other human beings.<sup>105</sup>

## 2. Mirroring: Reflection of Self-Identity

Mirror: *Reflection, reproduction, representation*;<sup>106</sup> the concept of mirroring is an inextricable facet of human development.<sup>107</sup> The validation and affirmation of human expression in infancy enables the developing child to develop a sense of cohesion within the self and self-expression.<sup>108</sup> In the process of attachment and calming, affirming the presence of others’ regard for, and sacredness of one’s humanness and that of others is manifested.<sup>109</sup> Mirroring may also be regarded as “seeing oneself in the eyes of others like oneself.”<sup>110</sup> From a psychosocial perspective, infants are sensitive to face-to-face affective communication and “are, to a large extent, dependent on their parent’s affect-regulative interactions as a means of emotional self-

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100. *Id.* at 33. The compelling desire for those in a life and death struggle is to bear witness. *Id.* To tell the world. DES PRES, *supra* note 97, at 33. Des Pres accounts that [i]t took months and months of preparation, cutting down the suicides, insisting that survival even in such a place is not without value. Their purpose—strong enough to lift the spirit from truly inhuman depths—was to destroy the camp and allow at least one man or woman to escape and bear the tale.

*Id.* at 32–33.

101. Devor, *supra* note 85, at 46.

102. *Id.* Devor makes the distinction between witnessing and mirroring. *Id.* The former is critical in that the “[w]itness[] can be presumed to have some distance and therefore . . . objectivity.” *Id.* at 46. That is, validation is from someone not like oneself. *Id.*

103. Devor, *supra* note 85, at 46.

104. *See id.*

105. *See id.* at 46–47.

106. THE AMERICAN CENTURY THESAURUS, *supra* note 93, at 253.

107. *See* Devor, *supra* note 85, at 46; Gergely & Watson, *supra* note 91, at 1186–88.

108. *See* Gergely & Watson, *supra* note 91, at 1186–88.

109. *Id.* at 1188.

110. Devor, *supra* note 85, at 46.

regulation.”<sup>111</sup> Thus, requisite to human development over the life span is a continual need of attachment or sense of belonging, the influence of significant others in providing feedback and affirmation, and the presence of a safe supportive environment in which to grow in self-understanding and expression.<sup>112</sup> “Each of us are social beings and as such we live in a sea of other humans with whom we interact during most of the waking hours of our lives.”<sup>113</sup>

These concepts are powerfully illustrated in the lives of people who are transgender, gay, lesbian, bisexual, and intersex.<sup>114</sup> There is, inherently, an immense role that society and the legal system plays in the struggle for their survival, struggle to be oneself, and have a valued place in the human sea.<sup>115</sup>

### 3. Identity Formation

“Although societal awareness of the existence of lesbian and gay people has increased dramatically over the past decade or so, most lesbians and gay men still grow up within a context of pervasive environmental and internalized homophobia and expectation to be heterosexual.”<sup>116</sup> Likewise, while biological considerations are significant, “all people live within social environments which give meanings to the realities of their bodies and psyches,”<sup>117</sup> including people who are transgender and intersex.<sup>118</sup> Interestingly, the study of identity remains primarily of interest to those most affected by discrimination and oppression and “little interest to members of the dominant group.”<sup>119</sup> While there are different issues regarding ethnicity and racial identity with those of differing sexual orientation and gender expression, there is nonetheless agreement that one’s identity is critical to psychological functioning as an individual and a person-in-environment.<sup>120</sup>

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111. Gergely & Watson, *supra* note 91, at 1188.

112. See ALLEN, *supra* note 54, at 36–38, 43; Devor, *supra* note 85, at 46; Gergely & Watson, *supra* note 91, at 1188–89.

113. Devor, *supra* note 85, at 46.

114. See *id.*; Susan R. McCarn & Ruth E. Fassinger, *Revisioning Sexual Minority Identity Formation: A New Model of Lesbian Identity and Its Implications for Counseling and Research*, 24 COUNSELING PSYCHOL. 508, 508 (1996).

115. See Devor, *supra* note 85, at 46–47.

116. McCarn & Fassinger, *supra* note 114, at 508.

117. Devor, *supra* note 85, at 42.

118. *Id.* at 42, 47.

119. Jean S. Phinney, *Ethnic Identity in Adolescents and Adults: Review of Research*, 108 PSYCHOL. BULL. 499, 499 (1990).

120. *Id.*

It is not within the scope of this article to compare and contrast all of the various models of identity development.<sup>121</sup> Each person is special and unique, as is one's life journey and circumstance. Thus, no one model can apply to all individuals in the same manner. However, there is some consistency in using a *stage model* to explain a highly complex process.<sup>122</sup> Frequently referenced among models of identity development was the stage model developed by Vivienne C. Cass in 1979.<sup>123</sup> The model has been revised and conceptually reworked by various researchers throughout the years.<sup>124</sup> In reviewing the history of sexual minority identity formation, McCarn and Fassinger postulate that Coleman included another dimension that focused on the "force of social pressure at different stages of the coming out process."<sup>125</sup> Further, according to McCarn and Fassinger, the concept of identity development was again modified by Troiden, who "noted the critical importance of a supportive lesbian [or] gay environment in facilitating self-definition and self-acceptance within the context of social stigma."<sup>126</sup> Devor proposes a fourteen-stage model of transsexual identity formation in order to more faithfully address needs and processes of *transsexed people*.<sup>127</sup> However, there are limitations with all of these models and research studies attempting to understand the very complex and myriad process of coming-out.<sup>128</sup> "More research is needed for inclusion of racially, ethnically, culturally, and economically diverse samples."<sup>129</sup>

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121. See *id.* at 501–03.

122. See, e.g., Vivienne C. Cass, *Homosexual Identity Formation: A Theoretical Model*, 4 J. HOMOSEXUALITY 219, 235 (1979).

123. See *id.* at 219–20. Cass intended the model to apply to both men and women. *Id.* at 220. The model includes such dimensions as one's cognitions—thoughts and beliefs—and affective and behavioral features into a six-stage process. *Id.* at 221. Stage one features identity confusion and questioning. *Id.* at 222. This stage may be accompanied by anxiety and discomfort. See Cass, *supra* note 122, at 223. Other stages include identity comparison, which often evokes feelings of isolation and alienation. *Id.* at 225. Final stages include acceptance of oneself and eventually pride. *Id.* at 231, 233.

124. *Id.* at 219–21; Eli Coleman, *Developmental Stages of the Coming Out Process*, in HOMOSEXUALITY & PSYCHOTHERAPY 1982, at 31, 31 (7 J. HOMOSEXUALITY, No. 3, 1982).

125. McCarn & Fassinger, *supra* note 114, at 510; see also Coleman, *supra* note 124, at 31.

126. McCarn & Fassinger, *supra* note 114, at 510; see also Richard R. Troiden, *The Formation of Homosexual Identities*, 17 J. HOMOSEXUALITY 43, 48–49 (1989).

127. Devor, *supra* note 85, at 42.

128. See Chad M. Mosher, *The Social Implications of Sexual Identity Formation and the Coming-Out Process: A Review of the Theoretical and Empirical Literature*, 9 FAM. J. 164, 172 (2001).

129. *Id.*

C. *Intersectionality: Human Beings, the Struggle for Self, Society, and the Legal System*

An emerging concept in the study of human behavior, particularly from a perspective of social justice, is that of *intersectionality*, which “underscores the complex nature of cultural and personal identities and human experiences that cannot be [divided] simply by one dimension of inequality or difference—either race or gender or sexual orientation or ability.”<sup>130</sup> The sense of identity—who one is and one’s place with other human beings—is a central theme among scholars of race, ethnicity, sexual orientation and gender, and gender expression.<sup>131</sup> It is the driving force of human expression to be authentically oneself.<sup>132</sup> If the struggle to become the authentic self takes place in a social environment that is fraught with messages and practices of oppression, destruction, and life threats, then the consequences to countless human beings is devastating.<sup>133</sup> Such conditions are much like the forces prisoners of domestic violence and war experience.<sup>134</sup> To be sure, such forces are often invisible, yet just as damaging to self and life.<sup>135</sup>

It is at this intersection of person-and-environment that courts must emerge as vigilantes and protectors of human life and expression.<sup>136</sup> As Labman so aptly observed, “[t]he law has the ability to both mirror and construct social norms.”<sup>137</sup> When society is inhumane and oppressive, the courts must move from a place of continuing to reflect on oppression to a place of constructing social norms such that all human beings may become their authentic selves. The need for belonging, for attachment to meaningful human relationships without terror or fear of annihilation, the creating of safe and affirming environments, and regarding of the sanctity of our humanness should be the mission of the legal system.

#### IV. SUMMARY

“Contemporary adolescents are coming of age in a world that is considerably more multicultural than the world in which their parents and

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130. YVETTE MURPHY ET AL., INCORPORATING INTERSECTIONALITY IN SOCIAL WORK PRACTICE, RESEARCH, POLICY, AND EDUCATION 42 (2009).

131. See Mosher, *supra* note 128, at 164; Phinney, *supra* note 119, at 499.

132. See ALLEN, *supra* note 54, at 128.

133. See *id.* at 137–42; Phinney, *supra* note 119, at 499, 511.

134. See ALLEN, *supra* note 54, at 137–42; HERMAN, *supra* note 79, at 51–52.

135. See ALLEN, *supra* note 54, at 127–28, 137–42.

136. See Labman, *supra* note 34, at 66.

137. *Id.*

grandparents grew up.”<sup>138</sup> The presence of the Internet and global communication has sped up globalization at an *unprecedented* pace.<sup>139</sup> For the youth of today, developing a cultural identity is much more inclusive and complex.<sup>140</sup> As a consequence, growing up is at a time of more pronounced openness and diversity.<sup>141</sup> This is no less true for people who are exploring or experiencing an identity that is fluid and affirming of the authentic self. To categorize or to make distinctions is to impose a hierarchy of power and perpetuate oppression. Whether binary or a range of categories—no matter how humane—the intension is in and of itself creating barriers to the flow of human development. The world is moving and changing at a speed unlike any other in time. There is a moral imperative for the courts to respond to the inevitable growing flexibility and fluidity of human expression and authenticity.

#### V. PERSONAL STORIES: SERAFIMA METZ AND KRISTA CASCIO

In order to avoid talking about people who deserve legal recognition in the abstract, their stories will be told. Since self-identity is key to finding out how society and the law in particular treat any person, the first portion of this Part will examine how each person self-identified.<sup>142</sup> These stories are a product of reaching out to the transsexual community and asking for volunteers to tell their stories.<sup>143</sup> Those transcripts and recordings will become part of a project at Shepard Broad Law Center to archive stories of the Lesbian, Gay, Bisexual, Transsexual, Intersex (“LGBTI”) community entitled: *The Harris L. Kimball Memorial Digital Archive of Lesbian, Gay, Bisexual, Transgender, and Queer Florida Legal Oral History*.<sup>144</sup>

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138. Lene Arnett Jensen, *Coming of Age in a Multicultural World: Globalization and Adolescent Cultural Identity Formation*, 7 APPLIED DEVELOPMENTAL SCI. 189, 189 (2003), <http://www.lenearnettjensen.com/files/2012/05/2003-ADS-Jensen-Coming-of-Age-Multicultural-World.pdf>.

139. *Id.*

140. *Id.*

141. *Id.* at 191.

142. *See infra* Part V.A–B.

143. *See* Interview with Krysta Cascio, in Fort Lauderdale, Fla., 1 (Apr. 8, 2013) (on file with Nova Southeastern University, Shepard Broad Law Center Library); Interview with Serafima Metz, in Fort Lauderdale, Fla., 1 (Apr. 1, 2013) (on file with Nova Southeastern University, Shepard Broad Law Center Library).

144. *See* Interview with Krysta Cascio, *supra* note 143, at 1; Interview with Serafima Metz, *supra* note 143, at 1.

A. *Identity*

Serafima Metz said that even though she was born a male, that over the process of both mental and physical development, she now considers herself female.<sup>145</sup> She found it problematic when it came to the law because she has observed that while she considers herself a female, the law might come to a different opinion.<sup>146</sup> Serafima was quite willing to accept labels when it came to identity.<sup>147</sup> She observed that when labeled as transgendered, she embraced it.<sup>148</sup>

Krysta Cascio had a different approach.<sup>149</sup> First, she said she did not like labels.<sup>150</sup> However, when pressed, she now considers herself as a “pansexual, intersex, post-op trans-woman.”<sup>151</sup> Interestingly, Krysta also said that she liked the definition of pansexual, which she understands as meaning *gender blind*.<sup>152</sup> She noted that pansexual is different from being bi-sexual, which means you are equally attracted to men and women.<sup>153</sup> But, bi-sexual leaves out, according to Krysta, all the trans-men, trans-women, and those who considered themselves two-spirited.<sup>154</sup> Thus, according to Krysta, gender is not binary.<sup>155</sup> Rather she sees it as a “huge scale of gray, and . . . you can fall in love with anyone on that scale of gray.”<sup>156</sup> Krysta adds that she is blind to race, religion or disability.<sup>157</sup> “[I]f I meet somebody and I connect with them and we click and then [that is] all that should matter. The rest is irrelevant.”<sup>158</sup>

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145. Interview with Serafima Metz, *supra* note 143, at 1; *see also* GRANT ET AL., *supra* note 20, at 24. The National Transgender Discrimination Survey has extensive information about transgendered people. GRANT ET AL., *supra* note 20, at 20–32.

146. Interview with Serafima Metz, *supra* note 143, at 1.

147. *Id.*

148. *Id.* Seventy-five percent of respondents identified themselves as transgendered. GRANT ET AL., *supra* note 20, at 24. Interesting that forty-seven percent of that number identified as MTF, while only twenty-eight percent identified as FTM. *Id.*

149. *See* Interview with Krysta Cascio, *supra* note 143, at 1.

150. *Id.*

151. *Id.*

152. *Id.* at 16.

153. *Id.*

154. Interview with Krysta Cascio, *supra* note 143, at 16. “Gender identity and expression are complex and layered characteristics, with almost as many variations as there are individuals.” GRANT ET AL., *supra* note 20, at 24.

155. Interview with Krysta Cascio, *supra* note 143, at 16.

156. *Id.* Of those surveyed, fourteen percent identified themselves as gender non-conforming. GRANT ET AL., *supra* note 20, at 24.

157. Interview with Krysta Cascio, *supra* note 143, at 16.

158. *Id.*

## B. *Growing Up*

Serafima's redefined identity began at an early age.<sup>159</sup> According to her, when she was "very young [she did not] fit in with the rest of the males" when she was at school.<sup>160</sup> The other boys teased her constantly.<sup>161</sup> She considered herself *different*.<sup>162</sup> She really had no role models and it was not until she was nineteen years old that she even met another transgendered person.<sup>163</sup> At that time, she realized that "it was actually quite acceptable thing to do at . . . my own moral code."<sup>164</sup> She knew she had the genitalia of a boy, but her identity was *nebulous*.<sup>165</sup> While she felt contrary to her body, she was happy with her life being a woman.<sup>166</sup>

Krysta had some of the same experiences.<sup>167</sup> When she was about four or five years old she said she recalls not falling into the *gender binary*.<sup>168</sup> She remembers dressing up as Wonder Woman every day.<sup>169</sup> She would come home and watch Linda Carter spin around and become Wonder Woman.<sup>170</sup> So, Krysta would spin around hoping that she would become a woman.<sup>171</sup>

Krysta's growing up phase differed from Serafima's.<sup>172</sup> First, Krysta went to a Christian school that only had six students in class.<sup>173</sup> Since the class was so small, the students really did not divide into gender specific roles.<sup>174</sup> For instance, to play football, they all joined in.<sup>175</sup> It was not until she started going through puberty that she realized something was not quite right.<sup>176</sup> While she devoted her spare time to science fiction, reading comic

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159. Interview with Serafima Metz, *supra* note 143, at 1.

160. *Id.*

161. *Id.* at 2. Seventy-eight percent reported harassment, thirty-five percent physical assault, and twelve percent sexual violence when in grades kindergarten through twelfth. GRANT ET AL., *supra* note 20, at 3. Unfortunately, teachers were not very helpful and, in fact, thirty-one percent said that teachers and staff also harassed them. *Id.* at 33.

162. Interview with Serafima Metz, *supra* note 143, at 2.

163. *Id.* at 1.

164. *Id.*

165. *Id.* at 1–2.

166. *Id.* at 2.

167. See Interview with Krysta Cascio, *supra* note 143, at 1.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. Compare Interview with Krysta Cascio, *supra* note 143, at 1, with Interview with Serafima Metz, *supra* note 143, at 2.

173. Interview with Krysta Cascio, *supra* note 143, at 1.

174. *Id.*

175. *Id.*

176. *Id.*

books, and becoming a gaming geek, she suddenly also developed breasts.<sup>177</sup> She thought she was a *mutant*.<sup>178</sup> She hid the factor, never revealing it to anybody.<sup>179</sup> She made sure she did not do anything that would show that she had breasts.<sup>180</sup> This meant she stopped swimming and wore heavy jackets to school.<sup>181</sup> Given that she lived in Miami, she was the target of ridicule because of her apparel.<sup>182</sup> She described herself as an *outcast*.<sup>183</sup> Even though she was an outcast, she had both girlfriends and boyfriends.<sup>184</sup> She had no name for her orientation.<sup>185</sup>

When Serafima was in high school, she began wearing women's clothing now and then.<sup>186</sup> Her take on it was that punk shows were popular at the time, so she was just following that style.<sup>187</sup> In fact, she went to many punk shows and always wore dresses, and it made her feel good.<sup>188</sup> Additionally, Serafima had a very supporting family.<sup>189</sup> While she found it difficult to fully *come out* to them, she felt they were enlightened and liberal and "really put the effort to try and understand" what she was confiding in them.<sup>190</sup> Regardless of their support, Serafima attempted suicide when she was eighteen.<sup>191</sup> Her parents encouraged her to go to a treatment center because she was suffering from major depression.<sup>192</sup> When she got out, she went back to the university she was attending, but again, she was so depressed, she tried to commit suicide again.<sup>193</sup> As a result, she went to another treatment center, which was a three-month program for patients who

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177. *Id.*

178. Interview with Krysta Cascio, *supra* note 143, at 1.

179. *Id.*

180. *Id.* at 1–2.

181. *Id.* at 2.

182. *Id.*

183. Interview with Krysta Cascio, *supra* note 143, at 2.

184. *Id.*

185. *Id.*

186. Interview with Serafima Metz, *supra* note 143, at 3.

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. Email from Charlene Smith, Law Professor, Nova Southeastern Univ., to Krysta Cascio (Apr. 12, 2013) (on file with Charlene Smith); see also Debra Cassens Weiss, Report: 'Staggering' Rate of Attempted Suicides by Transgenders Highlights Injustices, ABA J. (Feb. 4, 2011, 2:29 PM), [http://www.abajournal.com/mobile/article/staggering\\_rate\\_of\\_attempted\\_suicides\\_by\\_transgenders\\_highlights\\_injustices](http://www.abajournal.com/mobile/article/staggering_rate_of_attempted_suicides_by_transgenders_highlights_injustices). Forty-one percent of those who responded to a survey said they had attempted suicide in comparison to a 1.6% of the general population. Weiss, *supra* note 191.

192. Email from Charlene Smith, Law Professor, Nova Southeastern Univ., to Krysta Cascio, *supra* note 191.

193. *Id.*

had been diagnosed with mental illness.<sup>194</sup> She was also there for substance abuse.<sup>195</sup> After she got out, she lived with her parents for a short amount of time and eventually went to live in a house that was established for queer and trans people.<sup>196</sup> It was the first time she had ever interacted with trans or queer people.<sup>197</sup> As Serafima put it, “I began to feel comfortable questioning and exploring my gender identity.”<sup>198</sup> She started her transition with hormones, and as her body started changing, she began wearing women’s clothing all the time.<sup>199</sup>

### C. Relationships

Serafima considers herself a lesbian and is in a committed relationship with another woman.<sup>200</sup> She rejects the idea that she is bisexual.<sup>201</sup> She said she was always attracted to women and that has remained the same throughout her life.<sup>202</sup>

Krysta noted that relationships are tough for trans folks.<sup>203</sup> If somebody was with a person before the transition, it’s rough.<sup>204</sup> For instance, Krysta knew a couple that had been together for fifteen years but, right after the surgery, the wife left.<sup>205</sup> The hormonal treatment is also a factor.<sup>206</sup> Because the person seeking to become the opposite gender has many emotional changes, the partner cannot handle the ups and downs.<sup>207</sup> Then, after the change is completed, finding a partner who is understanding is almost impossible.<sup>208</sup> According to Krysta, when you are trying to find someone, you go stealth, and it becomes very awkward to tell the new person.<sup>209</sup> Additionally, the newly trans person tends to fall for the wrong person.<sup>210</sup>

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194. *Id.*

195. *Id.*

196. *Id.*

197. Email from Charlene Smith, Law Professor, Nova Southeastern Univ., to Krysta Cascio, *supra* note 191.

198. *Id.*

199. Interview with Serafima Metz, *supra* note 143, at 3–4.

200. *Id.* at 4.

201. *Id.*

202. *Id.*

203. Interview with Krysta Cascio, *supra* note 143, at 18.

204. *Id.*

205. *Id.* at 19.

206. *Id.*

207. *See id.*

208. Interview with Krysta Cascio, *supra* note 143, at 19.

209. *Id.*

210. *Id.*

D. *Legal and Societal Difficulties*

Before getting her name changed, Serafima applied to the university where she is currently a student.<sup>211</sup> To get the university to change her first name was an uphill struggle.<sup>212</sup> Her problem was that she would be on the teacher's roster with a male name.<sup>213</sup> She encountered a massive amount of bureaucracy to get her name on all the university's collection of her data corrected.<sup>214</sup> However, while the university changed her name, they still have her listed as a male.<sup>215</sup> She was able to change her driver's license by getting a letter from her doctor.<sup>216</sup> However, that was a very difficult task.<sup>217</sup> Serafima found very little information on how to go about this process.<sup>218</sup> The people who work at the Department of Motor Vehicles were not helpful.<sup>219</sup> Her experience with Social Security was even more stressful.<sup>220</sup> They eventually informed her that until her birth certificate was changed, they would not change the name on her Social Security card.<sup>221</sup> Naturally, that has made getting jobs very difficult for Serafima.<sup>222</sup> If it were not for True Group,<sup>223</sup> she would not have known the steps to take.<sup>224</sup> They provided all the forms she needed.<sup>225</sup> The process was not cheap; it cost Serafima over four hundred dollars in court costs to complete as many documents as she had.<sup>226</sup> She estimates that it takes about three to four months to complete the process, because many of the items required her to appear in court.<sup>227</sup>

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211. Interview with Serafima Metz, *supra* note 143, at 5.

212. *See id.*

213. *Id.*

214. *Id.* She notes that the university is huge, so that might explain some part of it. *Id.*

215. Interview with Serafima Metz, *supra* note 143, at 5.

216. *Id.*

217. *See id.*

218. *Id.*

219. *See id.*

220. *See* Interview with Serafima Metz, *supra* note 143, at 5–6.

221. *Id.*

222. *Id.* at 6.

223. This Miami based group provides information on their website on how to go about changing your name/gender on legal documents.

224. Interview with Serafima Metz, *supra* note 143, at 6; *Legal Name & Gender Marker Change*, *supra* note 223.

225. Interview with Serafima Metz, *supra* note 143, at 6–7; *Legal Name & Gender Marker Change*, *supra* note 223.

226. Interview with Serafima Metz, *supra* note 143, at 7.

227. *Id.*

Krysta's experience regarding the law mirrors much of what Serafima explained.<sup>228</sup> For instance, she said she spent a "whole day waiting at the wrong courthouse."<sup>229</sup> This happened because when she searched online, it gave the information that she could go to any courthouse within the county.<sup>230</sup> She said that she mostly ran in circles because she did not have a clue as to what to do.<sup>231</sup> Anybody she asked who had been through the experience had outdated information.<sup>232</sup> "[T]he name change alone was seven months of legal crap and fighting."<sup>233</sup> The whole process is different in every county.<sup>234</sup> Krysta thoughtfully documented her experience, and then put up a website to help others.<sup>235</sup>

Further, Krysta's situation was different from other trans.<sup>236</sup> Because she had Crohn's disease, it was more complicated.<sup>237</sup> For instance, because she needs Medicare assistance, Medicare gets information from Social Security, which gets its information from her birth certificate.<sup>238</sup> She needed to change her gender on official documents—including her birth certificate—because when she went to the pharmacy to get her medicine, if they did not see the *correct gender*, they would not give her the medicine she needed.<sup>239</sup> That differs from many trans folks because if they get their driver's license changed, then a private insurer will accept that as being the proof they need for gender identification.<sup>240</sup> Unfortunately, in Florida, you must have the surgery before you can change your birth certificate.<sup>241</sup>

## VI. THE LAW AND HOW TRANS RIGHTS ARE LARGELY IGNORED

There are many rights and privileges afforded to U.S. citizens who fit into the legal dichotomy of either male or female.<sup>242</sup> Individuals who identify with the biological sex he or she was born into, take for granted certain rights and protections. Unfortunately, the law creates distinct

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228. See Interview with Krysta Cascio, *supra* note 143, at 8–9; Interview with Serafima Metz, *supra* note 143 at 5–7.

229. Interview with Krysta Cascio, *supra* note 143, at 8.

230. *Id.*

231. *Id.*

232. *See id.*

233. *Id.* at 7.

234. Interview with Krysta Cascio, *supra* note 143, at 7.

235. *Id.*

236. *See id.* at 3–5.

237. *See id.*

238. *Id.* at 8–9.

239. Interview with Krysta Cascio, *supra* note 143, at 8–9.

240. *Id.*

241. *Id.* at 9.

242. *See infra* Part VII.

categories of male and female, rendering individuals who do not fit into this binary sex classification outside the scope of certain laws.<sup>243</sup>

The narrow binary sex classification system fails to take into consideration the difference between *sex* and *gender*.<sup>244</sup> The language and scope of the law makes the unfortunate and detrimental assumption that the biological sex a person is born with will match the gender they identify with.<sup>245</sup> There is a compelling need to reshape the law to incorporate individuals whose *sex* does not match their *gender*, because for trans people it is not as simple as penis equals male, and vagina equals female.<sup>246</sup> The trans community faces a great battle in their fight to gain equality and reshape the law to address the human rights and privileges currently denied to them.<sup>247</sup>

America is not always at the forefront of human rights, and is actually lagging behind other countries with respect to reaching equality for transgender people. Laws and policies followed in other countries would eliminate many of the issues discussed in this article.<sup>248</sup> For example, Argentina recently passed a gender-identity law, which enables people to change their name and sex on official documents without judicial or medical approval.<sup>249</sup> The Netherlands has also taken an illustrative step toward equality by removing the surgery requirement to changing the gender marker on official documents.<sup>250</sup> As this Article illustrates, America still has a long way to go in achieving equality and providing human rights to every person, irrespective of sexual orientation or gender identity.

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243. See *infra* Part VII. As Serafima Metz recognized, even though she personally identifies as a female, the law will not necessarily agree. Interview with Serafima Metz, *supra* note 143, at 1; see also *supra* Part V.A. Krysta Cascio also disagrees with the binary sex classification of the law, rejecting the black and white view of gender, believing instead in a *huge scale of gray*. Interview with Krysta Cascio, *supra* note 143, at 16; see also *supra* Part V.A.

244. See *supra* Part III.

245. See *infra* Part VII.

246. See *infra* Part VII. Serafima and Krysta were both born male, but from a very young age knew that the biological sex they were born into did not fit with the gender they identified with. Interview with Krysta Cascio, *supra* note 143, at 1–2; Interview with Serafima Metz, *supra* note 143, at 1–2.

247. See Jessica Sideways, *The Unique Issues that Transsexuals Face*, HUBPAGES, <http://jessicasideways.hubpages.com/hub/The-Unique-Issues-that-Transsexuals-Face> (last updated Feb. 9, 2014).

248. See *The Netherlands: Victory for Transgender Rights*, HUMAN RIGHTS WATCH (Dec. 19, 2013), <http://www.hrw.org/news/2013/12/19/netherlands-victory-transgender-rights>; Michael Warren, *Argentina's Gender ID Law Takes Effect*, HUFFINGTON POST (June 5, 2012, 11:24 AM), [http://www.huffingtonpost.com/2012/06/05/argentina-gender-identity-law-takes-effect\\_n\\_1570830.html](http://www.huffingtonpost.com/2012/06/05/argentina-gender-identity-law-takes-effect_n_1570830.html).

249. Warren, *supra* note 248.

250. *The Netherlands: Victory for Transgender Rights*, *supra* note 248.

Within the lesbian, gay, and bisexual (“LGB”) community, the fight to eliminate sexual orientation discrimination in areas such as marriage, raising children, and employment is ongoing and slowly moving in a positive direction.<sup>251</sup> However, gender identity and sexual orientation are different, and the binary approach to the law creates even bigger hurdles for trans people in reaching equality.<sup>252</sup> The myriad of issues faced by trans people begins with their legal identity, and includes much of the discrimination experienced by the LGB community.<sup>253</sup> Thus, although LGBT is often grouped together, the trans community faces legal issues distinct from LGBs, relating to gender identity rather than sexual orientation.<sup>254</sup>

This portion of the Article focuses on some of the major issues faced by transsexuals resulting from the law’s categorical approach of defining sex.<sup>255</sup> These topics include: States’ varying approaches for defining legal sex, processes of amending birth certificates and driver’s licenses, protections provided by state and federal anti-discrimination statutes, access to healthcare, the right to marry, and the right to raise children.<sup>256</sup>

## VII. LEGAL IDENTITY

The protections, rights, and benefits denied to the transgender community stem from the lack of recognition of their self-identified name and sex.<sup>257</sup> Trans people face legal obstacles at all stages and facets of their life and “the ability to live fully in their post-transition name and sex can be vitally important to their safety, gender transition, and family security.”<sup>258</sup> As discussed in this Article, the legal identity of a transsexual affects the protections afforded to them under state and federal anti-discrimination statutes, the right to marry, and the right to raise children, to name just a few.<sup>259</sup> Further, the basic need of a trans person’s recognition of the legal sex he or she identifies with is essential to his or her access to appropriate

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251. See Sideways, *supra* note 247.

252. See *The Netherlands: Victory for Transgender Rights*, *supra* note 248.

253. Sideways, *supra* note 247; see also *The Netherlands: Victory for Transgender Rights*, *supra* note 248.

254. See Sideways, *supra* note 247.

255. See *infra* Parts VII–X.

256. *Id.*

257. Janson Wu & Kylar W. Broadus, *Recognition of Name and Sex*, in *TRANSGENDER FAMILY LAW: A GUIDE TO EFFECTIVE ADVOCACY* 16, 16 (Jennifer L. Levi & Elizabeth E. Monnin-Browder eds., 2012).

258. *Id.*

259. See *infra* Parts VII–X.

public accommodations, such as prisons, shelters, and restrooms.<sup>260</sup> The first step in achieving equality is to legally recognize a transsexual's gender identity by providing simple legal mechanisms under which a transsexual may change his or her name, amend his or her birth certificate, driver's license, and any other official documents.<sup>261</sup>

#### A. *How the States Define Legal Sex*

An individual's sex is defined by his or her physical attributes, including sexual and reproductive anatomy, hormones, and chromosomes, as well as his or her gender identity, which is the individual's actual or perceived gender.<sup>262</sup> Generally, a person's biological sex and gender identity "line up, making the shorthand use of one's birth genitalia to identify sex unproblematic. Particularly for transsexual and intersexed persons, gender identity and the physical characteristics of sex in some way[s] conflict."<sup>263</sup> When there is a conflict, the states vary on the approach taken in determining the legal sex of a transgendered person.<sup>264</sup> Unfortunately, most jurisdictions take *the essentialist approach* and define sex as immutable and fixed at

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260. See D. MORGAN BASSICHIS, SYLVIA RIVERA LAW PROJECT, "IT'S WAR IN HERE": A REPORT ON THE TREATMENT OF TRANSGENDER AND INTERSEX PEOPLE IN NEW YORK STATE MEN'S PRISONS 12 (Dean Spade ed., 2007).

261. *The Netherlands: Victory for Transgender Rights*, *supra* note 248; see also Warren, *supra* note 248. This can be achieved by following the approach taken by countries like Argentina, which allow transgender people to change their names and amend official documents without having to go through painful and intensive surgery or obtaining judicial approval. *The Netherlands: Victory for Transgender Rights*, *supra* note 248. Serafima's experience provides an example of the complicated and expensive process that transsexuals go through when attempting to amend official documents. See *supra* Part V. She was unable to change her driver's license without a letter from her doctor, and Social Security would not change her Social Security card until her birth certificate was changed. See *supra* Part V.D. After about three to four months, and over four hundred dollars in court costs and multiple court appearances, she was able to amend her birth certificate and obtain congruent documents. See *supra* Part V.D.

262. See Taylor Flynn, *The Ties That (Don't) Bind: Transgender Family Law and the Unmaking of Families*, in TRANSGENDER RIGHTS 32, 34 (Paisley Currah et al. eds., 2006).

263. *Id.* (alteration in original). Intersexed individuals are born with "a reproductive or sexual anatomy that [does not] seem to fit the typical definitions of female or male. For example, a person might be born appearing to be female on the outside, but having mostly male-typical anatomy on the inside." *What Is Intersex?*, INTERSEX SOC'Y OF N. AM., [http://www.isna.org/faq/what\\_is\\_intersex](http://www.isna.org/faq/what_is_intersex) (last visited Aug. 25, 2015).

264. Compare *Littleton v. Prange*, 9 S.W.3d 223, 231 (Tex. App. 1999) (finding sex to be immutable and fixed at birth), with *M.T. v. J.T.*, 355 A.2d 204, 209 (N.J. Super. Ct. App. Div. 1976) (finding gender identity essential in determining legal sex of a transsexual).

birth.<sup>265</sup> A minority of jurisdictions have found gender identity to be determinative, or at least an essential factor, to defining legal sex.<sup>266</sup> The gender identity approach to defining legal sex is urged because, if followed by all states, it would not only provide consistency to the law, but also would reflect the current medical and psychological understanding of sex, and most importantly, would respect an individual's autonomy.<sup>267</sup>

As a normative matter, this framework of autonomy-preserving guarantees—including the rights to privacy, freedom of expression, and bodily integrity—creates constitutional space for an as-of-yet-unarticulated right, the right to self-determination of sexual identity. . . . Such an approach would attempt not only to reclaim a rights-protecting view of the Constitution but also envisions a world free of our current investment in policing a boundary between—or among—the sexes.<sup>268</sup>

### 1. The *Biological Test* to Defining Legal Sex

Unfortunately, a majority of states, such as Ohio, Texas, and Florida, follow the approach that sex is immutable and fixed at birth.<sup>269</sup> These states use a rigid *biological test* to define legal sex, refusing to depart from the narrow black and white view of sex and gender.<sup>270</sup> For instance, in Ohio, the court refused to issue an order finding a post-operative MTF transsexual to be female for legal purposes.<sup>271</sup> The court found that a person's sex is determined at birth and denied the transsexual's request to amend her birth certificate.<sup>272</sup> The holding rested solely on biological characteristics stating that “[t]here was no evidence that [the] applicant at birth had any physical characteristics other than those of a male and he was thus correctly designated *Boy* on his birth certificate. There also was no laboratory documentation that the applicant had other than male chromosomes.”<sup>273</sup>

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265. *Littleton*, 9 S.W.3d at 231; see also *Corbett v. Corbett*, [1971] P. 83 at 104 (Eng.); Flynn, *supra* note 262, at 33.

266. *M.T.*, 355 A.2d at 209.

267. See Flynn, *supra* note 262, at 33–35.

268. *Id.* at 34.

269. See Paisley Currah, *Gender Pluralisms Under the Transgender Umbrella*, in *TRANSGENER RIGHTS* 3, 17 (Paisley Currah et al. eds., 2006).

270. See *In re Declaratory Relief for Ladrach*, 513 N.E.2d 828, 832 (Ohio Prob. Ct. 1987).

271. *Id.*

272. *Id.* at 832.

273. *Id.*

Further, in *Littleton v. Prange*,<sup>274</sup> the legal question addressed by the Court of Appeals of Texas was: “[C]an a physician change the gender of a person with a scalpel, drugs, and counseling, or is a person’s gender immutably fixed by our Creator at birth?”<sup>275</sup> The litigant was born male but identified as female from the time she was three or four years old.<sup>276</sup> After receiving the appropriate treatments and undergoing complete sex reassignment surgery (“SRS”), she became a *true* MTF transsexual.<sup>277</sup> In reaching its conclusion on her legal sex, the court focused solely on the biological and sexual reproductive organs of the transsexual litigant.<sup>278</sup> The court held Christie to be a male, stating that even though “[s]ome physicians would consider Christie [to be] female; . . . [h]er female anatomy . . . is all man made. The body that Christie inhabits is a male body in all aspects other than what the physicians have supplied.”<sup>279</sup>

## 2. Dual Test of Anatomy & Gender

The legal system, as well as society, needs to recognize that the question of whether someone is a male or a female is not as simple as whether that person has a pair of XX or XY chromosomes and the genitalia he or she was born with.<sup>280</sup> The Superior Court of New Jersey understands this critical realization and the essential role of gender identity in determining sex.<sup>281</sup> Unlike the essentialist approach, the Superior Court of New Jersey recognized the complexities of sex and took into consideration factors other than mere biology.<sup>282</sup> The court determined that a MTF post-operative transsexual was considered to be legally female.<sup>283</sup> Despite recognition of jurisdictions following the essentialist approach to sex, this court found that:

The evidence and authority which we have examined . . . show[s] 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

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274. 9 S.W.3d 223 (Tex. App. 1999).

275. *Id.* at 224.

276. *Id.*

277. *Id.* at 225.

278. *See id.* at 230–31.

279. *Littleton*, 9 S.W.3d at 231.

280. *Id.* at 233 (Lopez, J., dissenting).

281. *See M.T. v. J.T.*, 355 A.2d 204, 209 (N.J. Super. Ct. App. Div. 1976).

282. *See id.*; Flynn, *supra* note 262, at 33.

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

observed that the *psychological sex of an individual*, while not serviceable for all purposes, is *practical, realistic, and humane*.<sup>284</sup>

Although the decision in *M.T. v. J.T.*<sup>285</sup> was favorable and the court's recognition of the importance of gender identity is noteworthy, the court engaged in a *body-parts checklist* approach.<sup>286</sup> The reasoning of the court contained a detailed discussion of the expert testimony of a doctor pertaining to J.T.'s post-operative genitalia including its cosmetic appearance, whether it "could function as any female vagina," and also whether she is capable of "traditional penile/vaginal intercourse."<sup>287</sup> This *hypersexualization* of a trans person's post-operative sexual anatomy falls short of the approach that should govern defining legal sex—that of gender identity.<sup>288</sup> While it is true that the New Jersey court found gender identity significant, the court's conclusion reveals an unnecessary emphasis of sexual anatomy focused on finding that the "transsexual's gender and genitalia are no longer discordant; they have been harmonized through medical treatment."<sup>289</sup>

#### B. *Legal Name Changes*

Often the first step that a transsexual takes in obtaining legal recognition of his or her true self is a legal name change because "a name change sends an important message to the world, a message solidified and made official with a court's approval."<sup>290</sup> All states have statutes addressing the process for changing a person's name, with varying procedural requirements.<sup>291</sup> Some states also allow common law changes, which take effect by simply using the new name.<sup>292</sup> Almost all state statutes governing legal name change contain requirements designed to prevent an individual from changing his or her name for fraudulent purposes.<sup>293</sup> Therefore, a transsexual who wishes to change his or her name to reflect his or her true identity should not be denied the right to do so. Unfortunately, some state courts continue to make what should be a simple process more difficult and

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284. *Id.* at 209; Douglas K. Smith, Comment, *Transsexualism, Sex Reassignment Surgery, and the Law*, 56 CORNELL L. REV. 963, 969–70 (1971).

285. 355 A.2d 204 (N.J. Super. Ct. App. Div. 1976).

286. *See id.* at 206; Flynn, *supra* note 262, at 37.

287. *M.T.*, 355 A.2d at 206.

288. *Id.* at 206–07.

289. *Id.* at 211.

290. ALLY WINDSOR HOWELL, *TRANSGENDER PERSONS AND THE LAW* 16–17 (2013).

291. *E.g.*, FLA. STAT. § 68.07 (2013).

292. HOWELL, *supra* note 290, at 17; *see also*, *e.g.*, *Wisconsin v. Hansford*, 580 N.W.2d 171, 173 (Wis. 1998).

293. *See, e.g.*, FLA. STAT. § 68.07(3)(j).

burdensome for transsexuals by requiring medical documents or doctors' notes providing the reason for the name change.<sup>294</sup>

### C. *Birth Certificate Amendments*

One way in which transsexuals attempt to obtain equal rights and protections of the law that conform to their self-identity, is through a birth certificate amendment.<sup>295</sup> Most jurisdictions in the United States have regulations, statutes, or policies governing birth certificate amendment procedures to change a person's sex designation.<sup>296</sup> While almost all of these jurisdictions have straightforward procedures for making an amendment to fix a mistake or change a person's name, the policies governing a transsexual's ability to amend the sex designation on his or her birth certificate are unpredictable, expensive, and unnecessarily intrusive.<sup>297</sup> State policies vary on the ability to change the sex designation on a birth certificate and the procedural requirements for doing so.<sup>298</sup> States that do permit such a change on a person's birth certificate may issue an amended or a new birth certificate, requiring proof of either complete SRS or just *necessary* medical treatments, and the state may or may not require a court order for changing the birth certificate.<sup>299</sup>

Some states confine the ability to change a person's sex designation to circumstances where there was a mistake in the declaration on the birth certificate of either boy or girl, as determined at the time of birth.<sup>300</sup> For example, the Ohio Probate Court held that an individual who was born male, who is now a post-operative female, could not amend her birth certificate.<sup>301</sup> The court interpreted Ohio's birth certificate statute as "strictly a *correction*

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294. *Transgender Man Denied Name Change by Virginia Judge*, LGBTQNATION (Apr. 17, 2013), <http://www.lgbtqnation.com/2013/04/transgender-man-denied-name-change-by-virginia-judge/>. For Krysta, just the process of changing her name took seven months. Interview with Krysta Cascio, *supra* note 143, at 7.

295. *E.g.*, CAL. HEALTH & SAFETY CODE § 103425 (West 2014).

296. *See* Kristin Wenstrom, Comment, "What the Birth Certificate Shows": *An Argument to Remove Surgical Requirements from Birth Certificate Amendment Policies*, 17 TUL. J.L. & SEXUALITY 131, 131–33 (2008).

297. *Id.*

298. *Changing Birth Certificate Sex Designations: State-by-State Guidelines*, LAMBDA LEGAL, <http://www.lambdalegal.org/publications/changing-birth-certificate-sex-designations-state-by-state-guidelines> (last updated Feb. 3, 2015).

299. *Id.*

300. *E.g.*, *In re Declaratory Relief for Ladrach*, 513 N.E. 2d 828, 831–32 (Ohio Prob. Ct. 1987).

301. *Id.*

type statute,” permitting a change only when an error was made in the designation of sex at the time of birth.<sup>302</sup>

Tennessee actually goes as far as statutorily prohibiting a birth certificate amendment to reflect a transsexual’s self-identified sex, even post-SRS.<sup>303</sup> Similarly, Idaho has a general statute permitting birth certificate amendments; but the Idaho Office of Vital Statistics shows that Idaho does not permit birth certificate amendments for post-operative transsexuals.<sup>304</sup>

States, such as Ohio, Tennessee, and Idaho, that do not permit an amendment to the sex designation on birth certificates, follow the approach that a “person’s sex is determined at birth by an anatomical examination by the birth attendant” and restrict such amendments—absent a showing of error or inaccuracy—at the time of recording the gender.<sup>305</sup> What these states fail to recognize is the importance of a transsexual’s internal sense of gender identity. Transsexuals often feel “incongruencies of assigned birth sex, physical body, and gender identity.”<sup>306</sup> In essence, the sex designation on their birth certificate, as recorded at the time of their birth, is *inaccurate*.<sup>307</sup> Preventing a person from obtaining congruent identity documents reflecting the appropriate sex, inhibits that person from living as his or her authentic self and from receiving equal rights and protections under the law.<sup>308</sup>

Forty-seven states, the District of Columbia, and New York City allow sex designation amendments or changes to a person’s birth certificate.<sup>309</sup> Almost all of these birth certificate amendment policies require proof that the applicant has undergone SRS,<sup>310</sup> and many states require a

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302. *Id.* at 831.

303. TENN. CODE ANN. § 68-3-203(d) (2014) (stating “[t]he sex of an individual [will] not be changed on the original certificate of birth as a result of sex change surgery”).

304. IDAHO ADMIN. CODE r. 16.02.08.201 (2013); *Changing Birth Certificate Sex Designations: State-by-State Guidelines*, *supra* note 298.

305. *In re Declaratory Relief for Ladrach*, 513 N.E.2d at 832; *Changing Birth Certificate Sex Designations: State-by-State Guidelines*, *supra* note 298.

306. Benjamin L. Jerner, *Culturally Competent Representation*, in *TRANSGENDER FAMILY LAW: A GUIDE TO EFFECTIVE ADVOCACY* 1, 3 (Jennifer L. Levi & Elizabeth E. Monnin-Browder eds., 2012).

307. *See id.*

308. Wu & Broadus, *supra* note 257, at 16–17; Wenstrom, *supra* note 296, at 132–33. *But see In re Declaratory Relief for Ladrach*, 513 N.E.2d at 832.

309. Wu & Broadus, *supra* note 257, at 19–20; *see also Changing Birth Certificate Sex Designations: State by State Guidelines*, *supra* note 298 (demonstrating state statutes that allow birth certificate amendments with proof of sex reassignment surgery).

310. *E.g.*, COLO. REV. STAT. § 25-2-115(4) (2014) (requiring “a certified copy of an order of a court of competent jurisdiction indicating that the sex of an individual born in this state has been changed by surgical procedure”); *see also* COLO. CODE REGS. § 1006-1-9.3, .6 (2014).

court order as a prerequisite to amending a birth certificate.<sup>311</sup> Although the majority of states require complete SRS,<sup>312</sup> other states do not specify the extent of surgery that is required.<sup>313</sup> The particular surgical requirements outlined by states are critical because the treatment and surgery that transsexuals undergo “range from relatively minor cosmetic procedures, such as facial hair removal or breast augmentation for [MTF] patients, to complete genital reconstructive surgery . . . for patients of both sexes.”<sup>314</sup> There are many reasons why a transsexual would decide not to undergo complete SRS.<sup>315</sup> For instance, there may be health risks associated with surgery, the transsexual may not be able to afford surgery, and “others simply object to the idea that the only way to belong to a particular gender is to have anatomy that conforms to that gender.”<sup>316</sup>

Furthermore, current understandings of transgender health indicate the personalized and unique process of gender transition.<sup>317</sup> A statutory requirement of SRS—as a pre-requisite to amending the sex designation on one’s birth certificate—is incongruent with transgender health and is unduly intrusive.<sup>318</sup> The more appropriate birth amendment policy that should be followed by states is one that only requires proof that the transsexual has completed the treatments necessary for his or her personal transition.<sup>319</sup>

Virginia was the first state that allowed birth certificate amendments to a trans person’s proper gender without requiring sex-reassignment surgery.<sup>320</sup> Prior to 2002, Virginia’s requirements conformed with the majority of the states, requiring complete genital reconstructive surgery to amend birth certificates.<sup>321</sup> However, Lambda Legal educated the Virginia Office of Vital Records on the various treatments that trans people undergo during their transition, and Virginia has changed its amendment requirement from complete SRS to necessary gender transition treatments.<sup>322</sup>

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311. *E.g.*, COLO. REV. STAT. § 25-2-115.

312. *E.g.*, MASS. GEN. LAWS ch. 46, § 13(e) (2014); *see also Changing Birth Certificate Sex Designations: State-by-State Guidelines*, *supra* note 298.

313. *Changing Birth Certificate Sex Designations: State-by-State Guidelines*, *supra* note 298.

314. Audrey C. Stirnitzke, Note, *Transsexuality, Marriage, and the Myth of True Sex*, 53 ARIZ. L. REV. 285, 288 (2011); *see also* COLO. CODE REGS. § 1006-1-9.3, .6.

315. Stirnitzke, *supra* note 314, at 288.

316. *Id.*

317. Wenstrom, *supra* note 296, at 132–33.

318. *Id.* 132–34.

319. *Id.* at 133–34; *see also* 12 VA. ADMIN. CODE § 5-550-320 (2014).

320. 12 VA. ADMIN. CODE § 5-550-320; Wenstrom, *supra* note 296, at 142. *But see Changing Birth Certificate Sex Designations: State-by-State Guidelines*, *supra* note 298.

321. *See* Wenstrom, *supra* note 296, at 142.

322. *Id.*

#### D. *Driver's License Amendments*

Each state also has its own policies and regulations for changing name and sex designation on driver's licenses.<sup>323</sup> In order to change one's name on a driver's license, all that is generally required is the court order documenting the name change.<sup>324</sup> However, in order to change the sex designation on a driver's license, the state may require proof from a physician or psychologist certifying the change of sex.<sup>325</sup>

States should follow Virginia's lead and become educated about transsexual health and the various procedures that transsexuals choose to undergo other than SRS.<sup>326</sup> In moving towards equality, legislatures need to understand the critical need of transsexuals to live authentic lives in their self-identified gender and realize that extensive surgical requirements create a painful, expensive, life-changing, and potentially unnecessary barrier for a transsexual to obtain congruent documents reflecting their true identity.<sup>327</sup> Countries outside of the United States, such as Argentina and the Netherlands, have acknowledged this need, as evidenced by the recent legislation enabling transsexuals to change the sex on official documents without prior judicial or medical approval.<sup>328</sup> A transsexual woman from Buenos Aires, Argentina, expressed her feelings after taking advantage of Argentina's new gender-identity law, stating that "[it is] important to have the freedom to decide by myself and not have anyone deciding it instead of me. . . . [N]o one is authorized to say who I am, but me."<sup>329</sup>

Transsexuals should have access to more efficient methods for amending their name and sex designation on official documents.<sup>330</sup> It is time for the states to remove the barriers that are preventing the people in our

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323. See, e.g., ARK. CODE ANN. § 27-16-506 (2014); *Change of Sex or Gender on a DMV Photo Document*, N.Y. DEP'T. OF MOTOR VEHICLES, [http://nysdmv.custhelp.com/app/answers/detail/a\\_id/405/~/~change-of-sex-or-gender-on-a-dmv-photo-document](http://nysdmv.custhelp.com/app/answers/detail/a_id/405/~/~change-of-sex-or-gender-on-a-dmv-photo-document) (last updated Aug. 5, 2015, 4:19 PM).

324. E.g., ARK. CODE ANN. § 27-16-506(b).

325. *Change of Sex or Gender on a DMV Photo Document*, *supra* note 323.

326. See 12 VA. ADMIN. CODE § 5-550-320 (2014); Wenstrom, *supra* note 296, at 142.

327. See *The Netherlands: Victory for Transgender Rights*, *supra* note 248; Warren, *supra* note 248.

328. See *The Netherlands: Victory for Transgender Rights*, *supra* note 248; Warren, *supra* note 248.

329. Warren, *supra* note 248.

330. Obtaining congruent documents is critically important for transsexuals in reaching equality and recognition of their true identity. See *supra* Part V.A–D. Inconsistent documents can make getting jobs difficult, and for Krysta, any inconsistency on her official documents meant that she would not receive medicine from the pharmacy to treat her Crohn's disease. See *supra* Part V.A–D.

country from being who they are, in order for our nation to move closer to achieving equality for all.<sup>331</sup>

#### E. *Public Accommodations*

Could you imagine if a stressful part of your day was dealing with public bathroom accommodations you are *permitted* to use? A decision to use a public restroom, something that is a seemingly mindless decision to most, is often “one of the most difficult and stressful parts of a transgender person’s day.”<sup>332</sup> Particularly for trans people who may be in the early stages of their transition, utilizing the restroom that corresponds to their gender identity has a potential to create “difficulty, anxiety, and even safety risks.”<sup>333</sup> There are numerous examples of transgender individuals being arrested, fined, or charged for using the restroom of his or her self-identified gender.<sup>334</sup>

Many cities and counties have public accommodation nondiscrimination ordinances, some of which include gender identity or expression.<sup>335</sup> However, most of these ordinances do not address the use of public restrooms, locker rooms, or showers.<sup>336</sup> The ordinances that do address the use of public restrooms, locker rooms, or showers generally state that the nondiscrimination ordinance does not apply to discrimination on the basis of sex or gender in these facilities.<sup>337</sup> Only a select few provide express protection for transitioned transsexuals against discrimination in the use of public restrooms.<sup>338</sup>

Furthermore, institutions with sex segregation policies, in organizing their accommodation programs, create great difficulty for trans people.<sup>339</sup> For example, U.S. prisons that place people in a facility based on their birth

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331. PAISLEY CURRAH & SHANNON MINTER, *TRANSGENER EQUALITY: A HANDBOOK FOR ACTIVISTS AND POLICYMAKERS* 15–16 (Sean Cahill et al. eds., 2000). *But see* ARK. CODE ANN. § 27-16-506 (2014); *Change of Sex or Gender on a DMV Photo Document*, *supra* note 323.

332. Jerner, *supra* note 306, at 9.

333. *Id.*

334. *See, e.g., Transgender Woman Charged with Trespassing, Banned from Idaho Supermarket for Using Women’s Bathroom*, N.Y. DAILY NEWS (Apr. 13, 2013, 2:43 PM), <http://www.nydailynews.com/news/national/transgender-woman-banned-idaho-store-women-restroom-article-1.1315827>.

335. *E.g., L.A., CAL., MUNICIPAL CODE* § 49.70 (2014).

336. *See, e.g., id.*

337. *E.g., BROWARD COUNTY, FLA., CODE OF ORDINANCES* ch. 16 1/2, art. II, § 34.1 (2014).

338. *E.g., BOULDER, COLO., REV. CODE* ch. 12-1-1, 12-1-4(c) (2013).

339. *See* Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731, 752–53 (2008).

sex can pose great danger for a trans person.<sup>340</sup> A transgendered woman, who was born as a man but looks and identifies as a woman, is subject to high rates of extreme physical and sexual abuse from other inmates.<sup>341</sup> Under the Eighth Amendment to the U.S. Constitution, prisons are required to provide for inmate's safety.<sup>342</sup> "A prison official's deliberate indifference to a substantial risk of serious harm . . . violates the Eighth Amendment."<sup>343</sup> Often the abuse is so great that the transgendered inmate is placed in solitary confinement or is segregated for their protection.<sup>344</sup>

Fortunately, the Prison Rape Elimination Act<sup>345</sup> ("PREA") was enacted in 2003 in response to the high rate of sexual abuse in prisons, particularly against homosexual, transgender, and gender nonconforming individuals.<sup>346</sup> The PREA mandates a screening process in federal prisons in determining whether to assign a trans person to a federal facility with male or female inmates.<sup>347</sup> The U.S. Department of Justice issued final regulations to implement PREA in May 2012, and will hopefully prove to be effective in remedying the difficulties faced by the trans population in prison.<sup>348</sup> The PREA is a positive step towards providing transgenders—as well as other at-risk groups—necessary protection, and demonstrates an understanding that the decision of where to assign a transgender person cannot be based solely on birth sex.<sup>349</sup> Chelsea Manning, an army soldier previously known as Bradley Manning, announced that she was a female living in the wrong body after she was convicted for leaking classified documents.<sup>350</sup> Chelsea will be sent to an all male prison and made a statement that, "[g]iven the way that I feel and have felt since childhood, I want to begin hormone therapy as soon

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340. BASSICHIS, *supra* note 260, at 17–18.

341. *Id.*

342. *Farmer v. Brennan*, 511 U.S. 825, 832 (1994); *see also* U.S. CONST. amend. VIII.

343. *Farmer*, 511 U.S. at 828.

344. *See id.* at 830; BASSICHIS, *supra* note 260, at 22–23.

345. 42 U.S.C. § 15601 (2012).

346. *LGBT People and the Prison Rape Elimination Act*, NAT'L CTR. FOR TRANSGENDER EQUAL. (July 2012), [http://www.transequality.org/Resources/PREA\\_July2012.pdf](http://www.transequality.org/Resources/PREA_July2012.pdf).

347. 28 C.F.R. § 115.42(a), (c) (2013).

348. *LGBT People and the Prison Rape Elimination Act*, *supra* note 346.

349. *See* 28 C.F.R. § 115.42(c); *LGBT People and the Prison Rape Elimination Act*, *supra* note 346.

350. Adam Gabbatt, 'I am Chelsea Manning,' Says Jailed Soldier Formerly Known as Bradley, *GUARDIAN* (Aug. 22, 2013, 12:35 EDT), <http://www.theguardian.com/world/2013/aug/22/bradley-manning-woman-chelsea-gender-reassignment>.

as possible.”<sup>351</sup> While in prison, she is prepared to take her plea for receiving gender reassignment treatment to court.<sup>352</sup>

Similar sex segregation issues exist with the placement of trans individuals in homeless shelters.<sup>353</sup> The majority of homeless shelters and other social service shelters house people according to his or her birth sex.<sup>354</sup> These policies often lead to harassment and assault against the transgender person by others housed in the facility.<sup>355</sup> The potential harassment and violence results in trans people avoiding homeless shelters.<sup>356</sup> Homeless shelters in a minority of jurisdictions, including San Francisco, Boston, Washington, D.C., and New York City, have policies permitting transgender people to be housed according to their self-identified gender.<sup>357</sup> Homeless shelters are in place to assist those in need; consequently, sex segregation policies that have the effect of transgender individuals avoiding such facilities clearly should be changed.<sup>358</sup>

Every person deserves equal access to appropriate public accommodations, such as restrooms, prisons, and homeless shelters, without fear of harassment or physical violence. No person should be afraid to use the restroom of their self-identified gender, and sex segregation policies should be changed in prisons and homeless shelters in order to prevent the harassment or violence that results when a transgender person is placed with his or her birth sex rather than his or her self-identified gender.<sup>359</sup>

#### VIII. STATE/LOCAL & FEDERAL ANTI-DISCRIMINATION STATUTES

Transsexuals experience severe discrimination and are in dire need of legislative protection in areas such as: healthcare, employment, education, housing, public accommodations, law enforcement, and in many other areas.<sup>360</sup> In order to reach equality and provide transsexuals with the same

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351. *Id.*

352. Denver Nicks, *Chelsea Manning Prepared to Take Gender Reassignment Plea to Court*, TIME (Nov. 1, 2013), <http://www.nation.time.com/2013/11/01/chelsea-manning-prepared-to-take-gender-reassignment-plea-to-court/>.

353. Spade, *supra* note 339, at 752–53.

354. *Id.* at 753.

355. *Id.*

356. *Id.*

357. *Id.* at 736.

358. *See* Spade, *supra* note 339, at 752–53.

359. *See* Jerner, *supra* note 306, at 9; Spade, *supra* note 339, at 753; Gabbatt, *supra* note 350.

360. CURRAH & MINTER, *supra* note 331, at 16.

rights and privileges as any other citizen, legislators and policymakers must remedy these injustices through *trans-protective* legislation.<sup>361</sup>

Many states have laws prohibiting discrimination on the basis of sex and sexual orientation; however, these laws do not provide protection for the trans community.<sup>362</sup> Where society has failed and remains close-minded to those who are perceived as *not normal*, the law must step up and provide protection.<sup>363</sup> Unfortunately, for trans people, where society has failed, so too has the law.<sup>364</sup>

#### A. *Anti-Discrimination Laws at the State Level*

Activists continue to fight for equal civil rights protections, and the greatest impact and progress has been at the local and state level.<sup>365</sup> “By adding or amending definitions of sex, gender, or even sexual orientation, or by adding a new category, usually *gender identity*, legislation can make it clear to the courts that nondiscrimination laws should and do include gender nonconforming people.”<sup>366</sup> In 1993, Minnesota became the first state to enact a statute prohibiting discrimination against trans people by defining sexual orientation to include “having or being perceived as having . . . a self-image or identity not traditionally associated with one’s biological maleness or femaleness.”<sup>367</sup> Luckily, other states followed suit, and in the years that followed, states such as California, Georgia, Illinois, Iowa, Michigan, Missouri, and Vermont began introducing non-discrimination laws for trans people.<sup>368</sup>

States that have extended anti-discrimination protection to transsexuals have done so in a number of ways.<sup>369</sup> Some states have explicitly included *gender identity* as protected under anti-discrimination

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361. *Id.*

362. *See, e.g.*, N.Y. EXEC. LAW § 292(10), (11), (27) (consol. 2014); N.Y. EXEC. LAW § 296(1)(a)–(b), (2)(a) (banning discrimination based on sexual orientation in employment, housing, and public accommodations, but gender identity is not protected); 2009 Md. Laws 540, 552–53, 558–59 (prohibiting discrimination in employment, housing, and public accommodations on the basis of sexual orientation).

363. *See* CURRAH & MINTER, *supra* note 331, at 16.

364. *See, e.g.*, *Littleton v. Prange*, 9 S.W.3d 223, 230–31 (Tex. App. 1999).

365. CURRAH & MINTER, *supra* note 331, at 15.

366. Currah, *supra* note 269, at 21.

367. MINN. STAT. § 363A.03(44) (2013); *see also* CURRAH & MINTER, *supra* note 331, at 15.

368. CURRAH & MINTER, *supra* note 331, at 15.

369. *Id.* at 15–16; *see, e.g.*, COLO. REV. STAT. § 24-34-301(7) (2014); N.J. STAT. ANN. § 10:5-12 (West 2014).

statutes,<sup>370</sup> other states prohibit discrimination based on sexual orientation and include gender identity or expression within the definition of sexual orientation,<sup>371</sup> and a few states prohibit discrimination on the basis of sex, and include gender identity within the statutory definition of sex.<sup>372</sup>

New Jersey's Law Against Discrimination provides a good example of an ideal trans-inclusive anti-discrimination law.<sup>373</sup> In New Jersey, "[a]ll persons shall have the opportunity to obtain employment, and to obtain all the accommodations, advantages, facilities, and privileges of any place of public accommodation, publicly assisted housing accommodation, and other real property without discrimination because of . . . *gender identity or expression*."<sup>374</sup> Further, transgender youth are protected in school from harassment, intimidation or bullying based on gender identity.<sup>375</sup>

States, such as Colorado, which have extended anti-discrimination protection to trans people through an expanded statutory definition of sexual orientation or sex is an improvement, but there is still room for misinterpretation.<sup>376</sup> In order to prevent any ambiguity or misinterpretation, gender identity should be expressly placed alongside other protected categories.<sup>377</sup> California has recognized this distinction, as evidenced by the recent amendment to its existing anti-discrimination law, which previously defined gender identity within the protected class of sexual orientation.<sup>378</sup> The law was amended in 2012, distinctly making gender identity and gender expression their own protected classes.<sup>379</sup> This decision was based on confusion that existed among employers and landlords about whether trans

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370. *See, e.g.*, N.J. STAT. ANN. § 10:5-12.c (The New Jersey Law Against Discrimination prohibits discrimination based on sexual orientation, gender identity, or expression in employment, housing, public accommodation, credit and business contracts).

371. *See, e.g.*, COLO. REV. STAT. § 24-34-301(7).

372. *See, e.g.*, Assemb. B. 887, 2011 Leg., Reg. Sess. (Cal. 2011).

373. *See* N.J. STAT. ANN. § 10:5-4.

374. *Id.* (emphasis added).

375. N.J. STAT. ANN. § 18A:37-14.

376. *E.g.*, COLO. REV. STAT. § 24-34-301(7).

377. *See, e.g.*, N.J. STAT. ANN. § 10:5-4. *But see* COLO. REV. STAT. ANN. § 24-34-402(1)(a)–(b).

378. CAL. CIV. CODE § 51(b), (e)(5) (West 2012); *see also* Assemb. B. 887, 2011 Leg., Reg. Sess. (Cal. 2011).

379. CAL. CIV. CODE § 51(b), (e)(5); *see also* Assemb. B. 887, 2011 Leg., Reg. Sess. (Cal. 2011).

people were protected under the law.<sup>380</sup> The amendment removed any such confusion and strengthened the state's anti-discrimination law.<sup>381</sup>

Currently, sixteen states and the District of Columbia have laws prohibiting discrimination on the basis of gender identity or expression.<sup>382</sup> The extent of protection within these laws vary, encompassing all or a few of categories including employment, public accommodations, housing, credit, and education.<sup>383</sup> States should continue to strive to provide comprehensive protections for trans people in all aspects of life.

## B. *Healthcare*

The trans community faces unfortunate health care discrimination by being denied equal access to health care services.<sup>384</sup> Transsexuals face discrimination and hostility from medical professionals and insurance providers.<sup>385</sup> Most private insurance plans deny coverage for transition-related treatment, and many state Medicaid and Medicare programs exclude such coverage as well.<sup>386</sup>

States that participate in the Medicaid program receive grants from the federal government to assist state health care services in providing necessary medical services to qualified state residents.<sup>387</sup> Although each state sets its own qualifying guidelines, "[t]he Medicaid agency may not arbitrarily deny or reduce the amount, duration, or scope of a required service . . . to an otherwise eligible beneficiary solely because of the

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380. See Ari Rosenstein, *California Passes AB 887: The Gender Nondiscrimination Act*, CPEHR BLOG (Oct. 31, 2011), <http://www.smallbizhrblog.com/california-passes-ab-887-the-gender-nondiscrimination-act.html>; see also Cal. Assemb. B. 887.

381. Rosenstein, *supra* note 380; see also Cal. Assemb. B. 887.

382. *Non-Discrimination Laws That Include Gender Identity and Expression*, TRANSGENDER L. & POL'Y INST., <http://www.transgenderlaw.org/ndlaws/#jurisdictions> (last updated Feb. 1, 2012); see also NAT'L CTR. FOR LESBIAN RIGHTS, STATE BY STATE GUIDE TO LAWS THAT PROHIBIT DISCRIMINATION AGAINST TRANSGENDER PEOPLE, NAT'L RES. CTR. ON LGBT AGING 2–3 (2010), <http://www.lgbtagingcenter.org/resources/pdfs/StateLawsThatProhibitDiscriminationAgainstTransPeople.pdf>.

383. NAT'L CTR. FOR LESBIAN RIGHTS, *supra* note 382, at 3–4.

384. TLC HEALTH CARE ACCESS PROJECT, TRANSGENDER HEALTH AND THE LAW: IDENTIFYING AND FIGHTING HEALTH CARE DISCRIMINATION (2004), available at <http://www.thecentersd.org/pdf/health-advocacy/identifying-transgender.pdf>.

385. *Id.*

386. *Id.*; KELLAN BAKER & ANDREW CRAY, CTR. FOR AM. PROGRESS, WHY GENDER-IDENTITY NONDISCRIMINATION IN INSURANCE MAKES SENSE 1–2 (2013), <http://www.americanprogress.org/wp-content/uploads/2013/05/BakerNondiscriminationInsurance-6.pdf>.

387. 42 U.S.C. § 1396 (2012).

diagnosis, type of illness, or condition.”<sup>388</sup> Additionally, private insurance plans have even denied coverage to trans people for medical needs unrelated to gender transition.<sup>389</sup> For example, an insurance company might argue that a medical concern—such as liver damage—resulted from transition related hormone treatment.<sup>390</sup>

Many state Medicaid programs explicitly deny coverage for transition-related treatment; however, a few state courts have struck down such blanket exclusions.<sup>391</sup> States that explicitly deny coverage for trans people justify these denials on the belief that such services are not *medically necessary*, or that such treatment is cosmetic.<sup>392</sup> These justifications are unfounded because mental health professionals may deem gender transition treatment—which may include surgery, hormone therapy, or medication—to be medically necessary for a trans person.<sup>393</sup> Therefore, the states that participate in the Medicaid program that deny necessary medical services to qualified state residents violate federal law.<sup>394</sup>

For example, in Iowa, procedures for treating gender identity disorder are specifically excluded from Medicaid coverage.<sup>395</sup> In *Smith v. Rasmussen*,<sup>396</sup> the Eighth Circuit Court of Appeals upheld this blanket denial of transition related treatment under its Medicaid program.<sup>397</sup> The court found the blanket prohibition on funding for sex reassignment surgery to be reasonable and consistent with the Medicaid Act due to the “evolving nature of the diagnosis and treatment of gender identity disorder and the disagreement regarding the efficacy of sex reassignment surgery.”<sup>398</sup>

Fortunately, there are states that have struck down total trans-related treatment exclusions from coverage.<sup>399</sup> In *Doe v. Department of Public Welfare*,<sup>400</sup> the Supreme Court of Minnesota held that the “total exclusion of transsexual surgery from eligibility for [medical assistance payments was] . .

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388. 42 C.F.R. § 440.230(c) (2012).

389. See BAKER & CRAY, *supra* note 386, at 2; TLC HEALTH CARE ACCESS PROJECT, *supra* note 384.

390. TLC HEALTH CARE ACCESS PROJECT, *supra* note 384.

391. BAKER & CRAY, *supra* note 386, at 1–2; see also, e.g., Doe v. Dep’t of Pub. Welfare, 257 N.W.2d 816, 820 (Minn. 1977) (“[T]otal exclusion of transsexual surgery from eligibility for M.A. benefits . . . is void.”).

392. BAKER & CRAY, *supra* note 386, at 2.

393. *Id.* at 2, 5.

394. See *id.* at 3.

395. IOWA ADMIN. CODE r. 441-78.1(4)(b)(2) (2014).

396. 249 F.3d 755 (8th Cir. 2001).

397. *Id.* at 761–62.

398. *Id.* at 761; see also Medicaid Act of 1965, Pub. L. No. 89-97, § 121, 79 Stat. 186, 343 (codified as amended at 26 U.S.C. § 3201 (2012)).

399. E.g., Doe v. Dep’t of Pub. Welfare, 257 N.W.2d 816, 820 (Minn. 1977).

400. 257 N.W.2d 816 (Minn. 1977).

. void.”<sup>401</sup> In reaching this decision, the court discussed transsexualism generally and found that in certain cases, “[t]he only medical procedure known to be successful in treating . . . transsexualism is the radical sex conversion surgical procedure.”<sup>402</sup> Therefore, a total exclusion of transsexual surgery from benefits under the medical assistance program is improper, and future determinations of the medical necessity of an applicant “must be considered individually, on a case-by-case basis.”<sup>403</sup>

Removing exclusions for transition-related treatment is critical in providing the trans community with equal access to health care.<sup>404</sup> “[C]ategorical exclusions are based on the false premise that the health care services that transgender people need are not medically necessary.”<sup>405</sup> In reality, there are unfortunate consequences for trans people who are denied necessary health care and treatment.<sup>406</sup> Lack of access to gender-transition medical care is linked with health consequences that include depression, anxiety, suicide, infections—such as HIV—and other health risks associated with seeking treatment on the black market.<sup>407</sup>

A few other states have made progress and are taking steps in the direction of achieving the goal of equal access to healthcare.<sup>408</sup> For example, in 2012, California became the first state to expressly “prohibit insurance discrimination against transgender people.”<sup>409</sup> The California Department of Insurance issued guidelines and regulations that ensure equal health care insurance coverage to the trans community.<sup>410</sup> Similarly, Colorado,<sup>411</sup> Oregon,<sup>412</sup> and Vermont<sup>413</sup> have all issued bulletins prohibiting insurance discrimination based on gender identity or expression.<sup>414</sup>

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401. *Id.* at 820.

402. *Id.* at 819.

403. *Id.* at 820.

404. *See* BAKER & CRAY, *supra* note 386, at 2.

405. *Id.* at 2.

406. *Id.* at 2.

407. Pooja S. Gehi & Gabriel Arkles, *Unraveling Injustice: Race and Class Impact of Medicaid Exclusions of Transition-Related Health Care for Transgender People*, SEXUALITY RES. & SOC. POL’Y: J. OF NSRC, Dec. 2007, at 7, 15. Access to gender transition treatments is critical for transgender people. Before Serafima began her transition treatments she experienced depression and attempted suicide on two occasions. *See supra* text accompanying notes 191–93.

408. BAKER & CRAY, *supra* note 386, at 3.

409. *Id.*

410. *See* CAL. HEALTH & SAFETY CODE § 1365.5(a)–(e) (West 2014).

411. DIV. OF INS., COLO. DEP’T OF REGULATORY AGENCIES, BULL. NO. B-4.49, INSURANCE UNFAIR PRACTICES ACT PROHIBITIONS ON DISCRIMINATION BASED UPON SEXUAL ORIENTATION (2013).

412. OR. INS. DIV., DEP’T OF CONSUMER & BUS. SERVS., BULL. INS 2012-1, APPLICATION OF SENATE BILL 2 (2007 LEGISLATIVE SESSION) TO GENDER IDENTITY ISSUES IN THE TRANSACTION AND REGULATION OF INSURANCE IN OREGON (2012).

Although a few states have struck down blanket exclusions that discriminate against trans people,<sup>415</sup> or have issued regulations against insurance discrimination based on gender,<sup>416</sup> the majority of the nation has a long way to go in providing transsexuals with equal access to the health care services they need.<sup>417</sup>

Private and public health insurance programs should not arbitrarily deny coverage to transsexuals for medically necessary treatment.<sup>418</sup> The remaining majority of the states should model the legislative decisions of states—such as California—by removing blanket exclusions of transition-related treatment and enacting regulations prohibiting insurance discrimination against trans people.<sup>419</sup>

### C. *Anti-Discrimination Laws and Protections at the Federal Level*

Although progress has been slower at the federal level, there have been some positive changes and protections in certain areas of the law that have been extended to reach the transgender community.<sup>420</sup> For example, in 2009 the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act was signed into federal law, expanding federal hate crime legislation to protect transgender people.<sup>421</sup>

Further, Title IX of the Education Amendments—which protects people from sex discrimination in education programs—has been extended to protect transgender students through a settlement agreement.<sup>422</sup> However, by far the most progress has been made in providing the trans community with much needed protection from employment discrimination.<sup>423</sup>

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413. DIV. OF INS., VT. DEP'T OF FIN. REGULATION, BULL. NO. 174, GUIDANCE REGARDING PROHIBITED DISCRIMINATION ON THE BASIS OF GENDER IDENTITY INCLUDING MEDICALLY NECESSARY GENDER DYSPHORIA SURGERY AND RELATED HEALTH CARE (2013).

414. BAKER & CRAY, *supra* note 386, at 3.

415. *E.g.*, J.D. v. Lackner, 145 Cal. Rptr. 570, 572 (Ct. App. 1978) (striking down Medi-Cal's blanket policy excluding coverage for transition-related treatment).

416. *E.g.*, CAL. HEALTH & SAFETY CODE § 1365.5 (West 2014).

417. *See* BAKER & CRAY, *supra* note 386, at 3.

418. *See, e.g.*, CAL. HEALTH & SAFETY CODE § 1365.5.

419. *E.g., id.*

420. *See, e.g.*, 18 U.S.C. § 249 (2012).

421. *Id.* § 249(a)(2).

422. 20 U.S.C. § 1681(a) (2012); *see also* Macy, No. 0120120821, 2012 WL 1435995, at \*6 n.6 (EEOC Apr. 20, 2012).

423. *See* Macy, 2012 WL 1435995, at \*11.

## 1. Employment—Title VII

Another major area of discrimination faced by the trans community is in employment.<sup>424</sup> Trans people face discrimination in various circumstances concerning employment.<sup>425</sup> A trans person may not be hired, may be fired if going through transition while employed, or may be fired if his or her transgender status is discovered.<sup>426</sup>

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of “race, color, religion, sex, or national origin.”<sup>427</sup> Originally, Title VII was interpreted to protect employees from sex discrimination and did not protect employment discrimination against trans employees.<sup>428</sup> However, in *Price Waterhouse v. Hopkins*,<sup>429</sup> the “Supreme Court [of the United States] concluded that gender stereotyping is sex discrimination under Title VII.”<sup>430</sup> The Court held that, under Title VII, an employer may not discriminate against employees based on gender stereotypes, stating “we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group.”<sup>431</sup>

The *Price Waterhouse* decision:

[U]nlock[s] the shackles that tether personality, mannerisms, preferences, and tastes to a particular biological container. After *Price Waterhouse*, because a body is branded *female* does not mean that *she* performs as the *charm school* graduate, “walk[s] . . . femininely, talk[s] . . . femininely, dress[es] . . . femininely,” . . . [and] a body, branded *male* need not be *aggressive* or *macho*.<sup>432</sup>

Although *Price Waterhouse* did not involve a trans individual, this case illustrates the *catch 22* experienced by trans people in the workplace.<sup>433</sup> A trans person who is just trying to be his or her self faces discrimination

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424. Kylar W. Broadus, *The Evolution of Employment Discrimination Protections for Transgender People*, in TRANSGENER RIGHTS 93, 93 (Paisley Currah et al. eds., 2006).

425. *Id.*

426. *Id.*

427. 42 U.S.C. § 2000e-2(a)(1) (2012).

428. *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984).

429. 490 U.S. 228 (1989).

430. Amy D. Ronner, *Let’s Get the “Trans” and “Sex” Out of It and Free Us All*, 16 J. GENDER RACE & JUST. 859, 866 (2013); see also *Price Waterhouse*, 490 U.S. at 250–51.

431. *Price Waterhouse*, 490 U.S. at 251.

432. Ronner, *supra* note 430, at 874 (quoting *Price Waterhouse*, 490 U.S. at 235).

433. *Id.* at 890; see also *Price Waterhouse*, 490 U.S. at 235, 251.

both pre-transition, for failing to conform to gender stereotypes, and post-transition for being a *fraud*.<sup>434</sup>

Fortunately, after *Price Waterhouse*, more cases continued to favorably interpret Title VII and provide protection for trans people in the workplace.<sup>435</sup> In a recent ruling, the federal Equal Employment Opportunity Commission (“EEOC”)—a federal agency authorized to enforce federal laws that prohibit workplace discrimination—held that transgender people are protected under Title VII’s sex discrimination provisions.<sup>436</sup> Based on the rulings in federal court cases involving the interpretation of Title VII and transgender discrimination, the EEOC “conclude[d] that intentional discrimination against a transgender individual because that person is transgender is, by definition, discrimination *based on . . . sex*, and such discrimination therefore violates Title VII.”<sup>437</sup>

Although these precedential rulings interpreting Title VII to provide protection for transgender people in the workplace are favorable, ultimately specific federal legislation embodying protection for transgender people is the most impactful.<sup>438</sup> Luckily, the Employment Non-Discrimination Act (“ENDA”), which was introduced in Congress in June of 2009, was finally passed by the Senate on November 7, 2013.<sup>439</sup> This “major civil rights legislation . . . protects lesbian, gay, bisexual, and for the first time ever, transgender Americans from discrimination in the workplace.”<sup>440</sup>

ENDA extends federal employment discrimination protection currently provided under Title VII to sexual orientation and gender identity.<sup>441</sup> The passage of this Act is a huge achievement and provides trans people equal rights and protection against discrimination in the workplace.<sup>442</sup>

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434. See Ronner, *supra* note 430 at 890–92.

435. *E.g.*, Smith v. City of Salem, 378 F.3d 566, 572–75 (6th Cir. 2004).

436. Macy, No. 0120120821, 2012 WL 1435995, at \*11 (EEOC Apr. 20, 2012).

437. *Id.*; see also Glenn v. Brumby, 663 F.3d 1312, 1320 (11th Cir. 2011) (holding that Title VII prohibits gender stereotyping); Smith, 378 F.3d at 574–75 (holding that discrimination based on sex encompasses gender discrimination); Schwenk v. Hartford, 204 F.3d 1187, 1202 (9th Cir. 2000) (holding that the term *sex* includes both the biological differences between males and females as well as gender).

438. See Smith, 378 F.3d at 572–74; Macy, 2012 WL 1435995, at \*11; Lauren Fox, *Senate Passes ENDA in Bipartisan Vote*, U.S. NEWS & WORLD REPORT (Nov. 7, 2013, 3:05 PM), <http://www.usnews.com/news/articles/2013/11/07/senate-passes-enda-in-bipartisan-vote>.

439. Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. (as passed by Senate, Nov. 7, 2013); see also Fox, *supra* note 438.

440. Fox, *supra* note 438.

441. S. 815 § 4(a)(1).

442. See *id.*; Fox, *supra* note 438.

## IX. MARRIAGE

The recognition or authorization of a trans person's marriage depends on three primary factors: (1) how that state defines the legal sex of trans individuals; (2) what the sex of the trans person's partner is; and (3) what the state's law is on same-sex marriage.<sup>443</sup> The marriage of a trans person is further affected by the individual's status as either post-transition or pre-transition.<sup>444</sup>

In the minority of states that have legalized same-sex marriage, a trans individual can marry—regardless of that state's determination of his or her *legal sex*—because both same-sex and opposite-sex couples are afforded the right to marry.<sup>445</sup> Whether a trans person is pre-transition or post-transition prior to entering into the marriage would have no effect, since the legal sex of the individual is not a determining factor in the legality of the marriage.<sup>446</sup> Further, a marriage would not be invalidated if a trans individual went through a transition and had a legal sex change after the marriage.<sup>447</sup> In 2003, Massachusetts became the first state to legalize same-sex marriage, effectively creating marriage equality for all couples, irrespective of sex.<sup>448</sup> To date, same-sex marriage is legal in thirty-six states and the District of Columbia.<sup>449</sup> While these states have recognized the importance of marriage equality for *all-sex* couples, the minority of the United States continues to prohibit same-sex marriage.<sup>450</sup>

The trans community faces great obstacles in the ability to marry in states that prohibit same-sex marriage.<sup>451</sup> A trans person living in a state that

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443. Elizabeth E. Monnin-Browder, *Relationship Recognition and Protections*, in *TRANSGENDER FAMILY LAW: A GUIDE TO EFFECTIVE ADVOCACY* 36, 36 (Jennifer L. Levi & Elizabeth E. Monnin-Browder eds., 2012).

444. *Id.*

445. *See id.* at 37–38; *Same-Sex Marriage Fast Facts*, CNN, <http://www.cnn.com/2013/05/28/us/same-sex-marriage-fast-facts/index.html> (last updated Aug. 24, 2015).

446. Monnin-Browder, *supra* note 443, at 37–38.

447. *Id.*

448. *Goodridge v. Dep't of Pub. Health*, 798 N.E. 2d 941, 948, 961 (Mass. 2003); *Same-Sex Marriage Fast Facts*, *supra* note 445.

449. *Same-Sex Marriage Fast Facts*, *supra* note 445. Same-sex marriage is legal in: Alabama, Alaska, Arizona, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Maine, Maryland, Massachusetts, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin and Wyoming. *Id.*

450. *See id.*

451. *See In re Estate of Gardiner*, 42 P.3d 120, 136 (Kan. 2002); *In re Application for Marriage License for Nash*, Nos. 2002-T-0149, 2002-T-0179, 2003 WL 23097095, at \*1, \*9 (Ohio Ct. App. Dec. 31, 2003).

prohibits same-sex marriage may face difficulty prior to entering into a marriage or, alternatively, his or her spouse or a third party may challenge the validity of an existing marriage.<sup>452</sup> Additionally, Congress' enactment of the Defense of Marriage Act ("DOMA") creates issues for same-sex couples who are legally married.<sup>453</sup>

#### A. *DOMA's Effect at the State Level*

Due to Congress' enactment of DOMA, each state, at its option, can choose to reject a legalized same-sex marriage from another state.<sup>454</sup> DOMA states: "No [s]tate . . . of the United States . . . shall be required to give effect to any public act, record, or judicial proceeding of any other [s]tate . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other [s]tate . . ." <sup>455</sup> Essentially, section 2 of DOMA grants the states an exception to the Full Faith and Credit Clause by allowing a state to not recognize the legal same-sex marriage granted to a couple in another state.<sup>456</sup>

To illustrate the impact of section 2, attorneys for the National Center for Lesbian Rights ("NCLR"), an advocacy organization for the LGBT community, has noted that "within the space of a day's travel across state lines, the same two individuals may be legally married in one state, demoted to domestic partners in another, and treated as complete legal strangers in a third."<sup>457</sup>

Section 2 of DOMA will not affect a post-transition marriage between two individuals if they were determined to be opposite-sex spouses at the time of the marriage.<sup>458</sup> DOMA only relates to interstate recognition of marriages between same-sex couples.<sup>459</sup> Thus, once again, the state's determination of a trans person's legal sex for the purpose of marriage comes into effect in determining whether the couple is a same-sex or opposite-sex

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452. See *In re Estate of Gardiner*, 42 P.3d at 121–22, 136; *In re Application for a Marriage License for Nash*, 2003 WL 23097095, at \*1, \*9.

453. 1 U.S.C. § 7 (2012), *declared unconstitutional by United States v. Windsor*, No. 12-307 (U.S. June 26, 2013); *see also* 28 U.S.C. § 1738C (2012).

454. 28 U.S.C. § 1738C.

455. *Id.*

456. See U.S. CONST. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."); Defense of Marriage Act of 1996 § 2, 28 U.S.C. § 1738C (2012).

457. Shannon Minter & Christopher Stoll, *Legal Developments in Marriage Law for Same-Sex Couples*, GEN. PRAC. SOLO & SMALL FIRM DIV., Jan.–Feb. 2010, at 30, 31–32; *see also* Defense of Marriage Act of 1996 § 2.

458. See Defense of Marriage Act of 1996 § 2; Monnin-Browder, *supra* note 443, at 39–40.

459. 28 U.S.C. § 1738C.

couple.<sup>460</sup> If determined to be a same-sex couple, section 2 of DOMA will affect them by giving other states the power not to recognize the individuals as a legally married same-sex couple.<sup>461</sup> Essentially, states that prohibit same-sex marriage do not have to give full faith and credit to a legally married same-sex couple from another state.<sup>462</sup>

#### B. *DOMA's Effect at the Federal Level*

Section 3 of DOMA defined marriage for federal purposes as: “[A] legal union between one man and one woman as husband and wife, and the word *spouse* refers only to a person of the opposite sex who is a husband or a wife.”<sup>463</sup> This definition of marriage prevents legal same-sex marriages from being recognized at a federal level, irrespective of the validity of that marriage at the state level.<sup>464</sup>

In *United States v. Windsor*,<sup>465</sup> the Supreme Court was presented with the question of “[w]hether [s]ection 3 of DOMA violates the Fifth Amendment’s guarantee of equal protection of the laws as applied to persons of the same sex who are legally married under the laws of their [s]tate.”<sup>466</sup> In this case, Edie Windsor and Thea Spyer had a legally recognized marriage in the state of New York.<sup>467</sup> Upon Spyer’s death, Windsor as sole beneficiary of Spyer’s estate was required to pay \$365,053 in federal estate tax because “their marriage was not respected by the federal government.”<sup>468</sup>

The Supreme Court found Section 3 of DOMA unconstitutional “as a deprivation of the [equal] liberty of . . . person[s] [that is] protected by the Fifth Amendment.”<sup>469</sup> Under Section 3 of DOMA, the federal government was infringing on the authority of states to define and regulate marriage

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460. Monnin-Browder *supra* note 443, at 36.

461. 28 U.S.C. § 1738C.

462. *Id.*

463. Defense of Marriage Act of 1996 § 3, 1 U.S.C. § 7, *declared unconstitutional by* *United States v. Windsor*, No. 12-307 (U.S. June 26, 2013).

464. *See id.*

465. No. 12-307, slip op. at 1 (U.S. June 26, 2013), *cert. denied*, 133 S. Ct. 2884 (2013).

466. Petition for Writ of Certiorari at I, *United States v. Windsor*, No. 12-307, slip op. (U.S. June 26, 2013), 2013 WL 3991414; *see also* Defense of Marriage Act of 1996 § 3.

467. *Windsor*, No. 12-307, slip op. at 2–3.

468. *Marriage at the Supreme Court in 2013*, FREEDOM TO MARRY, <http://www.freedomtomarry.org/landscape/entry/c/supreme-court> (last visited Aug. 25, 2015); *see also Windsor*, No. 12-307, slip op. at 3.

469. *Windsor*, No. 12-307, slip op. at 25; *see also* Defense of Marriage Act of 1996 § 3.

within their laws.<sup>470</sup> The federal government’s restrictions of benefits to same-sex couples was “directed to a class of persons that the laws of New York, and . . . [eleven] other [s]tates, have sought to protect.”<sup>471</sup> This decision had the effect of providing married same-sex couples—living in states where same-sex marriage was legal—over 1100 federal benefits that were previously denied to them through DOMA.<sup>472</sup>

In a similar victory, California’s Proposition 8, which amended the California Constitution to prohibit same-sex marriage,<sup>473</sup> was ruled unconstitutional by a district court and the Court of Appeals for the Ninth Circuit.<sup>474</sup> The Supreme Court ruled that the proponents of Proposition 8 did not have standing to appeal the decision and sent the case back to the appeals court with instructions to dismiss the appeal.<sup>475</sup> Although the Supreme Court allowed the lower court ruling that invalidated Proposition 8 to stand, its ruling was narrow, having the effect of striking down California’s Proposition 8, but dodging the substantive issues of the constitutionality of same-sex marriage.<sup>476</sup>

Therefore, the Supreme Court has yet to reach a substantive conclusion about the constitutionality of prohibitions on same-sex marriage.<sup>477</sup> Instead of sending the case back to the court of appeals, the Supreme Court should have used this appeal as an opportunity to rule on the constitutionality of prohibitions on same-sex marriage. Same-sex marriage prohibitions directly conflict with the legal conclusions and principles set forth in *Loving v. Virginia*.<sup>478</sup> The Supreme Court struck down the Virginia law that prohibited marriages between people of different racial classes.<sup>479</sup> The Court held the law unconstitutional, as violative of the Fourteenth Amendment, stating that “[u]nder our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State.”<sup>480</sup> This decision was monumental for the civil rights

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470. Defense of Marriage Act of 1996 § 3; *see also* Windsor, No 12-307, slip op. at 18–19.

471. *Windsor*, No 12-307, slip op. at 16.

472. *Windsor*, No 12-307, slip op. at 23, 25; *Marriage at the Supreme Court in 2013*, *supra* note 468; *see also* 28 U.S.C. § 1738C (2012).

473. CAL. CONST. art. I, § 7.5.

474. *Perry v. Brown*, 671 F.3d 1052, 1096 (9th Cir. 2012) (holding Proposition 8 unconstitutional).

475. *Hollingsworth v. Perry*, No. 12-144, slip op. at 17 (U.S. June 26, 2013).

476. *See id.*

477. *See id.*

478. 388 U.S. 1, 12 (1967); Julian Bond, *Why Prop 8 Must Fall: Civil Rights*, USA TODAY (June 10, 2011, 2:07 PM), [http://usatoday30.usatoday.com/news/opinion/forum/2011-06-10-In-wake-of-Loving-decision-Prop-8-cannot-stand\\_n.htm](http://usatoday30.usatoday.com/news/opinion/forum/2011-06-10-In-wake-of-Loving-decision-Prop-8-cannot-stand_n.htm).

479. *Loving*, 388 U.S. at 11–12.

480. *Id.* at 12.

movement, and the Lovings' struggle to achieve marriage equality in 1967, is deeply connected to the fight for civil rights experienced by same-sex couples today.<sup>481</sup> Just like the Supreme Court ruled in *Loving*, that "[t]he freedom to marry. . . a person of another race resides with the individual," so too should the Court conclude today, that the freedom to marry a person of the same-sex resides with the individual, and cannot be infringed by the State.<sup>482</sup>

As Mildred Loving reflected on the impact of her case, she stated:

I am proud that Richard's and my name is on a court case that can help reinforce the love, the commitment, the fairness, and the family that so many people, black or white, young or old, gay or straight seek in life. I support the freedom to marry for all.

. . . .

That's what Loving, and loving, are all about.<sup>483</sup>

### C. *States That Ban Same-Sex Marriage*

In states that limit the right to marry to heterosexual couples, the states' identification of a trans individual's legal sex is the key-determining factor in a trans' ability to marry.<sup>484</sup> That determination leads into the question of whether the state perceives the proposed marriage to be between same-sex or different-sex individuals.<sup>485</sup> As discussed above, in certain states a trans person can legally change his or her sex.<sup>486</sup> Accordingly, what may have been perceived as a same-sex couple pre-transition, would be an opposite-sex couple post-transition and legal sex change.<sup>487</sup> Nevertheless, there are states that do not recognize a trans individual's changed sex for the purposes of marriage.<sup>488</sup>

As discussed above, states vary in their determination of legal sex and the ability of trans people to change their legal sex to reflect their gender identity.<sup>489</sup> States are further divided on their recognition of a trans person's legal sex specifically for the purposes of marriage.<sup>490</sup>

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481. *Id.*; Bond, *supra* note 478.

482. *Loving*, 388 U.S. at 12.

483. Bond, *supra* note 478.

484. *See* Flynn, *supra* note 262, at 33.

485. Monnin-Browder, *supra* note 443, at 40.

486. *See supra* Part V.A–D.

487. *See* Monnin-Browder, *supra* note 443, at 40.

488. *See, e.g., In re* Application for Marriage License for Nash, Nos. 2002-T-0149, 2002-T-0179, 2003 WL 23097095, at \*9 (Ohio Ct. App. Dec. 31, 2003).

489. *See supra* text accompanying notes 262–68.

490. *See* Flynn, *supra* note 262, at 33–34.

There are two opposing standards utilized by courts in determining the validity of post-transition marriages: (1) the state finds sex as immutable and fixed at birth, refusing to acknowledge sex-reassignment surgery, psychological factors of gender identity, or birth certificate amendments for the purpose of marriage;<sup>491</sup> or (2) the state acknowledges a change to a birth certificate and recognizes that legal sex change for the purpose of marriage.<sup>492</sup>

For the purpose of marriage,

[d]ifferent jurisdictions . . . can and have come to different conclusions about how to determine legal sex: most take the essentialist approach that sex is immutable and fixed at birth, while a small minority recognizes the complexities of sex and looks to a person's gender identity as the primary determinant of legal sex.<sup>493</sup>

#### 1. Biological Approach—Sex Is Immutable and Fixed at Birth

The issue of legal sex for the purpose of ascertaining the validity of a transsexual marriage was first analyzed in *Corbett v. Corbett*,<sup>494</sup> a 1970 British case.<sup>495</sup> The issue in this case was a determination of the *true sex* of April Ashley, a post-operative MTF transsexual, for the purpose of concluding whether the marriage she entered into with Arthur Corbett was valid.<sup>496</sup> In assessing the legal sex of April, the court analyzed chromosomal factors, gonadal factors, genital factors, and psychological factors.<sup>497</sup> However, the court failed to discuss the psychological factors for assessing April's legal sex, and stated that the essential criteria must be biological.<sup>498</sup> The court further stated that the "biological sexual constitution of an individual is fixed at birth—at the latest—and cannot be changed . . . by medical or surgical means."<sup>499</sup> Therefore, the court concluded that the marriage between April and Arthur was void, since April "is not a woman for the purposes of marriage."<sup>500</sup> The narrow biological test and principles set forth in *Corbett* have been followed by courts that have concluded that

491. See, e.g., *Littleton v. Prange*, 9 S.W.3d 223, 231 (Tex. App. 1999).

492. E.g., *M.T. v. J.T.*, 355 A.2d 204, 209 (N.J. Super. Ct. App. Div. 1976).

493. Flynn, *supra* note 262, at 33.

494. [1971] P. 83 (Eng.).

495. *Id.* at 83.

496. *Id.* at 84–85.

497. *Id.* at 100.

498. *Id.* at 106.

499. *Corbett*, P. 83 at 104.

500. *Id.* at 106.

sex is immutable, unchanged by psychological identity, SRS, or amended birth certificates.<sup>501</sup>

Courts that have followed the conclusions of *Corbett*, disregarding the critical psychological and social factors in determining a person's sex, have both denied marriage licenses and invalidated existing marriages.<sup>502</sup> As previously mentioned, the majority of the states allow sex designation amendments to an individual's birth certificate upon proof of the transsexual's completed SRS.<sup>503</sup> Surprisingly, even an amended birth certificate, reflecting the transsexual's true, self-identified sex, does not guarantee the security of a transsexual's marriage, because courts have refused to recognize a transsexual's post-transition sex for the purposes of marriage, notwithstanding the existence of an amended birth certificate.<sup>504</sup>

In *In re Application for Marriage License for Nash*,<sup>505</sup> an Ohio appellate court denied a marriage license to a post-operative FTM transsexual with a female.<sup>506</sup> Nash, the FTM transsexual, successfully amended his out-of-state birth certificate to reflect a change in sex from female to male after undergoing SRS.<sup>507</sup> However, the Ohio court refused to give full faith and credit to his amended birth certificate, and denied the marriage license, stating that Ohio "has a clear public policy that authorizes and recognizes marriages only between members of the opposite sex."<sup>508</sup> The court would not interpret *male* in the state's marriage statute, to include a FTM post-operative transsexual.<sup>509</sup>

Moreover, the complex issues and varied interpretations of legal sex for the purpose of marriage has had the effect of *erasing* marriages through court invalidation, and for all legal purposes, it is as if *the marriage never existed*.<sup>510</sup> The invalidation of a marriage can have unfortunate consequences on the right to claim an inheritance when a spouse dies intestate.<sup>511</sup> The Supreme Court of Kansas invalidated the marriage of J'Noel, a post-transition MTF transsexual, to a male, after the husband had died intestate.<sup>512</sup>

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501. See *Littleton v. Prange*, 9 S.W.3d 223, 227, 230–31 (Tex. App. 1999); *Corbett*, P. 83 at 106.

502. See *Littleton*, 9 S.W.3d at 231; *Corbett*, P.83 at 106.

503. E.g., COLO. REV. STAT. § 25-2-115(4) (2014).

504. E.g., *In re Application for Marriage License for Nash*, Nos. 2002-T-0149, 2002-T-0179, 2003 WL 23097095, at \*1, 4–5 (Ohio Ct. App. Dec. 31, 2003).

505. Nos. 2002-T-0149, 2002-T-0179, 2003 WL 23097095 (Ohio Ct. App. Dec. 31, 2003).

506. *Id.* at \*9.

507. *Id.* at \*1.

508. *Id.* at \*5.

509. *Id.* at \*6.

510. Flynn, *supra* note 262, at 39–40.

511. See *In re Estate of Gardiner*, 42 P.3d 120, 123 (Kan. 2002).

512. *Id.* at 123, 137.

After his father died, the son challenged the validity of the marriage between his father and J'Noel because J'Noel was born a man.<sup>513</sup>

Like in *In re Application for Marriage License for Nash*, the Supreme Court of Kansas refused to give full faith and credit to J'Noel's amended Wisconsin birth certificate for the purpose of upholding the marriage to her husband.<sup>514</sup> However, in J'Noel's case, it actually had the effect of invalidating the marriage between J'Noel and her deceased husband.<sup>515</sup>

The court concluded that J'Noel was not a woman within the meaning of Kansas's marriage statute, and therefore affirmed the lower court's ruling that their marriage was void.<sup>516</sup> Consequently, the marriage between J'Noel and her deceased husband was erased; the son was named the sole heir, and inherited everything.<sup>517</sup>

Like the MTF transsexual widow in *In re Estate of Gardiner*,<sup>518</sup> an MTF transsexual widow in Texas also became a legal stranger to her deceased husband through court invalidation of her marriage.<sup>519</sup> In *Littleton v. Prange*,<sup>520</sup> the court granted a motion for summary judgment, holding that Christie, an MTF post-transition transsexual, was legally a male and therefore the marriage between Christie and another male was invalid.<sup>521</sup> Due to the court invalidating the marriage, Christie was unable to bring a claim under the wrongful death and survival statute because she was no longer considered the *surviving spouse*.<sup>522</sup> The court held that Christie is a male even though she had successfully amended the name and sex on her birth certificate.<sup>523</sup> "The trial court . . . granted the petition to amend the birth certificate" due to an affidavit presented by an "expert stating that Christie is a female."<sup>524</sup> As the dissent in the case correctly questioned:

How then can the majority conclude that Christie is a male? If Christie's evidence that she was female was satisfactory enough for the trial court to issue an order to amend her original birth certificate to change both her name and her gender, why is it not

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513. *Id.* at 123.

514. *Id.*; *In re Application for Marriage License for Nash*, 2003 WL 23097095, at \*9.

515. *See In re Estate of Gardiner*, 42 P.3d at 136–37.

516. *Id.*

517. *Id.* at 123, 137.

518. 42 P.3d 120 (Kan. 2002).

519. *Littleton v. Prange*, 9 S.W.3d 223, 231 (Tex. App. 1999).

520. 9 S.W.3d 223 (Tex. App. 1999).

521. *Id.* at 225, 230–31.

522. *Id.*

523. *Id.* at 231.

524. *Id.*

satisfactory enough to raise a genuine question of material fact on a motion for summary judgment?<sup>525</sup>

## 2. Biological and Psychological Approach

There is another line of cases that have moved away from the rigid biological test set forth in *Corbett*, applying an approach to defining legal sex for the purpose of marriage that incorporates the psychological, emotional, and social sense of an individual's gender identity.<sup>526</sup> These courts recognize the ability to change one's sex and recognize that change of sex in upholding post-transition marriages.<sup>527</sup>

In *M.T.*, the Superior Court of New Jersey recognized the role that gender identity plays in determining sex.<sup>528</sup> The court upheld the marriage of a post-operative MTF transsexual by ruling that she is legally female.<sup>529</sup> In this case, the court rejects the notion that "sex is somehow irrevocably cast at the moment of birth" and found that the determination involves an analysis of several criteria.<sup>530</sup> Notably, the court found that "a person's sex or sexuality embraces an individual's gender, . . . one's self image, the deep psychological or emotional sense of sexual identity and character."<sup>531</sup>

Critical in the court's determination was finding that there had been a *harmonization* between the trans-person's gender identity and physiology through SRS.<sup>532</sup> The court stated that she "has become physically and psychologically unified and fully capable of sexual activity consistent with her reconciled sexual attributes of gender and anatomy. Consequently, plaintiff should be considered a member of the female sex for marital purposes."<sup>533</sup>

In a more recent case, the United States District Court for the District of Minnesota recognized the many components in determining an individual's sex and upheld a post-transition marriage.<sup>534</sup> Prior to

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525. *Littleton*, 9 S.W.3d at 233 (Lopez, J., dissenting).

526. *M.T. v. J.T.*, 355 A.2d 204, 209 (N.J. Super Ct. App. Div. 1976). *But see Corbett v. Corbett*, [1971] P. 83 at 106 (Eng.).

527. *E.g.*, *M.T.*, 355 A.2d at 211.

528. *Id.* at 209.

529. *See id.* at 211.

530. *Id.* at 209.

531. *Id.*

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

533. *Id.* Similarly, a trial court in California upheld a post-transition marriage, recognizing the transsexual as their post-operative sex. Flynn, *supra* note 262, at 36. The California court based its ruling on a California statute which permits an individual to receive a new birth certificate after having undergone SRS to reflect his or her new sex. *Id.*

534. *See Radtke v. Miscellaneous Drivers & Helpers Union Local #638 Health, Welfare, Eye & Dental Fund*, 867 F. Supp. 2d 1023, 1036 (D. Minn. 2012).

Minnesota's legalization of same-sex marriage in August 2013, the sex of an individual—for purposes of marriage—was based on his or her sex at the time of marriage, not birth.<sup>535</sup> Minnesota also permits birth certificate amendments for people who have undergone SRS<sup>536</sup> and acknowledges that “[t]here is no basis to conclude that Minnesota recognizes Plaintiff as female for some purposes—birth records and driver’s licenses, but not for others—marriage certificates.”<sup>537</sup>

The courts in New Jersey, California, and Minnesota recognize that *sex* can no longer be defined narrowly and “gender identity plays a central role in determining sex.”<sup>538</sup> While these decisions are favorable, and certainly an improvement from the rigid approach taken in *Corbett*, *Nash*, and *Gardiner*, the decisions were very focused on what the New Jersey court considered *harmony* between the *transsexual’s gender and genitalia*.<sup>539</sup> The approach to defining sex for the purposes of marriage in states that prohibit same-sex marriage has certainly expanded, but is still too focused on sexual anatomy and biology as definitive of a person’s gender.<sup>540</sup>

This issue has been addressed in jurisdictions outside of the United States, and the approach taken by an Australian court is particularly noteworthy.<sup>541</sup> In *In re Kevin*, (*Validity of Marriage of Transsexual*),<sup>542</sup> a FTM transsexual and his wife sought a declaration as to the validity of their marriage.<sup>543</sup> Prior to their marriage, Kevin, a FTM transsexual, had undergone hormone treatments, a total hysterectomy and mastectomy, but did not undergo a phalloplasty and still had a vagina.<sup>544</sup> The key difference in this case from the New Jersey, California, and Minnesota cases, is that Kevin had not undergone complete sex-reassignment surgery, and therefore, in the words of the New Jersey court, there was not complete harmony between gender and genitals.<sup>545</sup> However, the Australian court was not

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535. *Id.* at 1032.

536. *See* MINN. STAT. § 144.218(4) (2013).

537. *Radtke*, 867 F. Supp. 2d at 1034.

538. *Id.* at 1032; *M.T.*, 355 A.2d at 211; Flynn, *supra* note 262, at 35–36.

539. *Radtke*, 867 F. Supp. 2d at 1032; *M.T.*, 355 A.2d at 211; Flynn, *supra* note 262, at 35–36; *see also In re Estate of Gardiner*, 42 P.3d 120, 136 (Kan. 2002); *In re Application for Marriage License for Nash*, Nos. 2002-T-0149, 2002-T-0179, 2003 WL 23097095, at \*9 (Ohio Ct. App. Dec. 31, 2003); *Corbett v. Corbett*, [1971] p.83 at 104 (Eng.).

540. *See M.T.*, 355 A.2d at 209.

541. *See In re Kevin (Validity of Marriage of Transsexual)*, [2001] FamCA 1074 ¶ 1 (Austl.).

542. [2001] FamCA 1074 (Austl.).

543. *Id.* ¶ 1.

544. *See id.* ¶ 30.

545. *Id.* ¶¶ 30, 198; *Radtke v. Miscellaneous Drivers & Helpers Union Local #638 Health, Welfare, Eye & Dental Fund*, 867 F. Supp. 2d 1023, 1032 (D. Minn. 2012); *M.T.*, 355 A.2d at 211; *see also* Flynn, *supra* note 262, at 35–36.

concerned with finding this *harmony*, and concluded that Kevin was legally male for the purposes of marriage.<sup>546</sup> The court's determination was based on expert testimony by psychiatrists who stated that Kevin's "brain sex or mental sex is male."<sup>547</sup> The court expressly rejected the approach taken in *Corbett*, finding that sex cannot be determined based on any single factor "such as chromosomes or genital sex," and stated that to determine a person's sex for the purpose of marriage:

[T]he relevant matters include . . . the person's biological and physical characteristics at birth . . . the person's life experiences, including the sex in which he or she is brought up and the person's attitude to it; the person's self-perception as a man or woman; the extent to which the person has functioned in society as a man or a woman; any hormonal, surgical or other medical sex reassignment treatments the person has undergone . . . and the person's biological, psychological and physical characteristics at the time of the marriage, including—if they can be identified—any biological features of the person's brain that are associated with a particular sex.<sup>548</sup>

#### D. *Issues That Arise During Divorce*

Even if a transsexual has successfully entered into a valid marriage recognized as a legal opposite sex marriage, issues may still arise when one of the spouses file for divorce.<sup>549</sup> What should generally be a straightforward divorce proceeding can turn into a complex judicial determination of the transsexual's legal sex and potential invalidation of the marriage.<sup>550</sup> This is the battle that Michael Kantaras—an FTM transsexual—faced when he filed a petition for dissolution of marriage, and his wife counter petitioned alleging that their marriage was void because Michael is female and Florida prohibits same-sex marriage.<sup>551</sup> The court agreed, holding that Michael is

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546. *In re Kevin (Validity of Marriage of Transsexual)*, [2001] FamCA 1074 ¶ 330; see also *M.T.*, 355 A.2d at 211.

547. *In re Kevin (Validity of Marriage of Transsexual)*, [2001] FamCA 1074 ¶ 244; Flynn, *supra* note 262, at 35.

548. *In re Kevin (Validity of Marriage of Transsexual)*, [2001] FamCA 1074 ¶¶ 328–330; see also *Corbett v. Corbett*, [1971] P. 83 at 104 (Eng.).

549. See *Kantaras v. Kantaras*, 884 So. 2d 155, 156 (Fla. 2d Dist. Ct. App. 2004).

550. *E.g., id.* at 156–57.

551. *Id.* at 156.

female and invalidated the marriage.<sup>552</sup> Due to the invalidation of their marriage, Michael faced an ongoing battle of establishing parental rights.<sup>553</sup>

More recently, an Arizona judge denied a divorce for Thomas Beatie—an FTM transsexual—based on the conclusion that he was a female at the time he married a woman, and due to Arizona’s prohibition on same-sex marriage, the marriage was invalid.<sup>554</sup> Beatie is referred to as the *Pregnant Man* because he retained female reproductive organs and gave birth to three children during his marriage.<sup>555</sup> He plans to appeal the divorce denial because “he wants the three children to whom he gave birth to know their parents’ marriage was legitimate” fearing that his children will “see that [the] court said that’s not your daddy.”<sup>556</sup>

It is clear that the sex of an individual is based on many components, which cannot be determined by biology alone.<sup>557</sup> It seems inappropriate, and rather counter-intuitive, to narrowly define sex of a person as fixed at the time of his or her birth, when the individual personally and psychologically identifies differently, has undergone SRS or transition-related treatments, or even has had his or her certificate changed to reflect his or her new sex.<sup>558</sup> Moreover, states that prohibit same-sex marriage, but refuse to acknowledge the sex change of a transsexual, ultimately permit precisely what the same-sex marriage ban was enacted to prevent.<sup>559</sup>

When the ban on same-sex marriage meets the insistence that legal sex may not be changed, the result is as fitting as it is ironic: [I]n these jurisdictions, transgender gay and lesbian couples *can* . . . marry. Assume a transsexual woman lives in a state where birth anatomy—here, a penis—forever defines legal sex. As a legal male, she is free to marry another woman, even though she, her partner, and society at large view them as lesbian.<sup>560</sup>

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552. *Id.* at 161.

553. *See id.*

554. Associated Press, *Arizona Judge Rejects Divorce for Transgender Pregnant Hawaii Man, Saying He Has No Jurisdiction in Same-Sex Marriage*, N.Y. DAILY NEWS (Mar. 29, 2013, 2:41 PM), <http://www.nydailynews.com/news/national/judge-rejects-divorce-transgender-pregnant-man-article-1.1302675>.

555. *Id.*; Jacques Billeaud, *Transgender Man Plans to Keep Seeking Divorce*, CHARLESTON GAZETTE, Apr. 3, 2013, at A8.

556. Billeaud, *supra* note 555.

557. *See supra* Part V.

558. *See Littleton v. Prange*, 9 S.W.3d 223, 231 (Tex. App. 1999).

559. Flynn, *supra* note 262, at 34.

560. *Id.* For example, Serafima is a MTF transsexual who is in a relationship with another woman and considers herself a lesbian. *See supra* Part V. The jurisdiction that prohibits same-sex marriage and follows the strict biological approach to defining sex for the purposes of marriage would permit them to marry, because Serafima was born a male—even though in reality they are a same-sex couple. *See Flynn, supra* note 262, at 34; *supra* Part V.

The complex issues of determining the validity of a post-transition marriage would be greatly simplified through same-sex marriage equality by removing any and all sex pre-qualifications for couples that want to marry.<sup>561</sup> However, the states that still prohibit same-sex marriage should follow the approach taken by the Family Court of Australia, which weighed more heavily psychological and personal perceptions of an individual's gender identity in the determination of legal sex for the purposes of marriage.<sup>562</sup>

#### X. THE RIGHT TO RAISE CHILDREN/PARENTAL RIGHTS

As seen thus far, the struggles faced by the trans community concern some of the most intimate aspects of life—the right to marry, the right to be recognized for all legal purposes as the gender one identifies with, the right to equal health care, and matters concerning child custody and parental rights.<sup>563</sup>

Legal ties between a parent and child can be established biologically, through adoption, or through marriage.<sup>564</sup> Unfortunately, none of these options for establishing and securing legal ties between a parent and child seem to hold true when a parent is transgender.<sup>565</sup> The guiding standard governing child custody disputes is always the best interest of the child.<sup>566</sup> Variation exists among the states in the interpretation of the best interest of the child standard, and judges have broad discretion in weighing factors in child custody determinations.<sup>567</sup>

Unfortunately, this standard has been unfairly applied against transgender parents.<sup>568</sup> Gender identity should not be a factor in custody determinations or adoption placements, absent special circumstances indicating a likely negative impact on the child's best interests.<sup>569</sup> Unfortunately, many courts have denied child custody to a parent based on a finding that the parent's gender identity, by itself, would not be in the best

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561. See Flynn, *supra* note 262, at 40.

562. See *In re Kevin (Validity of Marriage of Transsexual)* [2001] FamCA 1074 ¶¶ 43–46 (Austl.); *Same-Sex Marriage Fast Facts*, *supra* note 445.

563. HOWELL, *supra* note 290, at 2, 12–13, 57, 67–68.

564. Flynn, *supra* note 262, at 41–42.

565. *Id.* at 42.

566. E.g., FLA. STAT. § 61.13(2)(c) (2014).

567. Kari J. Carter, Note, *The Best Interest Test and Child Custody: Why Transgender Should Not Be a Factor in Custody Determinations*, 16 HEALTH MATRIX: J.L.–MED. 209, 209–10 (2006).

568. See, e.g., *Daly v. Daly*, 715 P.2d 56, 59–60 (Nev. 1986).

569. See *Kantaras v. Kantaras*, 884 So. 2d 155, 161 (Fla. 2d Dist. Ct. App. 2004); *Kantaras v. Kantaras*, No. 98-5375CA, at 294 (Fla. 6th Cir. Ct. 2003).

interest of the child.<sup>570</sup> Some extreme cases have even gone as far as terminating a trans person's parental rights.<sup>571</sup>

In *Daly v. Daly*,<sup>572</sup> the Supreme Court of Nevada terminated the parental rights of Suzanne—formerly known as Tim—the child's biological father who underwent SRS.<sup>573</sup> The court found that termination of parental rights were in the child's best interest due to a “risk of serious physical, mental, or emotional injury to the child” if she were forced to maintain visitation with Suzanne.<sup>574</sup> The court even went as far to state that “[i]t was strictly Tim Daly's choice to discard his fatherhood and assume the role of a female who could never be either mother or sister to his daughter.”<sup>575</sup>

In addition to the extreme cases terminating parental rights of a trans parent, there have been numerous decisions restricting or denying child custody and visitation rights to a transgender parent.<sup>576</sup> For example, the Missouri Court of Appeals in *J.L.S. v. D.K.S.*<sup>577</sup> reversed the order of joint custody by the trial court because the father underwent sex-reassignment surgery.<sup>578</sup> The court determined “that immediate contact between the children and father would impair the boys' emotional development.”<sup>579</sup>

A circuit court in Florida correctly recognized that transgender status should not be a factor in custody determinations.<sup>580</sup> In *Kantaras v. Kantaras*<sup>581</sup>, Michael Kantaras, a FTM transsexual, was married to Linda Forsythe.<sup>582</sup> Michael adopted Linda's son from a previous marriage, and during their marriage Linda gave birth to a daughter through artificial insemination.<sup>583</sup> After nine years of marriage to Linda, Michael filed for a

570. See, e.g., *J.L.S. v. D.K.S.*, 943 S.W.2d 766, 775 (Mo. Ct. App. 1997); *Cisek v. Cisek*, No. 80 C.A. 113, 1982 WL 6161, at \*1–2 (Ohio Ct. App. July 20, 1982).

571. E.g., *Daly*, 715 P.2d at 60.

572. 715 P.2d 56 (Nev. 1986).

573. *Id.* at 57, 60.

574. *Id.* at 57–58.

575. *Id.* at 59.

576. See *J.L.S. v. D.K.S.*, 943 S.W.2d 766, 775 (Mo. Ct. App. 1997); *Cisek v. Cisek*, No. 80 C.A. 113, 1982 WL 6161, at \*1–2 (Ohio Ct. App. July 20, 1982).

577. 943 S.W.2d 766 (Mo. Ct. App. 1997).

578. *Id.* at 774–75.

579. *Id.* at 772. Similarly, the Court of Appeals of Washington restricted the parental rights of a transgender father and granted residential placement with the mother, claiming to base this decision “on the children's need for ‘environmental and parental stability.’” *In re Marriage of Magnuson*, 170 P.3d 65, 67 (Wash. Ct. App. 2007). The court did not follow the recommendation of the Guardian Ad Litem, who concluded that “Robbie was the more nurturing and engaged parent, and . . . recommended that the court designate Robbie as the primary residential parent.” *Id.* at 68.

580. See *Kantaras v. Kantaras*, No. 98-5375CA, at 808 (Fla. 6th Cir. Ct. 2003).

581. No. 98-5375CA (Fla. 6th Cir. Ct. 2003).

582. *Id.* at 2, 4, 11.

583. *Id.* at 15, 18–19.

divorce and sought custody of both children.<sup>584</sup> In their custody battle, Linda argued that Michael had no parental rights over the children because he was a female.<sup>585</sup> She claimed that the adoption of her son was void because it was done when Florida prohibited gay adoption, and that Michael was not the biological or legal father of her daughter.<sup>586</sup>

Surprisingly, a Florida circuit court determined that the marriage was valid and concluded that it would be in the children's best interest to remain in the parental custody of their transgender father.<sup>587</sup> The approach taken by this court, in determining the custody of the children, is particularly noteworthy because Michael's transgender status had no impact on the court's application of the best interest of the child standard.<sup>588</sup> A psychologist, who testified about the qualities of a good parent, stated that there are no concerns about awarding custody to a trans parent as long as he is a good parent.<sup>589</sup> The circuit court's holding relied heavily on the finding that "[w]ith respect to the children, being a transsexual does not prevent him from being a good parent."<sup>590</sup>

However, the Second District Court of Appeal of Florida held the marriage between Michael and Linda as a same-sex marriage, and thus void *ab initio*.<sup>591</sup> The court's decision did not reverse the custody determination of the trial court and instead left that issue for review on remand.<sup>592</sup> This decision unfortunately meant that Michael faced continued litigation in the fight to protect the parental rights over his children.<sup>593</sup> Luckily, the well-known television celebrity, Dr. Phil, heard about this ongoing case, invited Michael and Linda on his show, and successfully encouraged them to resolve the dispute in mediation.<sup>594</sup> After two days of mediation, Michael's battle was finally over when it was settled that he would retain all of his parental rights over his two children.<sup>595</sup>

As demonstrated in *In re Marriage of Simmons*,<sup>596</sup> judicial invalidation of marriage can also have devastating effects on the parental

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584. *Id.* at 2–3, 102, 615.

585. *See id.* at 6.

586. *Kantaras*, No. 98-5375CA at 4–5, 8.

587. *Id.* at 52, 799, 808.

588. *Id.* at 52, 799.

589. *Id.* at 294.

590. *Id.* at 52.

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

592. *Id.*

593. *See id.*

594. *Case Summary & History*, NAT'L CTR. FOR LESBIAN RIGHTS, <http://www.nclrights.org/cases-and-policy/cases-and-advocacy/kantaras-v-kantaras/> (last visited Aug. 26, 2015).

595. *Id.*

596. 825 N.E.2d 303 (Ill. App. Ct. 2005).

rights of a trans person.<sup>597</sup> The marriage of Sterling, a transsexual male, to his wife Jennifer, was declared invalid as a same-sex marriage and the court declared sole custody of the child to the wife.<sup>598</sup> During their marriage, Jennifer underwent artificial insemination, and pursuant to the Parentage Act, the two of them and their physician signed a contract stating that Sterling is the natural father of the child born from this procedure.<sup>599</sup> However, the court awarded custody to Jennifer, finding that Sterling was not biologically tied to the child and “lacked parental rights or standing to seek custody.”<sup>600</sup>

In order for the artificial insemination agreement they signed to be valid, Sterling would have to be a *husband* and Jennifer, a *wife*.<sup>601</sup> However, due to the invalidity of their marriage, they were not husband and wife at the time the agreement was signed, and the court further concluded that the Parentage Act does not “include[] transsexual males who have signed artificial insemination agreements as husbands in an invalid same-sex marriage.”<sup>602</sup>

The fact that someone is transgender should not affect his or her parental rights and should not be a factor in the courts application of the best interest of the child standard.<sup>603</sup> Although courts may deny the fact that a parent’s transgender status had a negative impact on their decision restricting or terminating parental rights,<sup>604</sup> “reading between the lines it is easy for one to discern a bias against the transgender person and his or her gender identity.”<sup>605</sup> Courts should follow the approach used by the *Kantaros* court in determining the best interest of the child in child custody disputes.<sup>606</sup> The focus should be solely on parenting ability, excluding gender identity in that determination.<sup>607</sup> Being a transsexual does not prevent someone from being a good parent; bias, animus, or a lack of understanding should not restrict or prevent a person from the right to raise children.<sup>608</sup>

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597. *See id.* at 312.

598. *Id.* at 307, 311, 315.

599. *Id.* at 307.

600. *Id.*

601. *In re Marriage of Simmons*, 825 N.E.2d at 311.

602. *Id.*

603. *See In re Marriage of Magnuson*, 170 P.3d 65, 68 (Wash. Ct. App. 2007) (Kulik, J., dissenting).

604. *See id.* at 67.

605. HOWELL, *supra* note 290, at 68.

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

2004).

607. *Contra In re Marriage of Simmons*, 825 N.E.2d at 312–13.

608. *See* HOWELL, *supra* note 290, at 68.

## XI. CONCLUSION

As demonstrated, the American “legal system insists upon a male/female dichotomy.”<sup>609</sup> Further, there are social expectations associated with what it means to be *male* and *female*, and those who fall outside of the cultural *norm* for femininity and masculinity are misunderstood, harassed, discriminated against, and even physically abused.<sup>610</sup> For these reasons, there is a compelling need for legislative changes and specific legal protections for the trans community.<sup>611</sup> The law should not categorize people based on his or her chromosomal make-up or attempt to fit an individual into a narrow category in which he or she may not belong. As shown, the insistence on legally defining an individual as either male or female creates difficulties for transsexuals at all stages of his or her life.<sup>612</sup> This binary classification system has the effect of diminishing the trans person’s autonomy by refusing to acknowledge and respect him or her for who he or she is.<sup>613</sup> Everyone deserves to be respected and acknowledged for exactly who they are, an individual, not as a sex. Instead of determining the rights and protections given to American citizens based on their classification of either male or female, the law should treat everyone equally—whether a person is male, female, transgender, intersex, homosexual, bisexual, pansexual, and so on—we are all individuals, entitled to the same rights, protections, and respect in society as well as in law.

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609. Stirnitzke, *supra* note 314, at 289.

610. *See* GRANT ET. AL., *supra* note 20, at 3.

611. *See id.*

612. *See id.* at 3–8.

613. *See* Greenberg, *supra* note 2, at 935.