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ARTICLE: EXPANDING GENDER AND EXPANDING THE LAW: TOWARD A
SOCIAL AND LEGAL CONCEPTUALIZATION OF GENDER THAT IS MORE
INCLUSIVE OF TRANSGENDER PEOPLE

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BIO:

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SUMMARY:

... I came out as transgender in the middle of law school. ... And there are many transgender people who do not identify as either female or male, but as a third or other gender, such trans or boy-girl, just to name a few. ... The article ends with additional suggestions of how to be more inclusive and protective of the gender galaxy in order to ensure that every person's self-identified gender is respected, that every person can express their gender freely, from a fierce feminine transgender woman, a butch lesbian transgender woman, a non-transgender female soccer star, a proudly not-masculine transgender man, a flamey gay man, to a person whose gender goes far beyond the female-male binary. ... To overcome the truth of birth-assigned sex requires a host of medical experts to list all of the ways in which the transgender person is gender conforming. ... Ms. Hartin was a transgender woman who wanted to change her birth certificate to reflect her female gender, in other words, to change the gender marker from male to female. ... The court described transgender people as follows: "the male-to-

female transsexual, such as here, is anatomically and chromosomally a male who is deeply disturbed in his gender orientation and role. ...

HIGHLIGHT:

People are different from each other.

It is astonishing how few respectable conceptual tools we have for dealing with this self-evident fact. 1

- Eve Sedgwick

TEXT:

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Introduction

I came out as transgender in the middle of law school. 2 Trying to learn more about myself, I read cases about transgender people. 3 Unfortunately, I realized that how the law saw me was vastly different from how I saw myself. Most of the transgender people I know are not accurately reflected in the law.

The law paints a specific picture of transgender people, a picture in which all transgender people look the same. In the law, most transgender people are male to female (MTF). 4 And most MTFs in the law are women stuck in men's bodies, are very feminine heterosexual women, and want every possible surgical intervention. 5 Certainly, there [*256] are transgender people who fit the above description, but there are also many transgender people who fit only part or none of the above.

I felt invisible. This invisibility has pros and cons. If one is reflected by the dominant discourse, one is validated. If one is reflected by the dominant discourse, one may also be co-opted. But, if one is not recognized as existing by the law, one is not protected by the law. As long as the law sees only a small part of the transgender communities, many transgender people are left without legal recourse. When courts only recognize as "real" those transgender people who fit narrow gender stereotypes, have multiple medical interventions, and engage in heterosexual intercourse, then courts only grant custody, health benefits, and employment protections to transgender people who fit narrow gender stereotypes, have multiple medical interventions, and engage in heterosexual intercourse. Those clients of mine who do not fit the above requirements cannot make use of the legal protections. 6 As a legal advocate for transgender people, this is a concern I face every day.

Transgender people are hurt every day. Gwen Araujo was a young transgender woman who was brutally murdered by her transphobic classmates in the San Francisco Bay Area in 2003. 7 And Gwen is not alone. Each month a transgender person is murdered simply for being themselves. 8 Most transgender people have been or will be the target of a [*257] hate crime in their lives. 9 Calling the police is not always an effective option. In

San Francisco, approximately 50% percent of the violence against transgender people is perpetrated by the police. 10

Transgender people are discriminated against in many areas of life, from employment and housing, to health care and custody rights. Even in San Francisco, one of the most transgender friendly cities, over 50% of transgender people have experienced employment discrimination. 11 [*258] One client of mine worked at a local establishment for 15 years, got promotions and raises, and built her entire life around her work. Yet, the day she told her employer that she is transgender, she was fired. Unfortunately, this is not an uncommon story. 12 Discrimination in employment makes housing and health care difficult. In San Francisco, 47% of male to female transgender people, and 20% of female to male transgender people have no housing or only unstable housing. 13 Many of my clients are denied access to homeless shelters. In San Francisco, 51% of transgender people do not have health insurance. 14 Even if one has health insurance, one is not guaranteed treatment. Robert Eads, a female to male transperson who developed ovarian cancer, was denied treatment by over twenty doctors and died, untreated. 15

[*259] Transgender youth are frequently harassed at school and so lose out on their education, or their lives. A recent study found that 53% of students did not feel their school was safe for gender non-conforming boys. 16 California's Westminster School Board refused to enforce the state's Student Safety and Violence Prevention Act of 2000, 17 which protects transgender and gender non-conforming students from harassment and discrimination. 18 Westminster was willing to lose \$ 40 million in state funding to violate state law by failing to protect its transgender students. 19

This is only a small snapshot of the difficulties that many transgender people face. Transgender people are hurt every day, and often with no legal recourse. There are only four states that explicitly protect transgender people in employment. 20 California is the only state in the United States that protects transgender and gender non-conforming [*260] students from discrimination and harassment. 21 There are no laws that protect transgender people from discrimination in health care. 22 Courts are starting to rule for transgender people, but continue to do so in such a way that only those transgender people who fit stereotypical gender norms and want (and can afford) surgical procedures can make use of the victories. 23

This article examines two reasons why we are unable to transcend current discriminatory laws, policies, and social practices: a view of gender that does not recognize the existence of many transgender people, and a prevailing perception both in the legal and medical communities that there is a distinction between "gender" and "sex."

In Part I, the article first describes the many different ways in which one can be transgender. Many transgender women and men defy gender stereotypes. For instance, some male-to-female transgender people are butch lesbians. Some female-to-male transgender people like to cook and bake. And there are many transgender people who do not identify as either female or male, but as a third or other gender, such trans or boy-girl,

just to name a few. 24 Some transgender people choose to alter their bodies medically, and some do not. Some transgender people want to alter their genitalia, and some do not. Some transgender people are [*261] straight, some are gay, some are bisexual, some are queer. 25 The ways to be transgender are endless.

Part I next suggests a non-linear view of gender. Often, when we get past the binary gender system, the notion that there are only two genders, female and male, we do so by seeing gender as a spectrum or line running from female to male. 26 A conceptualization of gender that runs from female to male is limiting because it does not leave space for more complex genders. For instance, I have met many FTMs who are less masculine than many butch women. Would the FTM fall more towards the male end of the spectrum because the FTM identifies as male? Would the butch woman fall more towards the male end of the spectrum because she is in fact more masculine? This linear ordering breaks down quickly. I suggest a non-linear alternative conceptualization, which I call the gender galaxy. The gender galaxy is a three-dimensional non-linear space in which every gender has a location that may or may not be fixed. For instance, butch woman is one particular gender location. Feminine FTM is another gender location. These are two different valid gender locations that are not linearly related.

In Part II, the article argues that the sex-gender distinction is not part of the new conceptualization of gender, the gender galaxy. Within the sex-gender distinction, sex is seen as physiological and anatomical, and gender is seen as cultural and social. Gender is the cultural overlay onto a scientific and objective sex. For instance, Mary Anne C. Case defines sex as "the anatomical and physiological distinctions between women and men" and gender as "the cultural overlay on those anatomical and physiological distinctions." 27 Similarly, Francisco Valdes defines [*262] sex as the "physical attributes of humans" and gender as the "cultural dimensions derived from and determined by sex." 28 Under this paradigm, a person's genital configuration is sex, and a person's presentation of themselves to the world is gender.

One of the most harmful underlying concepts that courts use is the distinction between sex and gender. 29 If we see sex as biology and gender as a social construct, then we give sex more import and make it more real. If sex, that which we are assigned at birth by doctors, 30 is seen as more real, then transgender people's self-identification, which is different from an assignment at birth, is necessarily seen as less real. This distinction allows courts to see the transgender person's birth-assigned sex as an ultimate truth that most likely cannot be overcome (and to overcome it requires the testimony of a whole host of medical experts). 31 Halting the use of this distinction would do much to assure that more [*263] transgender people are protected by the courts, particularly transgender people who cannot afford to or choose not to enter the medical system, and so do not have a team of doctors available to testify on their behalf.

The sex-gender distinction also reinforces an environment that places transgender people in physical danger. A significant amount of violence against transgender people occurs because the perpetrator feels that the transgender person has deceived them. 32 The sex-gender distinction implies that transgender people are not who they say they are, that

their true, objective gender is the one they were assigned at birth. Thus, the sex-gender distinction plays into a belief that transgender people are deceitful, a belief that can cost transgender people their lives.

In Part III, after a brief overview of transgender law, the article shows how much of current law and policy is, at best, inclusive and protective of only a portion of the transgender communities. Historically, the courts ruled virtually unanimously against transgender people, and did so in extraordinarily insulting ways. 33 In the few instances when a transgender person won in court, it was a transgender person who fit a narrow view of what it means to be transgender. 34 There have been advances in the last few years. Despite these advances, many current courts [*264] use the same limiting standards from thirty years ago, standards that rely on the sex-gender distinction. 35

This article urges litigators and policy makers to refrain from using conceptualizations that are based on the sex-gender distinction. The article ends with additional suggestions of how to be more inclusive and protective of the gender galaxy in order to ensure that every person's self-identified gender is respected, that every person can express their gender freely, from a fierce feminine transgender woman, a butch lesbian transgender woman, a non-transgender female soccer star, a proudly not-masculine transgender man, a flamey gay man, to a person whose gender goes far beyond the female-male binary.

I. A Conceptualization of Gender that Is Inclusive and Respectful of Transgender People

A. A Description of Transgender Communities

In order to be protective of transgender people, we have to know who transgender people are. This article begins to describe the infinite gender diversity within the transgender communities. 36

Transgender people span all communities, cultures, races, ages, sexual orientations, and genders. This statement is fairly self-evident and clear, except perhaps the last part of the sentence: Transgender people have all genders.

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1. Gender Diversity

Transgender people have all genders. Some transgender people are male; some transgender people are female. Among non-transgender people, there are feminine women, masculine women, androgynous women, feminine men, androgynous men, masculine men, to name just a few. Among transgender people as well, there are feminine women, masculine women, androgynous women, feminine men, androgynous men, masculine men, and many more. Some FTMs do drag in slinky dresses, wear sparkly clothes while hiking in the woods, and host nail polish parties. Some MTFs identify as butch dykes, play soccer, and cringe at having to wear a skirt. 37 There is infinite variation in the world. We are all limited by imposing socialized binary gender

norms on our complex real life experiences. There are infinitely different women and infinitely different men. 38

[*266] And there are those who are neither. Some transgender people identify as trans, tranny, trannyboy, trannygirl, transsexual, transgender, shinjuku boy, boi, grrl, boy-girl, girl-boy-girl, papi, third gender, fourth gender, no gender, bi-spirit, butch, dyke-fag, fairy, elf girl, glitterboy, transman, transwoman - just to name a few. 39 On a San Francisco Human Rights Commission Survey one person described their gender as "hormonally enhanced, pre-op, trans, genderqueer, butch-dyke with recurring femme moments! I'm just your average boy-girl-boy, really." 40 In conversations and community discussions, 41 there are transgender people who identify as both FTM and dyke. Some see themselves as combining aspects of female and male. Some see themselves as falling between female and male. Some see themselves as falling completely outside of the binary gender system. Some who do not identify as strictly female or strictly male identify as "genderqueer." 42 Some do not identify with that term. 43

I know I'm not a man - about that I'm very clear, and I've come to the conclusion that I'm probably not a woman either 44

Author Leslie Feinberg "faces almost insurmountable difficulty when instructed to check an 'F' or an 'M' box on identification papers," and refers to herself as sie. 45

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2. Change and Fluidity

Some transgender people knew their true gender from the day they were born. Some transgender people realize their genders later in life, when they first meet another transgender person, through reading about transgender people, or through a series of experiences. 46 Just as there is no one age at which gay or bisexual or queer people recognize and acknowledge their sexual orientation, there is also no one age at which transgender people recognize and acknowledge their gender identity. Some transgender people know their gender at the age of three, some at the age of fifteen years, some at the age of eighty-five years. 47

Further, a recognition of one's gender identity at one point in time does not negate a different identification at a different point in time. Some transgender people have the same gender throughout their lives. Some have different genders at different times. Some FTMs identified as women, and then identified as men. Some FTMs have always identified as men. Some transgender people identify as male for part of their life, as female for another part of their life, and later again as male. 48 That does not mean that there was a mistake. It simply means there was change. Like so many things in life, and in fact, like every moment of life, gender can change, and it can change more than once.

For some transgender people, gender identification varies frequently. Some people's gender is situational. 49 For instance, I identify in the "male" region of the gender galaxy, but not really as female or male. Once, a law school exercise required that students divide into groups of women and men. I looked at the side of the room with the feminine women. I looked at the side of the room with the masculine men. At that point, I strongly identified as neither female nor male. That identification was both visceral and political. I needed more space. In that gender normative space, I needed to create an opening. 50 In contrast, at one transgender meeting in San Francisco I was told that I was welcome only if I did not identify as female or male. Here as well, I had a visceral and political reaction. Again, I needed more space. In that space, the [*268] male parts of my identity felt erased, so I needed to assert them. In that space, I identified as male. My gender is situational.

Many transgender people's genders are situational. For instance, some transgender people identify both as dyke and as FTM, more dyke or more FTM depending on the situation. Some people wake up on different days with slightly different genders. For some, gender is fixed, and for some it is fluid.

3. Body Diversity

In addition to the enormous variety of identifications, there is an equally impressive variety of bodies. Some women have wombs, some do not. Some men have facial hair, some do not. Some transgender women identify as one hundred percent female and never take hormones or have any surgeries. Transgender women define for themselves what it means to be female and to have a female body. Many transgender people name and reclaim their body parts. Some FTM transgender people take male hormones and have mastectomies and yet do not identify as men. Some do. Some mix and match to best express their gender. Some take hormones but have no surgery or vice versa. Some take low-doses or go on and off of hormones. Some female to male transgender men choose to become pregnant and bear and raise children. 51

When talking about bodies, I cannot leave out genitalia. Often when I tell people that I am transgender, the first question I am asked is: "Have you had THE surgery?" There is no such thing as THE surgery. There are many different possible types of surgeries. 52 Further, many [*269] transgender people do not want any surgery whatsoever. For some, altering genitalia surgically is important. For others, it is critical to keep their parts just the way they are. 53 Some transgender people do want surgical intervention, genital or otherwise, but cannot afford it, since there is virtually no insurance coverage for transgender surgeries. 54 Many transgender people are excluded categorically from having health insurance 55 and many are unemployed or underemployed. 56

Further, some transgender people of color want surgical procedures and/or hormones but choose to forgo those medical interventions because to date there are no studies on the effects of hormones or transgender surgeries on people of color. 57

In sum, transgender people make many different choices for their bodies. Some of the choices are for gender reasons; the person chooses for themselves how best to express their gender identity physically. Some choices are for economic reasons. Some choices are because the medical system does not have adequate data on transgender procedures, [*270] particularly relating to transgender people of color. 58 Thus, to assume that transgender people all have, want, or are able to have the same type of body is incorrect.

4. Sexual Orientations

Gender identity is who one is. Sexual orientation is to whom one is attracted. 59 Transgender people have all sexual orientations: some transgender people are straight, some are gay, some are bisexual, and some are queer. 60 Yet, such a statement is problematic. As soon as we recognize that there are more than two genders, the terms "homosexual," "heterosexual," and "bisexual" no longer make sense. For instance, I am someone who identifies as somewhat male, but not completely, as mostly trans, perhaps as trannyfag. So, am I "homosexual" only if I am attracted to others who have the exact identification that I do? Am I heterosexual if I'm attracted to anyone who does not have my exact identification? The terms "homo-", "hetero-", and "bi-sexual" presume a world with only two genders.

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5. Diversity of Experiences and Narratives

Transgender people have different identities, bodies, levels of fluidity, sexual orientations, and ways of mixing and matching all of the above. For instance, there is no one-to-one correlation between body modification and identity. It is not necessarily those who take low doses of hormones who identify as between male and female. It is not necessarily those who take hormones who identify as transsexual. It is not necessarily those who have genital surgery who identify as 100% male or 100% female. 61 Some queer-identified transgender people modify their bodies, and some do not. Some transgender people who alter their bodies medically have static identities, and some do not.

There is no one way to be transgender. I want to highlight this statement: there is no prototypical transgender experience.

In many disciplines, including law, medicine, and psychiatry, there exists a narrative that one has to fit to be a "real" transgender person. 62 Only if one fits this narrative does one become a bona fide transgender person, one who can receive services and legal rights. 63 The narrative goes something like this: transgender men are very masculine, played with trucks when they were little, always have known from day one that they were men, want to be heterosexual married men, are men trapped in women's bodies, have hated their bodies all their lives, and most definitely want genital surgery. The same goes for transgender women, [*272] substituting dolls for trucks. Transgender people are held to even higher sexist standards than are non-transgender people.

Transgender people have to tell this story to their doctors to get care, and to courts and agencies to get legal rights. 64 But for many transgender people this story is not true, or only partially true (as described above). Further, there are endless ways both to arrive at being transgender and to be transgender. Some transgender people feel and always felt at home in their bodies. Some transgender people who alter their bodies never felt trapped in their bodies. I know many transgender people who have lived happy and productive lives before coming out as transgender.

There are many different transgender experiences, as well as many different ways to conceptualize those experiences. Each person has their own narrative.

Moreover, each person has several different narratives. For instance, I can describe my past in several ways. I can pick out pieces of my past in such a way that my narrative fits more or less closely with the tranny-*proto*-narrative. I can try to make my past be more or less continuous and consistent. Part of me is drawn to having a narrative that fits in with a standard, or is at least consistent. But that narrative would leave out parts of my life.

[*273] I would like to let go of the need to have a cohesive linear narrative, and the need to have just one narrative. My life is complex. All our lives are complex. I would like to see us use our narratives in ways that empower us and that allow us to freely explore, and become, ourselves. For this to become a possibility, we have to tell and share many more narratives, the complicated and the simple, and to be very careful not to reify or institutionalize any particular one.

B. A Non-Linear View of Gender - The Gender Galaxy

Often when people get past the myth of two genders and attempt to describe gender diversity, they paint a line and see a spectrum running from female to male. 65 This article explains why the linear conception of a line or spectrum is not adequate and offers a non-linear conceptualization of gender.

To illustrate the limitation of a linear view of gender, here are a few of my friends: a butch transwoman; an FTM transperson who does not identify as male and, for that matter, is not very masculine or butch - he likes to wear nail polish; a butch woman who was assigned female at birth and who identifies as a woman; a woman who was assigned female at birth and who is viewed as "high femme," but who actually identifies as a fierce drag queen and does femininity with irony. How would my friends be ordered on a line from female to male? Where would we put a sissy FTM compared to a butch woman? Would the feminine FTM be more toward the female end of the spectrum because he is more feminine? Would the butch woman be more toward the female end of the spectrum because she identifies as a woman? Where does a fierce femme fall on this line? 66 It is impossible to order us on a line. The linear conception of gender is a logical impossibility. The line falls apart.

[*274] Gender is much bigger than a line. It is at least a three-dimensional space, but not a Cartesian one, not a space created by three lines. There are no lines, no ordering. 67 There is just space - an infinite space, a space that allows motion. I have gender claustrophobia and need a big space. I do not like it when people tell me that I have to identify as female or [*275] male. I also do not like it when people tell me that, because it is not radical enough, I cannot identify as female or male. 68 I need a big space in which everyone's gender has a space, and in which our genders are not hierarchically ordered. 69 Thus, a conception that works for me is a galaxy. A gender galaxy. 70 It is big, and it moves.

1. Each Person Has a Gender, a Place in the Gender Galaxy

One of my transgender friends gets annoyed when she is invited to speak on every gender panel. She asks the person who is inviting her [*276] why that person cannot be on the panel themselves - after all, that person has a gender, too. Each person has a space in the galaxy. Each person has a gender. Trannygirl/boy with drag queen tendencies is a location in the gender galaxy. Fierce femme is a location in the gender galaxy. Girl with a hot glue gun is a location in the gender galaxy. Female and male are locations in the gender galaxy. 71

Gender is one's own specific way of interacting with and presenting oneself to the world. Gender is expression - physical, mental, spiritual, sexual, inter-relational, connective expression. Gender is how we relate to each other and to the world. Gender is how we move through the world. Gender is a sense of self and a relationship to the world. 72 One's sense of self is organic and inter-relational. Gender is that expressive, relational, embodied self. 73

And we all have a gender. None of us can be anything but ourselves or have a gender other than our own. 74 Gender is complex. There are many different gender expressions. Ideally, each of our genders is our own as defined by ourselves. 75

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2. The Multiplicity in the Gender Galaxy Is Not a Void

I recently saw a postcard by Mollie Biewald from 1999 that said "things you can do to eradicate gender or to multiply it exponentially" followed by many trans-positive suggestions. Also, I often hear and read suggestions that all of gender is bad and we should just get rid of gender altogether - or that not having a gender is the best gender to have. Gender is seen as that which allows sexism and restrictive gender norms to exist. Gender is seen as a hindrance without which there would be no gender oppression. 76 I often hear that the ideal world would be one in which gender does not matter, in which everyone is seen simply as themselves, is seen simply as a human being, a gender-less human being - a gender-blind world.

Sometimes, the gender galaxy with its infinite genders is conflated with having no genders and with being gender-blind. I want to be clear that this is not what I mean.

First, I do not think that it is possible to have a world without gender. What would that world look like? Does that mean that we are all androgynous? Androgynous is a gender, a specific location in the galaxy. By saying that we want to eradicate gender, are we really replacing one norm with another?

Second, I like my gender. I am rather attached to my tranny gender. It took me thirty-four years to get here. I like gendered people. Gender can be playful and fun. Gender is part of who we are. I do not want to rid myself of my gender; I want to reclaim it.

Third, I cannot erase how my gender is perceived by others and the ramifications of those perceptions. Gender-blind politics is harmful to those who are most discriminated against because of gender norms. Right now, we have sexism. Right now, we have transphobia. Right now, though we are all harmed by gender norms, some of us are harmed more than others. To move toward a world in which sexism and transphobia do not exist, we have to address issues that affect women and transgender people. If we act as if gender does not exist, then we act as if [*278] sexism and transphobia do not exist and so reinforce the privilege of gender-normal genders and, in particular, male genders. 77

Again, I propose a gender galaxy, a space with many genders, not no genders. The gender galaxy is a space with infinite gender options that can move and are not hierarchically related - a space in which each of us has a location, a space in which each of us can choose that location and where all locations are equally supported and respected.

The gender galaxy already exists. There are infinite genders, and they are not linearly related. The people I see every day exist. Our genders exist. We exist. The gender galaxy already exists. But, we do still have to work toward a world in which everyone can freely choose their location in the gender galaxy. We do still have to work toward a world in which all people and all gender locations are supported, recognized, and protected by the law, without threat of harm, and, ideally, celebrated.

II. Against the Use of the Sex-Gender Distinction: It Is Not Logical and It Is Harmful to Transgender People

A. De-Naturalizing Sex: Sex Is Not to Nature as Gender Is to Culture - Both Sex and Gender Are Social Constructs and Socially Real

Often when I describe the beautiful gender variety of the transgender communities, the response is "well, that's gender, we all know that gender is cultural and varying - but, who are you kidding, all of you still have a predetermined sex." Sex is natural and biological and medically objective and fixed. Gender is cultural and changeable and subjective and in the head. Transgender people are those whose sex and gender do not match. I strongly disagree with this conceptualization. 78

[*279] The separation of gender from sex is a separation of expression from biology, of culture from nature, of emotion from reason, and of subjectivity from objectivity. These are false distinctions, and they are not helpful if we are looking for a world that protects and celebrates difference. 79

My theoretical leanings aside, I will look at the case at hand. What is sex in the United States? How does sex get determined in the United States?

There is an entire social apparatus whose sole purpose is to determine, track, and maintain my sex ... in the face of which none of us has a choice. 80

[*280] Human beings come in a great biological variety. Julie Greenberg lists several of the biological criteria we usually associate with sex: genetics/chromosomes, gonads, internal reproductive morphology, external reproductive morphology, hormones, and phenology/secondary sex features. 81 Within each category alone there are many possibilities. 82 Further, there are endless combinations between these categories. 83 There is an amazing biological variety. 84 Where we draw lines, and on what we focus, are cultural choices.

[*281] According to Julie Greenberg, one's ability to participate in reproductive heterosexual intercourse is key in how we draw that line, in determining one's birth-assigned gender. 85 Some courts use this standard, 86 although it is a difficult standard to apply practically. It is difficult to know whether or not and how a five-minute old baby will be a heterosexually reproductive adult. 87 We need a test for heteronormativity that works for five-minute old babies. This is our test: heteronormativity is measured with a ruler. 88 The baby's genitalia are measured by a ruler, and different doctors use different rulers. 89 If the clitoris/penis is below a certain length, it is a clitoris and the child a girl; if the clitoris/penis it is above a certain length, it is a penis and the child a boy. If the clitoris/penis falls between the two marks, the child is called intersex, a medical and social emergency. 90 This emergency must be "corrected" immediately, "corrected" with a knife, 91 for the child's own good. 92

[*282] The categories of intersex, female, and male are not natural. If we use a certain ruler, all intersex people would be "cured" on the spot. If we use a different ruler, all of us would be intersex. 93 Sex is just as much a cultural construct as is gender. 94 Both sex and gender are socially constructed and socially real. The logic of "sex is to nature as gender is to culture" does not hold. Sex is not the natural biological true backdrop for a cultural gender. 95

[*283] In addition to being illogical, the sex-gender distinction leads to an arbitrary cutting up of the body, leads us to make arbitrary distinctions between aspects and parts of our bodies. As just discussed, genital size at birth is absolute truth - and so it is definitely "sex." 96 Genital size later in life is somewhat related to truth - somewhat sex. Voice, body build, hormones, hair growth are half truths - part sex, part gender. How one

moves, feels, talks, interacts does not matter - it is only gender. 97 All the above are of the body; they are physical as well as social. There is no logical reason to say that any one of the above is "more" physical/natural/ bodily than another. Genitalia are no more physical than one's shoulders or one's hormones. One's tattoo is no less physical than one's body hair. What counts and what does not is an arbitrary choice. An arbitrary decision about what parts of our bodies count and what parts do not that constructs a hierarchy.

Granted, there are some theories that posit that distinctions in genital size and shape are meaningful and should be used in creating social categories. For instance, some theorists believe that the differentiation between women and men may stem out of a differentiated role in reproduction, which is tied to genitalia. 98 My point is that we could make a million differentiations: we could have gender difference based on height, we could have gender difference based on whether or not someone can roll their tongue, we could have gender difference based on innie or outie [*284] belly buttons, we could have gender difference based on how well a person can cook.

And, if we are going to base gender on role in reproduction and form of genitalia, then to be consistent, are those people with wombs that are infertile not women? Are those people in menopause no longer women? Does a hysterectomy change one's gender? Are impotent men not men? Are men with small penises not men? Having an enormous social category that affects every second of one's life based on one's assumed role in reproduction or one part of one's body is excessive and arbitrary. 99

Giving such enormous import to assumed genitalia is an arbitrary cultural choice. It is a choice that is linked to and supported by the sex-gender distinction. The sex-gender distinction is not logical, and it creates arbitrary distinctions in our embodied existence. This is not its only harm.

B. The Sex-Gender Distinction Takes the Power to Self-Define from Transgender People and Hands It to Non-Transgender People and the Medical Establishment

If the sex-gender distinction is illogical and arbitrary, why do we hold onto it? I suspect it is because the use of this distinction sets up a social reality that gives power to some and takes power from others. What are the systems of power that the sex-gender distinction supports? 100 What is at stake? 101

[*285] By calling doctor-assigned gender by a different name, by calling it "sex" and by calling it by a name that we (incorrectly) associate with nature and objectivity, we give doctors power. Doctors' gender assignments, although subjective assignments done by human beings, are relegated to a different truth realm than any other gender assignments. The sex-gender distinction sets up doctor-assigned gender (called "sex") as Truth, with a capital "T." It gives doctors omnipotent power to define and to decide gender, making their choices unquestioned and sacred. Thus, the sex-gender distinction provides the backdrop that gives doctors the right to perform unconsented mutilation on people whom the doctors call intersex in order to fit that truth. 102 It makes a transgender person's self-

assignment of gender false, as hiding the truth, or at best, something unrelated to the truth. The sex-gender distinction keeps transgender people's self-identity from being recognized as valid by courts, by doctors, by people in general. The sex-gender distinction appears in many forms. It commonly appears in definitions of transgender people. Transgender people often are defined as "having a mismatch of gender and sex." 103 Following the logic of truth, we can rewrite this as: "transgender people are really objectively and naturally of sex x but think they are and pretend to be of gender y." Within this truth, transgender [*286] people cannot self-define. The doctor is right; transgender people are wrong. 104

Unfortunately, these definitions of transgender people are common and prevail in a large part of our society's consciousness. 105 A personal example: I am a female to male transgender person who has been on testosterone for a couple of years and looks male. I identify as trans, not male, though in the male region of the galaxy. Often when I tell someone that I am transgender, that person then starts seeing me as a girl - an odd girl, a girl who has mutilated herself, a girl who wants to be a boy, a girl always and forever. The doctor was right. I am wrong. The doctor names my essence. The best I can do is name the trimmings. Why can we not question sex, the natural objective and eternal truth? We can question the teacher who told me I could not do math. We can question the career counselor who told me to wear a skirt. We can question the coach who told me I could not do martial arts. We can question doctors who do breast cancer research exclusively on men. But, questioning the doctor who told me I am a girl is off limits. Why do doctors get to define what it means to be a man or a woman? Why do non-transgender people get to define transgender people? 106

The sex-gender distinction furthers a disparity in power: the doctor has the power, the transgender person does not. I expect that therein lies one reason for the continued use of the sex-gender distinction. 107

[*287] I am concerned about doctors having the power to define a person's gender. Gender should be self-determined, period. Telling someone that they cannot be their self-identified gender is like telling that person they cannot be themselves. No one can be other than who they are. The court in *Doe v. Yunits* 108 points this out well by saying that asking a transgender woman to be male is like asking a short person to be tall. Though I do not want the medical establishment to have power over transgender people, I do not want the transgender movement to disengage from the medical establishment. Many transgender people want and need medical intervention. Many transgender people, in order to be themselves, depend on sympathetic and kind doctors. Those transgender people who do want medical intervention (hormones, surgery or multiple surgeries) 109 do require medical care, and thus require doctors who are willing and able to treat transgender people. I have had some extraordinarily positive experiences with doctors who have listened to me and provided me with respectful and individualized care. I appreciate those doctors and clinics, the medical care I received, and that the doctors did not try to tell me who I am. I do not object to the medical system. I object when a person's gender is defined by someone other than the person themselves.

The sex-gender distinction creates an environment that denigrates gender self-identification. It is a tool for giving power to some and taking power from others. It is a ruse for validating some experiences over others, for linking some experiences to a purported objectivity, and for giving certain professions eminent domain.

C. The Sex-Gender Distinction Reinforces an Environment that Places Transgender People in Physical Danger

The sex-gender distinction also reinforces a conceptual framework that is used to justify violence against transgender people. As described above, the sex-gender distinction sets up the doctor-assigned gender as truth, and the transgender person's self-identified gender as something solely in that person's head. The belief that transgender people are frauds [*288] against truth, or people who deceive others, permeates our society. This belief places transgender people in physical danger.

One not uncommon example: Gwen Araujo was killed by her classmates because they were transphobic, because they assumed that all women are alike and that there is a truth to doctor assigned birth. 110 They had such a hard time parting with their false beliefs that they had to destroy any evidence to the contrary. They murdered Gwen. Gwen's murderers are not alone in their transphobia. One article went so far as to attempt to justify the murderer's actions by saying that Gwen raped the murderers by deceiving them, by going against the "truth" of "sex:"

Jose Merel and friend Michael Magidson, 22, of Fremont, Calif., had sex with Gwen that night at the party, according to an article in The Los Angeles Times titled "Trying to Understand Eddie's Life - and Death." The two later found out that Gwen wasn't really Gwen at all, but rather Eddie Araujo, a 17-year-old male from Newark. Araujo didn't tell the men his gender. He tricked them into having sex with him, but if they would have known his sex, they wouldn't have been interested. That is just as bad as rape. 111

Unfortunately, transphobia is alive and well. An average of one transgender person a month is murdered because of transphobia. 112 Transphobia is supported by a belief that doctor-assigned gender is truth and that the self-identified genders of transpeople are not truth but fraud, deception.

To add insult to injury, much of the resulting media coverage of Gwen's murder referred to Gwen as "he," implying that she was not who she said she was. Again, there is the charge of deception. The use of incorrect pronouns also arises out of and reinforces the sex-gender distinction. By using incorrect pronouns, the media perpetuates the myth that birth-assigned gender is truth and that transgender people are lying, reinforcing the culture that endangers lives. 113 I want to thank those [*289] papers who, after discussions with the transgender communities, changed their editorial policies and started addressing transgender people respectfully and correctly. 114

D. The Sex-Gender Split Assumes Transgender People Are Not Whole, Cuts Bodies off from Minds, and Cuts Bodies into Pieces

In addition to setting up sex as truth and giving doctors omnipotent power to define and to declare gender, the sex-gender distinction create in transgender people a mind-body split. In the sex-gender conceptual framework, I have a female sex and a male gender; in other words, I am a female bodied, male-identified person. Female body, male head. This makes my head spin, literally makes me nauseated. This conceptualization is self-alienating. 115 I am transgender, all of me is [*290] transgender. I am a tranny with a tranny body. I am whole. I match myself just fine. 116 And I will gender my genitalia by myself, thank you very much. My transwoman friend says it beautifully, "I'm a woman, this is my body, therefore it's a female body and who is some doctor to tell me otherwise?" 117

Further, the sex-gender distinction cuts the body up into a hierarchy of pieces as described in Part II.A. I am not an assemblage of pieces, some of which are more true than others. 118

E. No Sex-Gender Distinction, Indeed No Sex

The sex-gender division makes it seem as if there is a truth beyond gender - something natural and inevitable - to which we can tie gender. 119 This false distinction is a way of ranking characteristics, of giving [*291] validity to some, taking it from others, making some seem more basic and essential than others. The sex-gender distinction leads us to devalue that which is usually called gender. It leads us to devalue transgender people's self-identified genders.

Sex is not truth. So, what is sex? What is the distinction between sex and gender? Sex is the unconsented gender assignment at birth that masks itself as objective truth. That is the only distinction: sex is unconsented gender, and sex is gender pretending to be objective scientific truth.

If we call the gender assignment that occurs at birth "sex," then we give that assignment a special truth value, make it appear as if it were an inevitable, objective truth. If we call the assignment that happens at birth "gender assigned at birth," we call it what it is, an assignment by a certain person at a certain time. If we give special value to the birth-assigned gender, then we denigrate transgender people's self-assigned gender. If we hide the fact that the birth-assigned gender is a subjective assignment, then we see it as more real than future subjective assignments. Using "sex" makes transgender people's self-identified genders appear less real and valid. The term "sex" takes power from transgender people. Using "sex" masks that it is in reality an unconsented gendering. I find the concept of sex harmful and deceptive. As such, I see no point of keeping the concept of sex. It is a myth, albeit a very powerful one. It is a myth I would like to dethrone. 120

The gender galaxy is not a cute fanciful construct that leaves in place "sex" as truth. It displaces sex. Sex is gone. All that is left is the gender galaxy. 121

[*292]

III. Toward Law and Policy that Is More Inclusive of Transgender People

A. The Law's Relation with Transgender People - Fraught with Difficulty, but Slowly Moving Forward

Until recently, most courts ruled against transgender people, seeing transgender people's birth-assigned gender as natural inevitable eternal truth and transgender people as freaks. 122 The courts denied transgender people the right to keep their children, 123 to marry, 124 to immigrate, 125 to [*293] have access to medical care, 126 and to employment without discrimination, 127 just to name a few. The courts not only ruled against transgender people, but have done so in extraordinarily insulting ways. A few examples:

The body that Christi inhabits is a male body in all aspects other than what the physicians have supplied... . There are some things we cannot will into being... . We hold, as a matter of law, that Christi Littleton is a male. 128

[Ulane is] a person born with a male body who believes himself to be female But even if one believes that a woman can be so easily created from what remains of a man, that does not decide this case." 129

Mark is a male entrapped in the body of a female, the record does not show that the entrapped male successfully escaped 130

Fortunately, there have been recent advances in both case law and statutory law. In 1989, the court in *Price Waterhouse v. Hopkins* held that a masculine woman, Ann Hopkins, was protected from job discrimination under sex-discrimination laws, specifically Title VII. 131 The court [*294] held that gender stereotypes, such as requiring that a woman wear heels and make-up, are sex-discrimination. 132

In 2000, relying on *Price Waterhouse*, the Ninth Circuit held that sex discrimination laws apply to transgender people. 133 *Schwenk v. Hartford* is the case of a transgender woman who was held in an all-male prison where she was sexually harassed and assaulted. She sued under the Gender Motivated Violence Act (GMVA). The court found that the GMVA applies to transgender people and that the attack on Ms. Schwenk was gender-motivated. 134 This decision follows and extends *Price Waterhouse*, holding that transgender people are protected under sex discrimination laws. To demand that a transgender person present themselves to society in a way that matches the stereotypes associated with their birth-assigned gender is gender stereotyping. 135

Since 2000, a series of courts have followed the lead of Schwenk and ruled that sex discrimination laws protect transgender people. 136 For instance, in *Enriquez v. West Jersey Health Systems*, the New Jersey Superior Court held that state sex discrimination laws apply to transgender people. 137 An MTF doctor, Dr. Enriquez, was fired from her hospital [*295] soon after she started wearing women's clothes. 138 Dr. Enriquez sued under state employment discrimination laws under the protected category of sex and won. 139

Another recent avenue of protection for transgender people is disability law. 140 For instance, in *Enriquez*, Dr. Enriquez also sued under state disability protections, and succeeded. 141 The court held that transgender people are covered under disability protections given that gender dysphoria is a recognized psychological condition. 142 Not all people in the transgender and disability communities, however, agree that transgender people should use disability law. 143

[*296] Further, there are now four states, ten counties, and fifty-one cities that provide statutory protections for transgender people. 144 A recent legislative example is the "Gender Non-Discrimination Act of 2003" in which the California Fair Employment and Housing Act was amended to include gender identity under existing sex discrimination protections. 145

Yet, there are still limitations to many of these victories. Currently, there is virtually no legal recognition of people who do not identify as female or male and thus, virtually no explicit protections for people who do not identify as female or male. 146

Further, there is little legal protection available for transgender people who do not fit the most narrow stereotypical gender norms. 147 There is virtually no case law or regulation that recognizes transgender people's self-identified gender. 148 There is almost no case law in which the court takes the person at their word when the person says they are a woman or a man (any other gender identification is not even an option). The court gets to ask: "This case involves the most basic of [*297] questions. When is a man a man, and when is a woman a woman?" 149 And the court, not the transgender person, gets to answer.

B. The Sex-Gender Distinction Is One of the Most Harmful Underlying Concepts Used by Courts Across the Board

The courts' lack of recognition of people who are not stereotypically male or stereotypically female, of people who do not identify as female or male, and generally, of people who self-identify their gender, I trace, in large part, to the courts' reliance on the sex-gender distinction. 150 If we see sex as biology and gender as social construct, then we give sex more import and make it more real. If sex, that which we are assigned at birth by doctors, is seen as more real, then transgender people's self-identification, which is different from the assignment at birth, is necessarily seen as less real. 151 This distinction allows courts to see the transgender person's birth-assigned sex as an ultimate truth that most likely cannot be overcome. To overcome the truth of birth-assigned sex

requires a host of medical experts to list all of the ways in which the transgender person is gender conforming. 152 In my experience, a person who was assigned male at birth and identifies as female has the best chance of having her self-identified gender confirmed by the courts if her medical experts testify that she is a feminine woman, a woman who played with dolls when she was young, a heterosexual woman, a woman with genital surgery, and so on. A gender non-conforming transgender person stands very little chance of having their self-identified gender recognized by the courts. 153 And since courts fall heavily on the side of [*298] birth-assigned gender, which is always female or male, courts tend to only acknowledge and discuss female and male genders as options. 154

Since the sex-gender distinction creates a conceptual framework in which birth-assigned gender is seen as an objective truth, 155 it is likely that halting the use of this distinction would create an environment in which self-identified and non-binary genders can be recognized. If the courts recognized the existence of non-binary genders and the importance of self-identification, then more transgender people would be legally protected.

In the next section, the article looks at representative cases, both from the 1970s as well as recent cases from 2001 to 2003 to show how the courts' use of the sex-gender distinction is harmful and limiting.

C. Cases that Use the Sex-Gender Distinction

The sex-gender distinction was the underlying framework in case law in the 1970s. The use of this conceptualization denigrated gender self-identification and validated gender identification by medical experts, who often used heteronormative and sexist definitions of women and men. I start this section by looking at several representative cases from the 1970s.

Unfortunately, the same definitions based on the sex-gender distinction that operated 30 years ago have not left us. Some recent cases look virtually identical to the older cases. I end the section with a discussion of recent cases that use the same reasoning as the older cases.

1. Hartin v. Director of Bureau of Records

In 1973, the New York Superior Court addressed the case of Ms. Hartin. 156 Ms. Hartin was a transgender woman who wanted to change her birth certificate to reflect her female gender, in other words, to change the gender marker from male to female. 157 Before allowing Ms. Hartin to change the gender marker on her birth certificate to female, [*299] the court wanted to determine whether or not Ms. Hartin was truly a woman. 158

The court began by providing the framework under which this gender decision would be made. The court described transgender people as follows: "the male-to-female transsexual, such as here, is anatomically and chromosomally a male who is deeply

disturbed in his gender orientation and role. He has an overpowering desire to be a woman." 159 The court spoke of biological truth, the permanence of that truth, and Ms. Hartin's attempt to hide that truth and to betray the world. 160 The court spoke of Ms. Hartin's male physiology, of "original sex," of male body cells, of male sexuality, of "mutilating surgery," and of fraud and deception. 161 According to the court, Ms. Hartin (referred to as "he") wanted to be a woman, but, unfortunately, was biologically and truly male. 162

This is a framework in which birth-assigned gender is objective biology and self-identified gender is a psychological disturbance. 163 This framework relies on the sex-gender distinction, in which sex is seen as biology, and gender is seen as social and psychological. By looking at gender through the lens of the sex-gender distinction, the court has already made its decision. Birth-assigned sex, being an ultimate truth, cannot be overcome. Ms. Hartin's subjective desire is pitted against an objective physicality and truth: gender versus sex. She is bound to lose, and she does lose. She is denied the chance to make her birth certificate reflect her gender. 164

[*300]

2. Anonymous v. Weiner

A few years before, in 1966, the New York Superior Court made a virtually identical gender decision. 165 Ms. Weiner, a transgender woman, also wanted to change her birth certificate. 166 In its determination of Ms. Weiner's gender, the definition that guides this inquiry is: a transsexual is someone who has a "striking disturbance of gender role and gender orientation ... a split between the psychological and the morphological sex." 167 In other words, the transgender person's objective body and subjective mental state do not match. Again, this is the sex-gender distinction; sex is physical and objective, gender is in the head.

Determining Ms. Weiner's gender in this framework, the court spoke of Ms. Weiner's definitive chromosomal maleness, of a failed attempt to change, and of fraud. 168 To help the court answer the question of Ms. Weiner's gender, the court used an array of gender experts: "gynecologists, endocrinologists, cytogenetics, psychiatrists and a lawyer." 169 Since Ms. Weiner had to overcome an objective biological truth (her sex), she had to use testimony that the court would understand as biologically objective: testimony by medical practitioners. Her own testimony on her gender was not seen as objective. 170 And even the purportedly objective testimony of the medical practitioners was not enough to overcome the ultimate truth of birth-assigned gender. The court concluded that no error was made on the original birth certificate, that it correctly states that Ms. Weiner is male. 171

[*301]

3. Frances B. v. Mark B

In 1974, the New York Superior Court was still using the framework of the sex-gender distinction. 172 In *Frances B. v. Mark B.*, the court addressed the issue of the validity of a marriage between a transgender person and a non-transgender person. 173 Mark was a transgender man who had married Frances, a non-transgender woman. 174 After years of being together, Frances wanted to annul her marriage to Mark. 175 She claimed that she had been deceived as to Mark's gender, that Mark was not a man and that he was never her husband because marriage can only occur between a man and a woman. 176 Again, the issue the court chose to make central is the issue of Mark's gender, is Mark a man or a woman? 177

The definition that guides this inquiry is that "Transsexuals strongly believe that their physical anatomies do not reflect their true genders." 178 Again, this framework is one that pits biology against belief, sex against gender.

Following this framework, Dr. Burou testified: "I don't change men into women. I transform male genitals into genitals that have a female aspect. All the rest is in the patient's mind." 179 Further, since objective biology is what mattered in the court's chosen framework, the court examined Mark's biology, particularly his genital biology. 180 The court concluded that Mark "does not have male sexual organs, does not possess a normal penis, and in fact does not have a penis." 181 The court found that Mark was not able to "perform male functions in a marriage." 182 [*302] This court used ability (and willingness) to participate in heteronormative sexuality as a prerequisite for manhood. 183 Mark's genitals and assumed sexuality made him a woman in the court's eyes. According to the court, Mark's male gender was all in his head. And what is in Mark's head was not sufficient. Mark "was a male entrapped in the body of a female, [and] the record does not show that the entrapped male successfully escaped." 184 The court concurred with the plaintiff and concluded that Mark "was and still is a woman, a member of the Female Gender of the Human Species." 185 And the court, again concerned with fraud, annulled Mark and Frances's marriage. 186

4. *M.T. v. J.T.*

In 1976, the New Jersey appellate court addressed another marriage case. 187 J was a transgender woman married to M, a non-transgender man. 188 M tried to annul the marriage using the same argument as in *Frances*, that there never was a marriage, since J was not a woman. 189 Here as well, the main issue at hand was J's true gender. In making this determination, the court's guiding concept was: a transgender person is someone who has "a great discrepancy between the physical genital anatomy and the person's sense of self-identity," 190 who "firmly believes he belongs to the other sex." 191

Since the sex-gender distinction was the guiding framework, purportedly objective biology, J's genitalia, had to be examined. J did have genital surgery. 192 Her doctor testified that after surgery, J's genitalia looked like the genitalia of people who are assigned female at birth. 193 Further, her doctor testified that J was able to perform normative heterosexual [*303] intercourse 194 and that J was unable to function sexually or reproductively as a male. 195 Here, a woman is defined by lack, lack of male

function. 196 In this case, the court was willing to see J as a woman and so to uphold the marriage. 197

This case shows that it is possible to win, even when the sex-gender distinction is operative. But, J did not win because of her self-identity. J won because she had genital surgery and doctors testified as to her heterosexuality. That is not what it should take to win. 198

And that is not a guarantee that one will win. The court could have easily found that J's genitalia were not sufficiently female or heterosexually functioning since those are vague, if not meaningless, terms. 199 With the sex-gender definition as the frame, there is always a hurdle to overcome, a hurdle of a truth that is not one's own, a truth that will be established by many professionals, a truth that is only available to those with the financial means to have surgery and to hire a team of medical experts, and a truth that will be judged as true enough - or not - by a court.

[*304]

5. Goins v. West Group

Twenty-five years later, in 2001, the highest court in Minnesota addressed the issue of bathroom access. 200 Ms. Julienne Goins, a transgender woman, worked at Westlaw, where she wanted to use the women's restroom just like any other woman. 201 Westlaw refused, and the matter went to court. 202 The main issue is whether or not Ms. Goins is a "true" woman. The court began by describing Ms. Goins's gender, saying "Julienne Goins was designated male at birth and given the name Justin Travis Goins, but Goins was confused about that sexual identity throughout much of childhood and adolescence." 203 Julienne Goins's "self-image is inconsistent with her biological gender." 204

This is the classic sex-gender distinction: sex is biology, gender is self-image and confusion. 205 Given this conceptualization of gender and of being transgender, it is no surprise that the court found that Ms. Goins cannot use the women's restroom, that designating bathrooms by birth-assigned gender is not discrimination, that birth-assigned gender is what matters in this world and that self-identified gender does not. 206

[*305] The one-sentence concurrence starkly states the hurdle that Ms. Goins had to meet: "[Ms.] Goins must establish that she is biologically female." 207 Again, birth-assigned gender is biological truth that must be overcome by something other than self-identified gender. "Sex" is truth.

6. In re Estate of Gardiner

In 2002, in Kansas, Mrs. J'Noel Gardiner, a transgender woman, was taken to court by her husband's family. 208 Mrs. Gardiner was married to a non-transgender man, who had died. 209 Her husband's relatives did not want Mrs. Gardiner to get her husband's inheritance. 210 They attempted to keep the inheritance themselves by claiming that there

never was a marriage since Mrs. Gardiner is not a woman. 211 Again, the issue at hand is Mrs. Gardiner's gender. 212

This court also focuses on "biology" and testimony from medical "experts." 213 Here we see again just how difficult it is to overcome the hurdle of biology, of sex, of birth-assigned gender, of truth. J'Noel's doctor testified that she is "a functioning, anatomical female." 214 Still, the court states, "we recognize that J'Noel has traveled a long and difficult road. J'Noel has undergone electrolysis, thermolysis, tracheal shave, hormone injections, extensive counseling, and reassignment surgery. Unfortunately, after all that, J'Noel remains a transsexual, and a male." 215 The court pits self-identified gender against birth gender - a situation that makes it virtually impossible to win. 216 Even after having [*306] had every possible medical intervention, Mrs. Gardiner still loses. 217 Thus it appears that no particular amount or type of medical intervention guarantees that one can overcome the "truth" of sex. 218

This unfortunate decision overturned a prior state court decision that did find for Mrs. Gardiner. That decision ended with a respectful statement of the importance of self-identification and that the role of doctors and courts is not to be arbiters of gender, but to listen to transgender people and to believe transgender when we say who we are:

"In the end it is only the children themselves who can and must identify who and what they are. It is for us as clinicians and researchers to listen and to learn. Clinical decisions must ultimately be based not on anatomical predictions, nor on the "correctness" of sexual function... ." 219

D. One Case that Moves away from the Sex-Gender Distinction: Doe v. Yunits

The Gardiner quotation demonstrates that courts are capable of viewing gender in a way that does not automatically denigrate self-identified gender. Doe v. Yunits does not rely on the sex-gender distinction. 220 In 2000, the Massachusetts Superior Court heard the case of a young transgender woman whose gender identity was not respected in her high school. 221 Her principal told her that she could not wear [*307] women's clothes to school, and the principal humiliated her daily. 222 Each day, she had to go by the principal's office where the principal would examine her outfit and determine whether it was male enough or not. If he thought it was not, he would send her home. 223

What sets this case apart from other cases is that the young woman's gender is not in question and is not an issue for the court or a question to be decided by the court. The court refers to the young woman as "she" and "her" throughout and respects her self-identified gender. 224 The question for the court is not whether or not she is a woman, but whether or not she can wear woman's clothes. 225 Granted, those two questions are inextricably intertwined. It is not possible to separate one's gender identity from one's

choice of clothing. 226 And a non-transgender woman would most likely not be told that she could not wear any women's clothing or any women's accessories. 227 It is refreshing, however, to see a case that does not discuss in detail the transgender person's childhood activities, medical history, and genital configuration. The court acknowledged that by asking about clothing, it was asking about an essential feature of gender:

Plaintiff in this case is likely to establish that, by dressing in clothing and accessories traditionally associated with the female gender, she is expressing her identification with that gender. In addition, plaintiff's ability to express herself and her gender identity through dress is important to her health and well-being, as attested to by her treating therapist. Therefore, plaintiff's expression is not merely a personal preference but a necessary symbol of her very identity. 228

[*308] Clothing is gender. And a transgender person has just as much a right to express her gender as does a non-transgender person. The court says,

In essence, the plaintiff alleges that requiring Doe to wear boy's clothing to school would be as injurious to her psychiatric health as requiring a psychologically masculine boy to wear a dress to school. 229

And the court recognizes that no one can be anything but the gender they are:

Certainly, a student who is five feet tall may be deemed constructively expelled if the school administrators forbade her from returning until she became six feet tall, because she could not do anything to satisfy that condition. 230

This court did not rely on the usual biology-mind, sex-gender distinction. This court recognized that dress is integral to gender - that dress is real, as real as biology. And this court found that it was likely discriminatory to forbid her to wear women's clothes just as any other self-identified young woman. 231

As Yunits shows, it is possible for courts to refrain from using the sex-gender distinction and to respect transgender people's self-identified genders. The Yunits court does not use the sex-gender distinction or a host of medical testimony about genitalia. What does Yunits use? One of the main arguments is freedom of expression. 232 This is very much in line with the gender galaxy framework. In the gender galaxy, gender is one's expressive embodied self. 233 So it makes sense to litigate transgender cases under freedom of expression.

[*309] Yunits also uses a gender-discrimination analysis. 234 The court relies on cases in which discrimination against gender non-conforming people (people who are seen as not masculine or feminine enough by someone) is seen as gender discrimination. 235 Yunits does not rely on traditional transgender cases, arguing that this is instead a case of gender non-conformity. 236 The discrimination arises out of the school thinking that the young woman is not sufficiently conforming to the stereotypes of what it means to be a woman/girl. 237

Litigating transgender cases under gender discrimination jurisprudence makes sense. Everyone has a gender. Discriminating against a transgender person because the person does not fit someone's idea of what it means to be a woman or a man is the same as discriminating against a non-transgender person who is seen as not fitting someone's idea of what it means to be a woman or a man. 238 Discrimination against a transgender woman (whose gender non-conformity might be that her [*310] birth-assigned gender is male) is analyzed similar to discrimination against a non-transgender woman who is gender non-conforming, perhaps by having short hair. 239 This approach is respectful because it does not question the transgender person's self-identified gender, it questions the gender norms of society that say that a woman or man should have x, y, and z qualities.

Using these two approaches, gender discrimination and freedom of expression, Yunits does leave behind the sex-gender distinction, the notion that birth-assigned gender is absolute truth. The young woman's birth-assigned gender is given no truth value. Yunits accepts the self-identified gender of the young woman and proceeds to analyze the case from that perspective.

When a court does not use the sex-gender distinction, there is no ultimate truth of birth-assigned sex to overcome, no need to examine the transgender person's body, and no need to bring in a host of medical experts to testify as to the gender normativity of the transgender person. 240 Thus, transgender people who chose not to or cannot afford gender related surgeries stand a chance of winning. When a court does not use the sex-gender distinction, it allows a gender non-conforming person and a person who does not identify as female or male to win. It allows the court to reinvision gender in a more holistic way, for instance, to see clothing as integral to gender. Halting the use of the sex-gender distinction would go far in extending protections to a larger part of the transgender communities.

IV. Conclusion and Suggestions

As seen in the Yunits case, courts are open to looking at gender in a way that does not automatically denigrate gender self-identification. The San Francisco Human Rights Commission recently passed Compliance Guidelines to Prohibit Gender Identity Discrimination that recognize and protect the right of each person to self-identify. The Introduction to the Compliance Guidelines says: "The sole judge of a person's gender identity is the individual person themselves and the sole proof of a person's gender [*311] identity is that person's statement or expression of self identification." 241

Education and change are possible. This article offers a few suggestions.

Definitions: It is imperative that we stop using the sex-gender distinction as a framework to conceptualize what it means to be transgender. Transgender people do not have a sex-gender incongruency. Creating a distinction between sex and gender disempowers transgender people and raises doctor-assigned gender to a level of unquestioned truth. 242 The sex-gender distinction pits transgender people's self-identified genders against a purported objective truth and gives power to "gender experts" other than the person themselves. This distinction reifies genitalia as ultimate truth. It leads courts to use classist and sexist standards to determine a person's gender. And the sex-gender distinction makes it virtually impossible for gender non-conforming people to win in court. 243

Many definitions of transgender use the sex-gender distinction as their basis. Any definition that uses both the word "sex" and the word "gender" relies on the sex-gender distinction since using both words implies there is a meaningful difference. Definitions that pit biology against psychology or the body against the mind parallel the sex-gender distinction. An example of this type of definition is: a transgender woman has the body of a man and the psyche of a woman. Any such definition denigrates transgender people's self-identified genders.

It is also essential to be explicit about what constitutes birth-assigned gender. The assigned gender at birth is precisely that, an assignment at birth, by a human being. The phrase is more cumbersome and longer than the word "sex," but it accurately describes reality. The assignment at birth has an immense social impact, but it should be given no truth value beyond that. That impact needs to be reduced. 244 When we define what it means to be transgender, it is important to refrain from using a definition that relies on the sex-gender distinction and to be as broadly inclusive as possible. Two examples of broad definitions: "transgender people are people whose birth-assigned gender does [*312] not completely describe the person's self-identified gender," or "transgender people are people who have a different gender identity than the one assigned at birth and/or a different gender expression than the one that is stereotypically associated with the gender assigned at birth."

Often in protective policies, "transgender" is not the protected category. "Gender identity" is a common category under which transgender people are protected. 245 One way in which to define gender identity inclusively is: "gender identity includes a person's identity, appearance, or behavior, whether or not that identity, appearance, or behavior is different from that traditionally associated with a person's gender assigned at birth." 246

Gender Multiplicity: It is imperative to explicitly state that there are not only women and men. If that is not politically feasible, then we should at least refrain from using gendered words (he, she, her, him, etc.) - particularly in statutes, regulations, policies, bills, and the like. Leaving out gendered words allows the law to be interpreted to include those who do not identify as strictly female or male. In my experience at the Transgender Law

Center, leaving out gendered words is usually not difficult. For instance, saying "the person's" instead of "his or her" is usually not seen as controversial.

Gender Norms: It is also important to refrain from using sexist stereotypes to show that a client is "truly" a woman or "truly" a man. All of us fit stereotypes in some way, just as all of us defy them in some way. 247 For instance, it may be the case that one client is a transgender woman who is heterosexual and likes to wear dresses though she did not play with dolls when she was young. It may be the case that a gay transgender man played with trucks as a child. Putting into record only those characteristics of the transgender person that fit the requisite stereotypes will most likely help that particular client's case. But, putting into the record only the requisite stereotypes reinforces the validity of those stereotypes and that it is necessary, and indeed possible, to fit all stereotypes. It will also likely make those stereotypes a requirement for the next person who brings a similar case. This will make it more difficult, if not impossible, for all later clients who do not fit those particular stereotypes to win a case. I do not have a simple answer, but we have to [*313] consider ways of getting our client's needs met that do not foreclose future client's cases.

My main suggestion is to educate attorneys and judges about gender diversity, so that it will be possible to litigate cases without over-simplifying and distorting transgender people's genders. Litigating the case of a transgender person who does not fit stereotypes could be part of that education. 248

Body Multiplicity: Along the same lines, it is key to stop using physical and medical attributes as requirements for being a certain gender or as proof that the person is truly of a certain gender. Once it is in record that a person is female because she has had genital surgery, it will be difficult for those transgender people who have not had or cannot afford or never intend to have genital surgery to have their genders recognized. The same argument holds for other medical interventions and physical attributes. No medical intervention should be required to be a certain gender. No physical attributes should be required. 249

Identity Documents: It is also helpful to refrain from requiring identity documents, such as driver's licenses, passports, and the like, as proof of gender. An identity document can be used if the transgender person wants to use it and finds it helpful. But, it should never be a requirement. Non-transgender people do not have to prove their gender; they are taken at their word. Transgender people should also be taken at their word, be able to self-identify. 250 Further, it is often difficult to get gender [*314] markers changed on identifications because there often is a surgical or medical requirement. 251 Rarely do identification documents allow for genders other than female or male. 252 Thus, it may be impossible for a transgender person (particularly a transgender person who is not surgically altering their body or a transgender person whose identity is not female or male) to get an identification that accurately reflects their gender.

Fluidity: Often employers complain that employees need to "stick with" one gender, and "make up" their minds - in other words, to have a "consistent" gender. This requirement

often relates to dress codes. 253 There is a fear that transgender people will constantly change the way they dress, and there is a fear that men will come to work wearing dresses. There are several responses. First, what is seen as changing may actually be more fixed. For instance, a transgender woman who identifies as a woman may wear a skirt one day and pants another. This does not mean that the transgender woman is uncertain about her gender or is going back and forth. It simply means that people who identify as female wear a wide range of clothes. Second, a gender non-conforming person may wear a variety of clothes that cannot easily be labeled female or male. This also does not mean that the person is uncertain of their gender. It simply means the person has a complex gender and is expressing that complex gender consistently. 254 Third, in response to the fear of men in dresses, the sky will not fall if men wear dresses. In fact, as long [*315] as men are not allowed to wear dresses, we know that sexism and rigid gender norms are still alive and well. 255 Lastly, I also want to recognize that there is nothing wrong with change, inconsistency, and exploration. In a world that provides few role models with complex genders, it may take searching and time to find our true genders. Because we are part of a dynamic changing world, our true selves may very well change over time.

We have to get protection for all gender diverse people. Until we do so, no one will be safe. As Jody Marksamer points out in his paper *Wrong Bathroom: The Forces Behind Legal and Social Exclusion of Transgender People from the Bathroom*, even those who have had the most surgeries and those who are the most heterosexual and those who fit most of the prescribed norms can still be found lacking. 256 We can all be found not female enough or not male enough. No one will have their gender rights secure until the entire gender galaxy, including the most gender fluid and gender different of the galaxy, have rights and protections. 257

Self-identified gender is the only true gender. Doctor-assigned gender (i.e., "sex") is not truth. It is far from the truth; it is an arbitrary and harmful construct. In the end, there is a gender galaxy. Not all FTMs played with trucks, not all MTFs want husbands, and not all people are female or male.

In the end, I will sit ... with butch women, femme dykes, nellie men, studly fags, radical faeries, drag queens and kings, transsexual people who want nothing more than to be women [*316] and men, intersexed people, hermaphrodites with attitudes, transgendered, pangendered, bigendered, polygendered, ungendered, androgynous people of many varieties and trade stories long into the night... . Sad stories about bodies stolen, bodies no longer here. Enraging stories about false images, devastating lies, untold violence. Bold, brash stories about reclaiming our bodies and changing the world. 258

- Eli Clare

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights Law Contractual Relations & Housing Fair Housing Rights Gender & Sex
Discrimination Labor & Employment Law Employment Relationships Employment
Contracts Conditions & Terms Duration of Employment Permanent
Employment Healthcare Law Business Administration & Organization Employment
Discrimination

FOOTNOTES:

n1. Eve Sedgwick, *Epistemology of the Closet* 1, 22 (1990).

n2. I use the word transgender very broadly to refer to people whose gender identity and/or expression does or is perceived to not match stereotypical gender norms associated with their birth-assigned gender. Some people who fit the above definition do not self-identify as transgender. For instance, all masculine women fit the above definition of transgender, yet not all masculine women identify as transgender.

n3. E.g., *Schwenk v. Hartford*, 204 F.3d 1187, 1201 (9th Cir. 2000); *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984); *Rentos v. OCE-Office Sys.*, 72 Fair Empl. Prac. Cas. (BNA) 1717 (S.D.N.Y. 1996); *Littleton v. Prange*, 9 S.W.3d 223 (Tex. Ct. App. 1999); *J.D. v. Lackner*, 80 Cal. App. 3d 90 (Ct. App. 1978); *Frances B. v. Mark B.*, 355 N.Y.S.2d 712 (Sup. Ct. 1974); *M.T. v. J.T.*, 355 A.2d 204 (N.J. Super. Ct. App. Div. 1976).

n4. See, e.g., all cases *supra* note 3, except *Frances B. v. Mark B.* A male to female transgender person (MTF) is a person who was assigned male at birth but identifies as female. A female to male transgender person (FTM) is a person who was assigned female at birth but identifies as male. I frequently encounter people who do not know that FTMs exist. I am a FTM transgender person, and for most of my life, I did not know that FTMs existed. For more literature about FTMs, see, for example, Leslie Feinberg, *Trans Liberation: Beyond Pink and Blue* (1998). See also, Loren Cameron, *Body Alchemy: Transsexual Portraits* (1996); *Finding the Real Me: True Tales of Sex and Gender Diversity* (Tracie O'Keefe & Katrina Fox, eds., 2003).

n5. To be a "real woman" or a "real man," one has to undergo countless medical procedures to alter one's body to make it more stereotypically female or male - and even that may not be enough. See, e.g., *In re Gardiner*, 42 P.3d 120, 122-24 (Kan. 2002); *Littleton*, 9 S.W.3d at 223. To be a "real man," one has to be heterosexual. See, e.g., *Frances B.*, 355 N.Y.S.2d at 713-18, M.T., 355 A.2d at 210. To be a "real woman," one has to be heterosexual. *Littleton*, 9 S.W.3d at 225. To make one a "real man," the size and shape of one's genitalia are key. See, e.g., *Frances B.*, 355 N.Y.S.2d at 118; *Kantaras v. Kantaras*, No. 98-5375, slip op. at 40-55 (Fla. Cir. Ct. 2003), available at <http://www.transgenderlaw.org/cases/kantarasopinion.pdf> (*Kantaras* is a great improvement by not requiring genital surgery). To be a "real man," one has to fit sexist gender stereotypes. *Kantaras*, No. 98-5375, slip op. at 64, 795. Some articles discussing transgender people consider only MTFs, or use MTFs as the main examples. See, e.g., Ronald R. Garet, *Self-Transformability*, 65 S. Cal. L. Rev. 121, 126, 130, 135, 142, 145, 151, 153 (1991) (asking how the lives and actions of transgender people should be regarded morally by using solely MTF examples). See also Kevin Tallent, *My "Dude Looks Like a Lady:" The Constitutional Void of Transsexual Marriage*, 36 Ga. L. Rev. 635 (2002) (discussing the implications of *In Re Gardiner*, using primarily MTF examples).

In case law, "real man" and "real woman" are the only two gender options. There exists no case in the United States that even considers any other alternatives. Yet, in a recent San Francisco Human Rights Commission survey, about half of the transgender identified people did not identify as strictly female or male. S.F. Human Rights Comm'n, *Gender Neutral Bathroom Survey* (2001), at http://www.transgenderlawcenter.org/documents/safe_WC_survey_results.html.

n6. I estimate that only about 2% of my clients have had genital surgery. Approximately 50% of my clients have had some form of medical intervention. The medical intervention requirement, and in particular the genital surgery requirement, makes it especially difficult for many of my clients to make use of protective laws.

n7. See, e.g., Henry Lee, *Murder Trial Jury Selection*, S.F. Chron., Mar. 16, 2004, at B1. Gwen Araujo was a high school student in Newark, CA. She was beaten and strangled to death at a party by her classmates, while other classmates watched.

n8. Gwendolyn Smith and Ethan St. Pierre provide the most comprehensive list of transgender people who have been murdered, approximately one person a month. Gender Education & Advocacy, *Trans Murder Statistics: 1970 to 2004*, at <http://www.gender.org/resources/dge/gea02002.pdf> (last visited Mar. 31, 2005). For a list of names, please see Gwendolyn Ann Smith, *Remembering Our Dead*, at

<http://www.gender.org/remember/#> (last visited Apr. 5, 2005). Gwen Smith also started the Annual "Day of Remembrance," a day to remember the many transgender people who have died because of transphobia. Last year, I was scheduled to do a transgender know-your-rights workshop with a local transgender activist. She did not make it to the workshop because, that day, she was beaten so badly that she was unconscious for days. On August 13, 2004, a transgender woman, Delicious Green, was murdered in San Francisco. Press Release, Community United Against Violence (Aug. 2004) (on file with author). Michelle Paz was also murdered because of transphobia. Amnesty International, Venezuela: Possible extrajudicial execution/ Fear for safety, at <http://web.amnesty.org/library/index/engAMR530012002?open&of=eng-384> (Feb. 12, 2002). Bibi Barajas was shot to death in 2002. Human Rights Campaign, Transgender Basics, at http://www.hrc.org/Content/NavigationMenu/HRC/Get_Informed/Issues/Transgender_Issues1/Transgender_Basics/Transgender_Basics.htm (last visited Nov. 1, 2004).

n9. Ella Baker Center for Human Rights and TransAction, *Walking While Transgender: Law Enforcement Harassment of San Francisco Transgender/Transsexual Community* (2000).

n10. Approximately 50% of the calls that the agency Community United Against Violence (CUAV) receives from transgender people are calls in which the perpetrators of the violence are law enforcement agents. Id. A nationwide survey of violence against LGBT people found that 40% of police-initiated violence was directed at transgender people. National Coalition of Anti-Violence Programs, *Anti-Lesbian, Gay, Bisexual, and Transgender Violence in 1998* (1999), available at <http://www.avp.org/publications/reports/1998ncavpbiasrpt.pdf>. In 1999, Victoria Schneider, a transgender woman, sued the San Francisco Sheriff's Department for doing an unnecessary strip search and harassing her. Ms. Schneider won the suit. Bill Wallace, *750,000 Awarded for Strip-Search by Sheriff's Department*, S.F. Chron., Apr. 20, 1999, at A15.

n11. Nat'l Ctr. for Lesbian Rights and the Transgender Law Ctr., *Trans Realities: A Legal Needs Assessment of the San Francisco Transgender Communities* (2003), available at <http://nclrights.org/publications/transrealities0803.htm>; see Patrick Letillier & Ysenio V. Lewis, *Human Rights Commission, City and County of San Francisco, Economic Empowerment for the LGBT Communities* (2000), available at <http://www.sfgov.org/site/search.asp?q=economic+empowerment> (reported that 70% of self-identified transgender respondents were found to be unemployed). The median income of transgender people in San Francisco who are employed is between \$ 744 (MTFs) and \$ 1100 (FTMs) per month. S.F. Dep't of Public Health, *The Transgender*

Community Health Project: Descriptive Results (Feb. 18, 1999), at <http://hivinsite.ucsf.edu/InSite.jsp?doc=2098.461e>. The Transgender Law Center's Trans Realities study found similar results: Sixty-four percent of survey respondents reported annual incomes of \$ 25,000 or less. Nat'l Ctr. for Lesbian Rights and Transgender Law Ctr., supra. In Washington, D.C., 42% of the transgender survey respondents were unemployed, and 31% reported an annual income of less than \$ 10,000 per year. Jessica Xavier, The Washington Transgender Needs Assessment Survey (2000), available at <http://www.glaa.org/archive/2000/tgneedsassessment1112.shtml>. For an example of employment discrimination, see The Associated Press, Transgender Podiatrist Settles Gender Discrimination Complaint Against Hospital, Mar. 27, 2004, at http://www.hrc.org/Content/ContentGroups/News3/2004_March/Transgender_Podiatrist_Settles_Discrimination_Complaint.htm (a transgender woman who was the director of the surgical residency program for thirteen years was fired two weeks after disclosing that she is transgender).

n12. At the Transgender Law Center, each month I saw at least one client who was fired from their job because their employer is transphobic. Most of the employment discrimination cases at the Employment Law Center's Lesbian Gay Bisexual and Transgender Project involved gender identity discrimination. Conversation with Sheryl Harris, Esq., Founder, LGBT Workers' Rights Project, in San Francisco, Cal. (2002). An entire website, Transgender at Work, at <http://www.tgender.net/taw/tg.html> (2001), is dedicated to navigating being transgender at work.

n13. S.F. Dep't of Public Health, The Transgender Community Health Project: Descriptive Results, available at <http://hivinsite.ucsf.edu/InSite.jsp?doc=2098.461e> (Feb. 18, 1999). The Trans Realities study similarly found that 19% of respondents lack stable housing. Nat'l Ctr. For Lesbian Rights and Transgender Law Ctr., supra note 11.

n14. S.F. Dep't of Pub. Health, supra note 13. The Transgender Law Center's TransRealities study found similarly that 46% of respondents lack health insurance. Nat'l Ctr. For Lesbian Rights and Transgender Law Ctr., supra note 11. In Washington, D.C., almost 50% of the respondents had no health insurance, and 39% had no doctor for routine care. Xavier, supra note 11. Further, 58% of the respondents who use hormones obtained them from friends or off the street. Id. In Los Angeles, 53% of female-to-male respondents had been denied medical services simply because they are transgender. FTM Alliance of Los Angeles, Results of the 2003 Health Access Survey (Mar. 2004). The Transgender Law Center has worked on several cases in which people were told by health insurance companies that they were denied coverage because they are transgender.

n15. For a documentary of his fight with ovarian cancer, see Southern Comfort (New Video Group 2001). Another FTM transgender person was denied coverage for uterine cancer. His insurance company said that it "did not cover uteruses in men." Interview with FTM, in San Francisco Bay Area (2001).

n16. Cal. Safe Sch. Coalition & the 4-H Center for Youth Dev., Univ. of Cal., Davis, A Safe Place to Learn: Consequences of Harassment Based on Actual or Perceived Sexual Orientation and Gender Non-Conformity and Steps for Making Schools Safer 2 (2004). See Office for Pub. Policy of the Gay Lesbian and Straight Education Network, The 2001 National School Climate Survey, Gay Lesbian and Straight Education Network (2001) (finding that 74% of transgender youth reported being sexually harassed at school in the past year, and 90% of transgender youth reported feeling unsafe at school because of their gender expression).

Many transgender and gender non-conforming students do not feel safe going to the restroom in their school. This is one of the biggest problems that students face. Gay Straight Alliance Network, Focus Group Results (Apr. 21, 2001). A 2001 Human Rights Commission survey found that transgender people are often harassed and assaulted in both the men's and women's restrooms. S.F. Human Rights Comm'n, *supra* note 5. Respondents to the survey illustrate the severity of the problem caused by gender segregated bathrooms: "I have been slapped, pushed, and dragged out," "I have spent so many hours avoiding bathrooms that I have damaged my bladder and put pressure on my kidney." *Id.* One transgender person keeps a bucket in his office, since he cannot safely go to either the women's or men's room in his workplace. Interview, in San Francisco, Cal. (2001).

n17. Assem. Bill 537, 1999-2000 Reg. Sess. (Cal. 1999) (amending Cal. Educ. Code 200).

n18. Joel Rubin, Beliefs Imperil Funding: Three of Five on an O.C. School Board Reject a State Gender Definition on Religious Grounds, L.A. Times, Mar. 14, 2004, at B1. In response to Westminster, the California Department of Education issued a Legal Advisory, stating that no school district could ignore state law. Legal Advisory Re: Gender Equity and Discrimination Laws in California Public Schools (Apr. 30, 2004), available at <http://www.cde.ca.gov/nr/re/ht/yr04ltr0430.asp>.

n19. Rubin, *supra* note 18.

n20. Cal. Gov't Code 12920 (1992); Minn. Stat. 363A.03, subd. 44 (2004); N.M. Stat. Ann. 28-1-2(Q) (2000 & Supp. 2003); R.I. Gen. Laws 11-24-2.1(1) (2002).

n21. See Assem. Bill 537, 1999-2000 Reg. Sess. (Cal. 1999) (amending Cal. Educ. Code 200).

n22. In California, Transgender Equality California, a coalition of activists and civil rights organizations, is preparing to introduce the first transgender health insurance bill in the United States. The bill would require health insurances to stop discriminating against transgender people.

n23. See *supra* note 5.

n24. Several major newspapers have recently written about transgender people who do not identify as strictly female or male. See, e.g., Fred A. Bernstein, *On Campus, Rethinking Biology 101*, N.Y. Times, Mar. 7, 2004, at 9.1 (showing how college campuses are becoming more open to transgender people, including transgender people who do not identify as female or male); Rona Marech, *Nuances of Gay Identities Reflected in New Language*, S.F. Chron., Feb. 8, 2004 at A1. (exploring different transgender identities, particularly identities that go beyond the female-male binary). For more discussion on gender identities that go beyond female and male, see Kate Bornstein, *Gender Outlaw: On Men, Women, and the Rest of Us* (1994) [hereinafter Bornstein, *Gender Outlaw*]; Kate Bornstein, *My Gender Workbook: How to Become a Real Man, A Real Woman, the Real You, or Something Else Entirely* (1998) [hereinafter Bornstein, *Gender Workbook*]; Pat Califia, *Sex Changes: The Politics of Transgenderism* (1997); Leslie Feinberg, *Trans Liberation*, *supra* note 4; Leslie Feinberg, *Transgender Warriors: Making History from Joan of Arc to Dennis Rodman* (1996); *Finding the Real Me*, *supra* note 4; Jamison Green, *Becoming a Visible Man* (2004).

n25. There is a debate concerning the appropriate use of words such as "queer," "dyke," and "fag." These words can certainly be used as epithets. Some people within the LGBT (Lesbian, Gay, Bisexual, and Transgender) communities prefer that people outside of the LGBT communities not use these terms. Yet, within parts of the LGBT communities, the

words are reclaimed and used proudly. This article uses "queer," "dyke," and "fag" in a celebratory, not derogatory, sense. For a more detailed discussion, see Michelangelo Signorile, *The Word "Queer" Belongs in the Mainstream*, *Newsday*, Nov. 25, 2003, at A1.

n26. See e.g., Bernstein, *supra* note 24; Marech, *supra* note 24; Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 *Ariz. L. Rev.* 265, 275 (1999); Nancy Nangeroni, *Int'l Found. for Gender Education (IFGE), Transgender 101*, at http://lgbtrc.ucr.edu/trans_101.html (last visited Feb. 7, 2005); Cristan Williams, *TG 101*, at http://www.geocities.com/gypsyrose1972/tg_101.html (last visited Feb. 7, 2005).

n27. Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 *Yale L.J.* 1, 10 (1995) (arguing that the sex-gender distinction is necessary to protect masculine women and feminine men).

n28. Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 *Cal. L. Rev.* 1, 6 nn.5-6 (1995) Other writers similarly distinguish sex from gender: seeing sex as that which is more tied to biology and gender as that which is more tied to culture. See, e.g., Greenberg, *supra* note 26, at 271; John M. Ohle, *Note, Constructing the Trannie: Transgender People and the Law Footnote*, 8 *J. Gender Race & Just.* 237, 243-45 (2004); Amy Sonnie, *Queer 101: A Glossary*, in *Revolutionary Voices: A Multicultural Queer Youth Anthology*, 245 (Amy Sonnie ed., 2000); *TransLife.net, Transgender 101*, at <http://www.translife.net/tg101/basicdefs.htm> (last visited Feb. 7, 2005).

n29. Katherine Franke shows how the sex-gender distinction is harmful to the feminist movement. If we view sex and gender as distinct, that means we view woman and femininity and man and masculinity as distinct - where the former in each pairing is seen as more natural, prior, and real than the latter - its cultural overlay. If we see sex as more natural and real than gender, then we allow ourselves to question and destabilize femininity and masculinity, but we do not allow ourselves to question and destabilize woman and man. Yet, woman, man, and sex are socially constructed categories, constructed out of our gender norms. By keeping sex and gender distinct, we set off sex as that natural reality which we do not question. In so doing, we limit our ability to challenge gender norms. Katherine M. Franke, *The Central Mistake of Sex*

Discrimination Law: The Disaggregation of Sex from Gender, 144 U. Pa. L. Rev. 1, 1-3 (1995) (showing how the sex-gender distinction is harmful to transgender people).

n30. We usually refer to that which we are assigned at birth as sex. This article argues against the use of the concept sex. It argues that sex is nothing more than birth (and other-, as opposed to self-) assigned gender. See Part II. Hence, that which we are all assigned at birth I refer to as birth-assigned gender.

n31. See, e.g., *Kantaras v. Kantaras*, No. 98-5375, slip op. at 1 (Fla. Cir. Ct. 2003); *Anonymous v. Weiner*, 270 N.Y.S.2d 319, 321 (Sup. Ct. 1966); *Frances B. v. Mark B.*, 355 N.Y.S.2d 712, 717 (Sup. Ct. 1974); *Hartin v. Dir. of Bureau of Records & Statistics*, 347 N.Y.S.2d 515, 518 (Sup. Ct. 1973); *Littleton v. Prange*, 9 S.W.3d 223, 225 (Tex. Ct. App. 1999).

n32. The most explicit example is the case of Gwen Araujo. The defendants who murdered her claimed as their justification that Gwen "deceived" them. See, e.g., Lee, *supra* note 7. Another well-publicized tragedy is the murder of Tyra Hunter. Tyra was in a car accident. When the paramedics who were called to the scene saw her genitalia, they said that she was not a real woman - in other words, that she deceived them by making them assume that she had one type of genitalia when she in fact had another. They stopped helping her and let her die. For a community account, see <http://songweaver.com/gender/hunter.html>. The reporting in the Washington Post further entrenches the incorrect belief that transgender people deceive. The Post used Tyra's old name, Tyrone, in reporting her death and described her as a "man dressed as a woman." Wendy Melillo, D.C. Fire Officials to Reinvestigate Transvestite's Death, *Wash. Post*, Dec. 5, 1995, at B2. In doing so, the Post suggests that Tyra is deceiving, that Tyrone is her real name, and that she is really a man. My friends and I commonly face the reaction that we are not who we say we are. Sometimes the reaction is a violent one. Furthermore, I believe that much of the violence against transgender people arises out of a person feeling they have been deceived rather than that a gender norm has been violated. Hence, it is imperative that our society recognize transgender people as being the gender that we say we are and that our society changes its very narrow views of what it means to be a woman or a man.

n33. For particularly insulting examples, see *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1087 (7th Cir. 1984); *Frances B.*, 355 N.Y.S. 2d at 712; *Littleton*, 9 S.W.3d at 231.

n34. See, e.g., *M.T. v. J.T.*, 355 A.2d 204, 206 (N.J. Super. Ct. App. Div. 1976).

n35. See, e.g., *In re Gardiner*, 42 P.3d 120 (Kan. 2002); *Goins v. West Group*, 635 N.W.2d 717 (Minn. 2001).

n36. Several recent authors, transgender authors and allies, in the legal field use the term transgender broadly and recognize the diversity of the transgender communities. For instance, Dean Spade shows that transgender and gender non-conforming people make many different choices, for personal and/or economic reasons, about their bodies and to what extent to enter the medical system. Dean Spade, *Resisting Medicine, Re/modeling Gender*, 18 *Berkeley Women's L.J.* 15 (2003). Paisley Currah and Shannon Minter use the term transgender broadly: "pre-operative, post-operative and non-operative transsexual people; cross-dressers; feminine men and masculine women; intersexed persons; and more generally, anyone whose gender identity or expression differs from conventional expectations of masculinity or femininity." Paisley Currah & Shannon Minter, *Unprincipled Exclusions: The Struggle to Achieve Judicial and Legislative Equality for Transgender People*, 7 *Wm. & Mary J. Women & L.* 37, 37 n.1 (2000). Taylor Flynn uses transgender synonymously with "gender variant," "gender non-conforming," and "trans," and shows that one's anatomy does not determine one's gender identity. Taylor Flynn, *Transforming the Debate: Why We Need to Include Transgender Rights in the Struggles for Sex and Sexual Orientation Equality*, 101 *Colum. L. Rev.* 392, 395 n.2 (2001) (expanding and adding to the description of gender diversity).

n37. Interviews at Transgender and LGBT Meetings, in San Francisco Bay Area: FTM International, Transgender San Francisco, Community United Against Violence, Tenderloin Aids Resource Center, UCSF Trans Women of Color Project, Youth Gender Project, Lavender Youth Recreation and Information Center, United Genders of the Universe, Tom Waddell Health Clinic, Dimensions Health Clinic (2000-2004); interviews at Transgender Conferences: True Spirit in Washington, D.C (2001), FTM International Conference in Seattle, WA (2002), LGBT Health Summit in Boulder, CO (2002); interviews and conversations with over 1,000 clients and workshop participants during my work at the Transgender Law Center (2002-2004) [hereinafter Interviews]. See Dean Spade, *Make-Zine*, at <http://www.makezine.org>; Micah Timtum, *A Trans Jew Zine* (2000). See generally *supra* note 24.

In the next sections, I describe the gender diversity within the transgender communities. Often, I will cite to this footnote and note 24. I would like to cite to studies of how many transgender people identify outside the binary gender system, of how many MTFs identify as butch women, and of FTMs who bear children. Unfortunately, the transgender

communities are under-researched, under-studied, under-discussed, and under-funded. For instance, at this point, only one study exists on the effect of hormone therapy on FTM transgender people. See Paul J. M. van Kesteren et al., *Mortality and Morbidity in Transsexual Subjects Treated With Cross-sex Hormones*, 47 *Clinical Endocrinology* 337 (1997). Mainstream press has only recently begun writing about the non-binary diversity within the transgender communities. See *supra* note 24. The more nuanced descriptions of transgender people have not yet made it into mainstream press, but are readily talked about at meetings, conferences, in one-on-one conversations, on e-mail lists, and the like. There are a few anthologies and books in which transgender people describe their own lives and describe themselves without simplifying. See, e.g., Bornstein, *Gender Outlaw*, *supra* note 24; Bornstein, *Gender Workbook*, *supra* note 24; Califia, *supra* note 24; Feinberg, *Trans Liberation*, *supra* note 4; *Finding the Real Me*, *supra* note 4.

n38. Even in the law, there are masculine women and feminine men. See, e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213 (1st Cir. 2000). See generally, e.g., *Revolutionary Voices: A Multicultural Queer Youth Anthology* (Amy Sonnie ed., 2000); Sandra Lee Bartky, *Femininity and Domination: Studies in the Phenomenology of Oppression* (1990).

n39. See *supra* note 24. See also S.F. Human Rights Comm'n, *supra* note 5 (in which almost 500 people described their often complex and rich gender identities).

n40. S.F. Human Rights Comm'n, *Gender Neutral Bathroom Survey, Raw Data #37* (on file with author). For summary of survey, see S.F. Human Rights Comm'n, *supra* note 5.

n41. Particularly dyke-FTM community forums such as "Gender Talk" (2001) organized by the San Francisco Human Rights Commission, or the community forum organized by Seattle's FTM Conference (2002). See Jaron Kanegson, *After the Butch/FTM Conference: Why Not to Give UP on Butch/FTM/Trannyboy Coalition Building*, *FTM Int'l Newsletter* (FTM Int'l, S.F., Cal.), June 1998, at 5.

n42. "Genderqueer" is a term that some who see themselves as falling outside of the female-male binary use to describe their gender identity, just as some who fall outside of the gay-straight binary use "queer" to describe their sexual orientation. See *infra* Part I.A.4 and *infra* note 59 for a discussion about the difference between gender identity and sexual orientation.

n43. Gender identification: I use the terms "identify as gender x" to refer to a person self-naming and self-claiming their gender.

n44. Bornstein, *Gender Outlaw*, supra note 24, at 8.

n45. Feinberg, *Trans Liberation*, supra note 4, at 1.

n46. See, e.g., *Finding the Real Me*, supra note 4; Riki Anne Wilchins, *Read My Lips* (1997); *Sex, Lies and Darwin: Profile of Joan Roughgarden* (BBC television broadcast, Jan. 26, 2004).

n47. See *Interviews*, supra note 37. For further examples, see the books cited in note 24.

n48. See *Interviews*, supra note 37. For further examples, see the books cited in note 24.

n49. See *Interviews*, supra note 37. For further examples, see the books cited in note 24.

n50. I ended up standing in the middle of the room.

n51. I personally know two FTMs who chose to become pregnant and bear and raise children. There were enough FTMs to have an entire workshop on child bearing/rearing at last year's FTM Conference. For workshop descriptions, see *So You Want to Have Kids? Parenting and Childbirth, FTM 2004: The Gender Odyssey* (2004), at <http://www.transconference.org/programming/index.htm>.

n52. For a list of common surgeries, see The Harry Benjamin Int'l Gender Dysphoria Ass'n, Standards of Care for Gender Identity Disorders, Sixth Version (Feb. 2001), at <http://www.hbgda.org/soc.cfm>. For a more detailed list, see Ryan Nicholas Gorton, M.D., Transgender Therapy: A Summary of Common Surgical, Medical, and Behavioral Techniques to Achieve Cross-Gender Transition, Sylvia Rivera Law Project (2004) (including mastectomy - bilateral periareolar, mastectomy and bilateral complete with nipple and areolar reconstruction, mastectomy - scar revision, liposuction to reduce fat in hips, thighs, buttocks, metoidioplasty, metoidioplasty with urethroplasty, abdominoplasty, free flap forearm phalloplasty, abdominal pedicle flap phalloplasty, penile erectile prosthesis implantation, scrotoplasty with insertion of testicular expanders, colpectomy, colpoplasty, hysterectomy with bilateral salpingo-oophorectomy, tracheal shave, forehead contour adjustment, malar augmentation, rhinoplasty, mentoplasty, rhytidectomy, blepharoplasty, feminizing laryngoplasty, vaginoplasty with penile inversion, colovaginoplasty, simple penile amputation, urethromeatoplasty, labiaplasty, bilateral orchiectomy, augmentation mammoplasty).

n53. See Interviews, *supra* note 37. See also Finding the Real Me, *supra* note 4; Bornstein, Gender Outlaw, *supra* note 24.

n54. Most insurance companies categorically exclude any procedures related to being transgender in their provider manuals. The few exceptions are California's Medi-Cal (Medi-Cal) recipients (though there are virtually no doctors in California who perform transgender surgeries and take Medi-Cal) and employees of the City of San Francisco, Dupont, Lucent, Avaya, and IBM. For a listing of Fortune 500 companies that cover all or part of the health needs of transsexuals, see Transgender at Work, Best Companies to Work For; Transsexual Health Benefits Registry (2001), at <http://www.tgender.net/taw/goodcomp.html>. In 2000, Medi-Cal was ordered by the Superior Court of California to halt categorical denials of medically necessary procedures related to being transgender. *Doe v. Bonta*, No. 00CS00954 (Cal. Super. Ct. 2001). In 2001, the Board of Supervisors of San Francisco removed the transgender exclusions from the city health plan. Advocates for the removal of the exclusions pointed out that the city was not providing special benefits to transgender people. Rather, it was making sure that transgender people got the same access to health care as everyone else. For example, non-transgender people can obtain a hysterectomy, a mastectomy, hormone therapy - yet transgender people are often denied these same treatments. See Mark Leno, Paying and Human Rights, *S.F. Chron.*, Apr. 29, 2001, at D8. For a personal story, see Rachel Gordon, Profile: Claire Skiffington: Changing Times: New Health Benefits for Sex-Change Surgery Will Help One City Administrator on Journey to Life as a Woman, *S.F. Chron.*, May 14, 2001, at A1.

n55. See supra note 14.

n56. See supra notes 11, 12.

n57. I am not aware of any such study, nor is the Transgender Civil Rights Project at the National Gay and Lesbian Taskforce, the Sylvia Rivera Law Project, or the National Center for Lesbian Rights.

n58. I am not aware of any studies that document, for instance, how many FTM transgender people choose not to have "top surgery" (chest reconstruction) because of their expression of gender identity, versus how many FTM transgender people choose not to have top surgery because of cost or lack of medical data. In my experience working at the Transgender Law Center, all three types of choices are made frequently.

n59. A version of this statement is used in many "Transgender 101" trainings and materials. See, e.g., Alexander John Goodrum, Gender Identity 101: A Transgender Primer, at http://www.sagatucson.org/resources/gender_101.htm (last visited Feb. 14, 2005); Warren J. Blumenfeld, Glossary of Transgender Terms, Out Proud, at http://www.outproud.org/article_glossary.html (last visited Feb. 14, 2005); Carleton College: Gender and Sexuality Center, Vocabulary (2004), at <http://webapps.acs.carleton.edu/campus/gsc/lgbt/vocab>.

This distinction is very useful in showing that gender identity and sexual orientation are different and can be mixed and matched in any way. This is not to say that gender identity and sexual orientation are always unrelated. Some people's recognition of their gender identity comes out of sexual experiences and out of having a certain sexual orientation. Gender is relational; one's relations may play a part in shaping one's gender. Seeing sexual orientation and gender identity as separate is a cultural phenomenon. See Shannon Minter, Do Transsexuals Dream of Gay Rights? Getting Real About Transgender Inclusion in the Gay Rights Movement, 17 N.Y.L. Sch. J. Hum. Rts. 589, 591 (2000).

n60. See, e.g., Finding the Real Me, supra note 4; Best Transgender Erotica (Hanne Blank & Raven Kaldera eds., 2002); Alex Sousa & Eric Peterson, FTM on FTM, FTM Int'l Newsletter, (FTM Int'l, S.F., Cal.), June 1998, at 1, 12.

n61. See Interviews, supra note 37.

n62. Most states that allow one to change one's gender marker on one's birth certificate require surgery in order to do so. See Ala. Code 22-9A-19(d) (1975); Ark. Code Ann. 20-18-307(d) (1987); Cal. Health & Safety Code 103425 (1996); Colo. Rev. Stat. 25-2-115(4) (1997); D.C. Code Ann. 7-217(d) (2002) ; Ga. Code Ann. 31-10-23(e) (2000); Haw. Rev. Stat. 338-17.7(4) (1993); La. Rev. Stat. Ann. 40:62(c) (2001); Mass. Gen. Laws ch. 46, 13(e) (2000); Mich. Comp. Law 333.2831(c) (2002); Mo. Rev. Stat. 193.215(9) (2000); Neb. Rev. Stat. 71-604.1 (2002); N.J. Stat. Ann. 26:8-40.12 (1996); N.M. Stat. Ann. 24-14-25(D) (2000); N.C. Gen. Stat. 130A-118(b)(4) (2003). Many cases require one to fit sexist stereotypes to count as a "real" transgender person. See cases discussed supra Part III.C. For specific medical guidelines, see Whitney Barnes, *The Medicalization of Transgenderism*, Trans-Health.com (Summer 2001), at http://www.trans-health.com/Iss1Vol1/medicalize_tg.htm. Transgender women were refused hormones because they did not go to the doctor in a skirt. Transgender men were refused hormones because they disclosed to their doctor that they are gay. Disclosing to one's doctor that one is neither female nor male and obtaining hormones is virtually impossible. Interviews, in San Francisco Bay Area, Cal. (2002).

n63. Danny Kirchoff, director of Transgender Equality California at Equality California, calls this the "proto-tranny-narrative."

n64. See supra note 62. Since, by and large, the legal and medical communities have a particular view of what it means to be transgender, in order to get rights and/or medical care, transgender people, in these settings, have to conform themselves to the expectations. I have gone to countless transgender support group meetings where transgender people shared: "only if you say x, y, and z about yourself will this doctor/clinic provide you care," or "only if you say x, y, and z about yourself will you get a letter from the doctor that will then allow you to change the gender on your driver's license." Since the Social Security office only recognizes male and female gender identities, I counsel people that using that setting to talk about their complex genderqueer identity may not be the most effective.

There are exceptions. There are doctors and clinics that do not require that transgender people fit into narrow boxes. These are doctors who provide a safe environment in which transgender people can be themselves, openly. These are doctors who listen to and hear transgender people, instead of imposing their own preconceptions. I am very grateful to those doctors and clinics.

There are also laws that do not require a particular narrative. See, e.g., City and County of S.F. Human Rights Comm'n, Compliance Guidelines to Prohibit Gender Identity Discrimination (Dec. 10, 2003), at http://www.sfgov.org/site/sfhumanrights_page.asp?id=6274 [hereinafter Compliance Guidelines]; Assem. Bill 196, 2003-2004 Reg. Sess. (Cal. 2003) (amending Cal. Gov't Code 12926, adding 12949); Assem. Bill 537, 1999-2000 Reg. Sess. (Cal. 1999) (amending Cal. Educ. Code 200). Years of negotiations made these laws inclusive of transgender people who do not fit a narrow story.

n65. Virtually every "Transgender 101" workshop I have attended has used this approach. See also Case, *supra* note 27.

n66. In my experience, the linear conception of gender also furthers divisions between communities. For instance, there are at times misunderstandings and difficult relations between butch women and FTMs, which, in my experience, is in part due to a linear conception of gender. Under a linear conception of gender, a question arises: are butch women more masculine or are FTMs more masculine? That is, where, on the line of gender, do we place FTMs relative to butch women? With this view of gender, competition arises - a competition of masculinity, a competition that does cause tensions. This competition is unnecessary. I know masculine FTMs, I know FTMs who are not very masculine, and I know butch women who are more masculine than most FTMs.

In my experience, viewing gender as a line also leads to viewing gender as progressive. In other words, that butch women naturally progress into FTMs and that FTMs were butch women at some point. From attending the butch/FTM forums, I notice that viewing gender as progressive leads to a fear of "losing butches" to the FTM world. Yet, many FTMs never were butch women. I know FTMs who were straight women, feminine women, androgynous women, and butch women. Further, many butch women never transition to become FTMs. Many butch women are in fact MTFs - a "gaining of butches."

A gender galaxy conception does not lead to competition or a viewing of gender as progressive. "Butch woman" is a different gender than "FTM" - they are not linearly related. They are two equally valid and different locations in the gender galaxy.

n67. Eve Sedgwick proposes a model of gender that shares some similarities with the gender galaxy. Sedgwick describes gender as a space created by three, four, or n number of lines. She points out rightly that there are many independent or unpredictably related gender categories. So, for instance, one can be feminine but not femme, or masculine but

not butch. To account for the many ways in which people can be gendered, Sedgwick suggests a model of gender in which each gender term has its own axis in space. So, for instance, one's gender could be high on the masculinity axis and low on the butch axis. Importantly, Sedgwick's model is one in which masculinity and femininity are not linearly related to each other. The axis of femininity and the axis of masculinity are perpendicular to each other, in other words independent. If one is more feminine, one is not automatically less masculine. One's gender could be high on the masculinity axis and high on the femininity axis - one's gender can be gender-ful. Eve Kosofsky Sedgwick, "Gosh, Boy George, You Must Be Awfully Secure in Your Masculinity!", in *Constructing Masculinity* 11 (Maurice Berger et al. eds., 1995).

Sedgwick's model and the gender galaxy overlap in that they are both at least three-dimensional. Both models allow for infinite combinations of gender characteristics, and both models see masculinity and femininity not in opposition, not linearly related.

Yet Sedgwick's model, being a linear Cartesian space, differs from the gender galaxy. The gender galaxy is a non-linear space. I prefer the non-linear model because it does not require that we definitively demarcate and make quantifiable each gender characteristic. To create separate lines for butch, masculine, femme, high femme, trannyfag, and so on, we have to define these terms and make them quantifiable. I do not think it is possible to standardize definitions for all gender terms. If I ask ten people what "trannyfag" means to them, I suspect I will get ten different answers. I am also resistant to making the terms quantifiable. In a linear space, people are ordered; unless person A has exactly the same gender as person B, person A is more or less butch than person B. Having a hierarchy of femmeness or butchness or femininity creates a framework that can easily lead to competition and division. In the gender galaxy, if two people are at different gender locations, it does not necessarily mean that one is more butch or more femme than another - it means that one person is differently butch or differently femme from another. Different genders are not linearly or hierarchically related, different genders are simply that, different.

n68. The idea that the best gender to have is the most complicated one or the one that combines the most female and male characteristics in one person replaces one norm with another. In a world that tells us from day one who we should be and how we should be, choosing one's own gender, whether or not exactly the gender one was assigned at birth, is radical.

n69. Most of the United States still sees gender as binary and hierarchal. Thus, even if I see my gender as falling somewhere in the gender galaxy, many others will read my gender in a binary way and accordingly give or withhold privilege. See generally Bartky, *supra* note 38; Marilyn Frye, *Politics of Reality: Essays in Feminist Theory* (1983). The

United States still operates on a hierarchized gender model. I do not want to invalidate that material reality in any way. But, one way to change that reality is to change how we view gender. It is harder to discriminate based on gender if there are a million non-hierarchical genders that could change at any moment. To discriminate based on gender, we need fairly discrete gender categories, and the fewer, the simpler, and the more easily recognizable the better. Having only two gender categories ("women" and "men") makes discrimination and oppression fairly simple: one category is seen as superior to the other, and one is given preferential treatment over the other. In the United States, we spend an enormous amount of energy making sure that we can tell into which of the two categories any person falls so that we can engage in preferential treatment. See *id.* at 17. If it is difficult to tell into which category a person falls or if people move from one category to another, it will be more difficult to discriminate based on gender. It will be more difficult to know against whom to discriminate. If we have an infinite number of categories, it is difficult to order them hierarchically - and so to discriminate. Sexism would have a more difficult time surviving in a gender galaxy.

n70. Thanks to Ellise Nicholson from whom I first heard this beautiful phrase - the gender galaxy. I shared my three-dimensional, non-linear, moving view of gender, and she said, "That's like a 'galaxy,' a 'gender galaxy.'" I am not aware of anyone who has written about gender as three-dimensional, non-linear, non-static space.

The gender galaxy has been cited in Anthony S. Winer, *Assimilation, Resistance, and Recent Transsexual Marriage Cases*, 1 *Seattle J. Soc. Just.* 653, 675 n.20 (2003).

For earlier short descriptions of the gender galaxy, see Joel Engardio, *Legal Precedent*, *S.F. Weekly*, June 12, 2002; Dylan Vade, *Beyond the Women's Room*, *Curve Magazine*, May 2003, at 46; Dylan Vade (with Jody Marksamer), *Transgender Introduction*, *Transgender Law Center* (2003), available at <http://www.transgenderlawcenter.org/tranny/pdfs/Transgender%20101.pdf>.

n71. Female and male, though parts of the gender galaxy, take on a different meaning in that context. In the context of the binary gender system, female and male are all that exist and the ultimate norms. In the context of the gender galaxy, they are two among an infinite number of genders.

n72. Transgender people, as everyone, "are not simply expressing their innermost sense of self, but are re-establishing their relationship to the world." Ken Cooper, *Practice with Transgendered Youth and Their Families*, in *Social Services with Transgender Youth* 111, 113 (Gerald P. Mallon ed., Harrington Park Press 1999).

n73. For example, Judith Butler views gender as performative - a performativity that is expressive, physical, and done in relation to others. See, e.g., Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (1990); Judith Butler, *Imitation and Gender Insubordination*, in *Inside/Out: Lesbian Theories, Gay Theories* (Diana Fuss ed., 1991).

n74. Though we cannot be other than ourselves or have a gender other than our own, we can present to the world a gender that is not our own and not defined by ourselves. From hearing transgender people speak about their experiences and from personal experience, presenting a gender to the world that is not one's own takes enormous energy, is exhausting, and keeps one from being fully, openly, and honestly present to other people and to the world (and to oneself).

n75. Currently, many people are not able to express themselves as they would like, due to sexism, transphobia, racism, our economic structure, and the very justified fear of losing one's job, losing one's family, being assaulted, and losing one's life. We do not yet live in a world where we can all express our genders freely and be ourselves. For examples of difficulties that transgender people face in expressing their gender identities, see supra notes 9-16 and accompanying text.

n76. See, e.g., Riki Anne Wilchins, *Read My Lips: Sexual Subversion and the End of Gender* 16 (1997) ("I have begun speaking simply of gender as a name for that system that punishes bodies for how they look."). Gender is all bad. Gender only punishes. Gender is a cage. *Id.* at 156. I do agree that the way we currently conceptualize and use gender is highly problematic: that there are only two options, that no one can choose their option, that there are hierarchies of power related to gender. Gender in and of itself, however, is not bad.

n77. For a criticism of race-blind politics, see Gary Peller, *Race Consciousness*, 1990 *Duke L.J.* 758 (1990). Though I am not implying that race and gender are the same, I would argue similarly against a gender-blind society as Peller argues against a race-blind society.

n78. Feminists who argue for the use of the sex-gender distinction view sex as related to biology and gender as related to culture - sex related to male and female, and gender related to masculine and feminine. See Case *supra* note 27, at 11; Valdes, *supra* note 28, at 21. This conceptualization of sex and gender, female and feminine, male and masculine, does have a positive effect. By separating female from feminine and male from masculine, we can envision masculine females and feminine males. We can envision non-stereotypical women and men.

I find it crucial to create space for feminine men and masculine women. The sex-gender distinction, however, is not necessary to achieve that space and possibility. Other conceptualizations create space for masculine women and for feminine men. And the sex-gender distinction has the negative by-product of reinforcing sexism and ultimately reinforcing and ossifying rigid gender norms. Katherine Franke poignantly shows how the sex-gender distinction keeps in place the validity of biological differences and the hierarchies of power based on those biological differences: the sex-gender split is "a central mistake of equality jurisprudence ... [an] equality jurisprudence [that] has uncritically accepted the validity of biological sexual differences." Franke, *supra* note 29, at 2.

n79. For more discussion on this point, particularly the emotion/reason and related body/mind split, see Carol Bigwood, *Renaturalizing the Body (with the Help of Merleau-Ponty)*, 6 *Hypatia* 54 (1991) (arguing that all knowledge comes from or through our bodies); Rosi Braidotti, *Patterns of Dissonance: A Study of Women in Contemporary Philosophy* (Elizabeth Guild trans., Polity Press, 1991) (calling for a more embodied thought); Lorraine Code, *Epistemic Responsibility* (1987) (arguing that knowledge arose more out of particulars than universals); Vrinda Dalmiya & Linda Alcoff, *Are "Old Wives" Tales Justified?*, in *Feminist Epistemologies* 217 (Linda Alcoff & Elizabeth Potter eds., 1993) (questioning the validity of seeing "more scientific" views, that is, views more aligned with "reason," as more valid); Frye, *supra* note 69, at 84 (showing how knowledge can come from emotion); Patricia S. Greenspan, *Emotions and Reasons: An Inquiry into Emotional Justification* (1988) (showing the importance of emotion in knowledge and reason); Lisa Heldke, *Recipes for Theory Making*, 3 *Hypatia* 15 (1988) (showing that theorizing, usually seen as reason, includes emotion, intuition, and particulars); Alison M. Jaggar, *Love and Knowledge: Emotion in Feminist Epistemology*, in *Women, Knowledge, and Reality: Explorations in Feminist Philosophy* 129 (Ann Garry & Marilyn Pearsall eds., Unwin Hyman 1989) (showing how our perceptions are inextricably intertwined with our emotions); Genevieve Lloyd, *The Man of Reason: "Male" and "Female" in Western Philosophy* (2d ed. 1984) (describing how historically "female" has been defined in opposition to "reason"); Evelyn Fox Keller, *Feminism and Science in Women, Knowledge, and Reality*, *supra*, at 175 (describing the importance of intuition and the body in reason); Phyllis Rooney, *Recent Work in Feminist Discussions of Reason*, 31 *American Philosophical Quarterly* 1 (1994) (describing the different forms that women are seen as or that are excluded from reason); Gail Stenstad, *Anarchic*

Thinking, 3 *Hypatia* 87 (1988) (showing the value of ambiguity and incompleteness in forming knowledge).

n80. Wilchins, *supra* note 76, at 57.

n81. Greenberg, *supra* note 26, at 278.

n82. For instance, in chromosomes, one can have not only xy or xx, but also xxx, xxy, xxxy, xyy, xyxy, xyxyy, or xo. One can have two ovaries, two testes, one ovary and one testis, two ovotestes, or streak testes which function as neither. One's external morphology can consist of a small clit, a large clit, a small penis, a large penis, both a penis and a vagina. One can have different combinations of internal morphology. Everyone has both testosterone and estrogen and there are endless combinations of relative amounts. Similarly there are endless combinations of phenotypical features (e.g. hair, breasts, etc.). *Id.* at 278-91. For frequency of particular physical conditions, see Melanie Blackless et al., *How Sexually Dimorphic Are We? Review and Synthesis*, 12 *Am. J. Hum. Biology* 151 (2000), available at <http://www3.interscience.wiley.com/cgi-bin/fulltext/69504033/PDFSTART>.

n83. For instance, one can have an xy chromosome and a testes and external female genitalia. Greenberg, *supra* note 26, at 273.

n84. I am not describing the enormous biological variety to naturalize transgender, to say that there is a natural basis for transgender experience. It is not those people whose genitalia fall into the intersex category that identify as third gender. Most intersex people identify as male or female. Some identify as transgender. Most transgender people were not labeled intersex at birth. See Emi Koyama, *Introduction to Intersex Activism: A Guide for Gay, Lesbian, Bisexual, and Trans Allies* (Intersex Society of North America 2001). Gender identification has nothing to do with genital configuration.

Collapsing transgender and intersex hides the fact that the experience of intersex and transgender people is quite different. Though the underlying gender system makes life difficult for both intersex and transgender people (and some people are both intersex and transgender) it does so in very different ways. Intersex people are fighting the medical establishment to stop unconsented infant genital mutilation. Transgender people are fighting to have their genders recognized and legally protected.

Naturalizing transgender also denigrates choice. Only those whose genitalia are intersex would be "true" transgender people. Naturalizing transgender furthers the belief that there is validity and truth in tying gender to genitalia.

I am not describing the enormous biological variety to naturalize the gender of transgender people or to show that gender is just as natural as sex. On the contrary, I am describing the enormous biological variety to denaturalize sex, to show that sex, just as gender, is a cultural construct - and an extremely harmful construct.

For background material on intersex people, see Intersex Society of North America (ISNA) website at <http://www.isna.org>. See also Suzanne J. Kessler, *Lessons from the Intersexed* (1998); Greenberg, *supra* note 26; Alice Domurat Dreger, "Ambiguous Sex" - or Ambivalent Medicine? *The Hastings Center Report* 24 (May/June 1998); Brief of Amicus Curiae Intersex Society of North America, *Intersex Genital Surgery Cases*, Const. Court of Colum., Sentencia SU-337/99 (1999), at <http://www.isna.org/node/97>; S.F. Human Rights Comm'n Hearing, May 27, 2004, at http://www.sfgov.org/site/sfhumanrights_page.asp?id=24950.

n85. Greenberg, *supra* note 26, at 272.

n86. See, e.g., *M.T. v. J.T.*, 355 A.2d 204, 209-10 (N.J. Super. Ct. App. Div. 1976); *Frances B. v. Mark B.*, 355 N.Y.S.2d 712, 717 (N.Y. 1974).

n87. See Dreger, *supra* note 84, at 26.

n88. Some doctors define penises as being 1 cm and above, some define them as 1.5 cm and above, some 2.5 cm and above. Dreger, *supra* note 84, at 26. See Jody Lynee Madeira, *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, 132-36 (2002) (discussing the construction of the body and viewing the body as text).

n89. See *supra* note 88.

n90. There is limited agreement on how many people are intersex. First, it is difficult to get an exact number because there is a lot of shame around being intersex, so many intersex people do not disclose that they are intersex. Greenberg, *supra* note 26, at 268 n.9.

Further, one's answer depends on how one defines intersex (and how one defines man and woman). According to Julie Greenberg, the numbers are between 1 in 25 and 1 in 100. *Id.* at 267. According to ISNA, intersex births are statistically anywhere from 1 in 1500 to 1 in 2000. Intersex Soc'y of N. Am., *How Common Is Intersex*, at <http://www.isna.org/faq/frequency> (last visited Apr. 5, 2005). The statistics are 1.7/1000 according to Ken Cooper. Cooper, *supra* note 72, at 115. Even if we take a conservative figure, such as 1 in 2000 - this means that there are more intersex people in the world than there are Jewish people. Sherri Groveman, *Introduction to Intersex Activism* (Intersex Soc'y N. Am. 2001).

Why is there so little agreement? To know who is intersex, who has ambiguous genitalia, we have to know what we consider to be ambiguous. To know who falls outside or between female or male, we have to know what is female and what is male. To know what is a mixture of essential female and essentially male characteristics, we have to know what the essential male and essentially female characteristics are. How we define intersex depends on how we define male and female, and vice versa. This is circular reasoning. Intersex, female, and male are not natural categories. Dreger, *supra* note 84, at 26.

n91. In the United States, each day, five infants are subjected to unconsented genital surgery. Cheryl Chase, *Address at Creating Change*, Annual Conference of the Gay and Lesbian Task Force (Nov. 2001). For more information on the prevalence of performing surgery on infant's genitalia, see Greenberg, *supra* note 26, at 271.

n92. S.F. Human Rights Comm'n Hearing, May 27, 2004, at http://www.sfgov.org/site/sfhumanrights_page.asp?id=24950; *Pediatric Assignment of Sex: A Critical Reappraisal* (Stephen A. Zderic et al. eds., 2002).

One rationale behind infant mutilation is that without this surgical intervention, the child will be mercilessly harassed at school, in lockerrooms, etc. At a recent panel discussion, one intersex person who did not have unconsented surgical intervention at birth (her parents are doctors and successfully argued with the doctors who did want to mutilate their child) discussed her experience in locker rooms. She said that she had no difficulties. First, the other children did not pay that much attention to her or anyone else's genitalia. Further, she did not have self doubt: she thought that the other children's

genitalia were unusual, not her own. Intersex Panel, Intersex Society of North America, in San Francisco, Cal. (July 2001).

n93. This example is Cheryl Chase's. Chase, *supra* note at 91.

n94. By calling sex a cultural construct I do not intend to minimize how this construct affects all of us every day. The construct sex creates a cultural reality, and its normative affects are all too real. Those who are seen as intersex are mutilated at birth in the name of this construct to keep alive the cultural belief that there are only two natural sexes. Those who are so lucky as to not get labeled intersex at birth are still labeled boy or girl, a label that will affect what color shirt one will wear on day one, the types of socks/hose one will wear at job interviews, to what jobs one will have easy access, how one will perceive and live and move in one's body, what emotions one can acceptably express, whether one's assertiveness will be seen as aggressive, the level of safety one feels walking alone at night, what bathroom one will go to, how one is treated by teachers, strangers, parents, how one is expected to interact, and so on. Sex - the label one gets at birth, without one's consent, based on a quick measurement of one body part - is a label that will affect every single aspect of every day of one's life. Sex is a cultural construct that creates our social reality. The construct of sex sets in motion and justifies an enormous cultural apparatus that throws all human beings into one of two tracks. And this cultural construct is made to appear natural - so as to seem unquestionable and inevitable. For a discussion on the apparatus that maintains and reinforces our sex, see, for example, Frye, *supra* note 69, and Bartky, *supra* note 38.

n95. Judith Butler was the first to unpack this relation between sex and gender - i.e., that sex is seen as the natural, objective grounding for a cultural gender. Seeing sex as natural and objective justifies the existence of gender norms. See *supra* note 73.

n96. Genitalia are "absolute truth." See discussion *supra* Part II.A. This belief is also not foreign to the law. For instance, many states require genital surgery to change the gender marker on one's identification. For state laws on birth certificate gender changes, see *supra* note 62. Phil Duran of OutFront Minnesota had an excellent response regarding Minnesota's requirement of genital surgery to change the gender marker on one's driver's license. He asked Minnesota Driver and Vehicle Services (DVS) why it put a picture of people's faces and not of people's genitalia on the driver's license if genitalia are so critical:

"DVS' policy requiring amended birth records effectively requires that those seeking to change their driver's licenses undergo genital reconstruction. However, DVS has no legitimate interest in the shape of license applicants' genital organs. DVS does not ask about applicants' genitals, and the shape of one's genitals has no bearing, of course, on one's ability to drive. As part of its efforts to confirm a physical description of an applicant, DVS photographs the applicant's face, not their genitals."

Phil Duran, *OutFront Minnesota*, Petition for Rulemaking to Minnesota Department of Public Safety (2002).

n97. It is very rare that self-identification is recognized in the law; the law ordinarily requires some form of medical intervention to "validate" the person's gender identity. See *supra* note 5. For a good exception, see *Compliance Guidelines*, *supra* note 64.

n98. See, e.g., Sherry Ortner, *Is Female to Male as Nature Is to Culture?*, in *Women and Values: Readings in Recent Feminist Philosophy* (Marilyn Pearsall ed., 1986).

n99. Further, in most of life, actual genitalia do not matter. In our day to day life, we do not read the gender of our co-workers, our friends, or the people we pass on the street by looking at their actual genitalia. We read gender and then assume genitalia. Have you seen every person's genitalia whose gender you know? Thanks to Jody Marksamer for this observation.

n100. Whenever there is a conceptualization, such as the sex-gender distinction, that aids a power differential (by making it seem natural, for instance), questions arise. Who benefits from that conceptualization? And, what keeps that conceptualization and power differential in place? See, e.g., Friedrich Nietzsche, *Beyond Good and Evil: A Prelude to a Philosophy of the Future* (Walter Kaufman trans., 1989); Michel Foucault, *The History of Sexuality: An Introduction* (Robert Hurley trans., 1990).

n101. Who benefits from a world of binary, genitally based, unquestioned gender? Certainly, people who do not have binary or genitally based genders - or who question gender - do not benefit. See *supra* notes 9-16 and accompanying text. People who present according to traditional gender norms have a relative benefit. Men do benefit. Sexism and the preferential allocation of resources to men can exist more easily if there are few and

easily recognizable genders that cannot be questioned. See, e.g., Frye, *supra* note 69, at 1-40 (describing how easily recognizable genders aid the oppression of women).

n102. Consent: obviously a one day old child cannot consent, but parents can. This consent can be meaningful if the parents are educated on intersex issues, as presented by intersex organizations, rather than as presented by the medical establishment, before making that decision. Doctors should provide information on real medical issues and dangers that might arise if the child undergoes surgery. Doctors should show videotapes provided by ISNA. Telling parents that the child must undergo surgery to lead a productive happy life is a misrepresentation and does not leave parents with a meaningful, informed ability to choose. And if there is no true medical emergency, there is always the option of letting the child decide themselves when they are older. See Kishka-Kamari Ford, "First, Do No Harm" - The Fiction of Legal Parental Consent to Genital-Normalizing Surgery on Intersexed Infants, 19 *Yale L. & Pol'y Rev.* 469, 474 (2001) (arguing that parents are not given enough information by doctors to give legal consent to their child's surgery); Glenn M. Burton, *General Discussion of Legal Issues Affecting Sexual Assignment of Intersex Infants Born with Ambiguous Genitalia*, at <http://www.isna.org/node/196> (last visited Apr. 29, 2005).

n103. I dislike all versions of this definition: "Transmen have female bodies and male identifications," "Transwomen are male born people who feel they are women," "Transpeople have genitalia of one sex and the mind of another," "FTMs are women with body ambivalence who cut off their tits and "turn into men." Michelle Tea, Boogie Dykes, *S.F. Bay Guardian*, Jan. 31, 2001, at 26. See also all cases cited in Part III.C.

n104. James Green puts it well: when we separate sex from gender, expression from biology, "when we use terms like sex 'roles' or gender 'roles,' our language subtly conditions us to doubt the authenticity of a person's self-expression." D.E. Butler (original draft by Jamison Green), *Training and Information Bulletin*, Jan. 15, 2000, available by contacting www.jamisongreen.com.

n105. See, e.g., Wendy Melillo, *D.C. Fire Officials to Reinvestigate Transvestite's Death*, *Wash. Post*, Dec. 5, 1995, at B2 (referring to Tyra Hunter, who was a transsexual woman, as a man who is a transvestite, using Tyra's old name and male pronouns. Implied in the piece is that Tyra is really a man, that Tyra is not who Tyra says she is.). After the recent murder of the transgender woman Gwen Araujo, the local papers and A.P. Press initially referred to Gwen as "Eddie" and used the male pronouns to such an extent that the Gay and Lesbian Alliance Against Defamation (GLAAD) issued an Action Alert. GLAAD,

Urge Respectful, Accurate Coverage of Gwen Araujo (Nov. 19, 2002), at http://www.glaad.org/action/alerts_detail.php?id=3110. See also Tea, *supra* note 103 (FTMs are really women who cut off their breasts). Also, please see all cases cited in Part III.C for similar definitions.

n106. See generally Wilchins, *supra* note 46.

n107. I am not suggesting a conspiracy theory, that there is a group of people who conspire to give power to doctors. Yet, individuals and groups can create, reinforce, or maintain power dynamics. For instance, The Harry Benjamin International Gender Dysphoria Association (HBIIGDA) creates the "Standards of Care" - for doctors' treatment of transgender people. The "Standards of Care" outline who is deemed a real transgender person and who is not, who gets care and who does not. The Standards give doctors the power to make that determination. The Standards, though evolving, are still largely binary. And, HBIIGDA board members, who create the Standards, are largely non-transgender physicians. These individual physicians do have enormous power and reinforce the power that physicians have over transgender people. See The Harry Benjamin Int'l Gender Dysphoria Ass'n, *supra* note 52.

n108. Doe v. Yunits, 15 Mass. L. Rep. 278, 282 (Mass. Super. Ct. Feb. 26, 2001).

n109. See discussion *supra* Part I.A.3.

n110. See, e.g., Lee *supra* note 7, at B1.

n111. Zach Calef, Double Standards in Reactions to Rape, Iowa State Daily, Online Ed., Oct. 24, 2002, at http://www.iowastatedaily.com/vnews/display.v/ART/2002/10/24/3db7765f45381?in_archive=1.

n112. See Smith & St. Pierre, *supra* note 8.

n113. See supra note 32. Questioning transgender people's validity and the validity of transgender people's self-identified genders is not uncommon, and occurs even in law review articles. For instance, Ronald Garet, in his article, asks the question of how the lives and actions of transgender people should be regarded morally. For instance, is it moral for a father to transition? See Garet, supra note 5, at 143-45. It is interesting that Garet never asks himself whether or not it is moral for him to be himself, to have the gender he has, to make the gender choices he makes. Because his gender choices are more in line with his birth-assigned gender, i.e. "truth," he sees himself as immune from these questions. It is only transgender people who are potential frauds and immoral agents. I find the question of whether or not it is moral for transgender people to be themselves extraordinarily insulting. I also question Garet's familiarity with actual transgender people. He posits that perhaps transgender are only transgender because they have narrow views of gender. For instance, he suggests that perhaps transgender women transition because they believe in sexist gender norms, because they cannot conceive of themselves as feminine men. *Id.* at 182-84. How does this question apply to a butch lesbian transgender woman? To a not-masculine transgender man? To a feminine transwoman? Being a feminine woman is a very different gender location than being a feminine man. Garet's hypothesis relies on a limited knowledge of the transgender communities and a limited view of gender possibilities.

n114. A word on disclosure of doctor-assigned gender. I am openly transgender, but, I do not always wear it on my forehead. Sometimes I run into situations where people tell me that I should have told them earlier that I am transgender, and that by not doing so, I deceived them. Deception. Why do I have any more obligation to make that disclosure than a non-transgender person? One person with whom I was flirting told me that he was horrified because he thought that I was just a "cute gay guy." In retrospect, I should have responded by saying that I, too, was horrified, for I had assumed he was "just a cute queer tranny boy," and how dare he not disclose his non-trans status right up front. Why is the onus only on transgender people to disclose their birth-assigned gender? I am not a fraud. I am more true to myself than I have ever been. If someone else assumes by looking at me that I have a certain birth-assigned gender or that I have a certain shape/size of genitalia, that is that person's issue, that person's stereotyping, narrow, and incorrect belief about what it means to be female, male, third gender, trans, genderqueer, and so on.

n115. I do not like to see myself as having a body and mind that do not match. To be honest, I cannot conceptualize it. My body and my mind are part of me, inseparable. Everyone is a whole person - a whole embodied thoughtful person - a complex person. Just because I am gender non-conforming does not mean that something does not match. I have a gender non-conforming body and a gender non-conforming mind all wrapped in

up in one gender non-conforming me. To separate out one from the other makes it feel as if part of me is not really part of me, as if something is being ripped away from me - and the physical sensation I have as I think of that is nausea.

n116. Another conceptualization that relies on the sex-gender distinction is "bio-boy." See, e.g., Butch-Femme.com, Reinforcing the Stereotype, at <http://www.butch-femme.com/portal/forums/printthread.php?threadid=4663> (last visited Feb. 19, 2005); Transgender Alphabet Soup, at <http://users4.ev1.net/~taragem/terms.htm> (last visited Apr. 5, 2005).

"Bioboy" is used to describe non-transgender men. If non-transgender men are biological, what am I? An alien? "Bio-boy" reinforces the idea that there is a biological basis for gender, that non-transgender men are more "real," and that non-transgender men are the only men who have their body match their gender identity and can escape the mind-body split.

n117. There are transgender people who do conceptualize themselves as having a mismatch of body and mind. What is key is that the transperson defines their experience themselves and that it is not imposed by a doctor under a purported objectivity and truth.

n118. I am not aware of any writing about the effect that a mind-body split or a split of the body has specifically on transgender people. Eating disorders are one possible effect of being dissociated from one's body. See, e.g., Susan Bordo, *Unbearable Weight: Feminism, Western Culture, and the Body* (1993). For other pieces on the harms of the mind-body split, see, for example, Steven Greer, *Healing the Mind/Body Split: Bringing the Patient Back into Oncology*, 2 *Integrative Cancer Therapies* 5 (2003), at <http://ict.sagepub.com/cgi/content/abstract/2/1/5>; Patrick Bracken & Philip Thomas, *Time to Move Beyond the Mind-Body Split*, 325 *Brit. Med. J.* 1433 (2002), at <http://bmj.bmjournals.com/cgi/content/full/325/7378/1433>.

n119. As Judith Butler argues, sex/gender is "the discursive/cultural means by which 'sexed nature' or 'a natural sex' is produced and established as 'prediscursive'." Butler, *supra* note 73, at 7. "Gender is a kind of imitation for which there is no original." Butler, *supra* note 73, at 21 (emphasis omitted).

n120. "Sex is fucking, everything else is gender." Doris Rita Alfonso, *Imagining Sex in Space: How Sexual Difference Acquires Ontological Import in Plato's Timaeus 1, 173* (2002) (dissertation, State University of New York at Stony Brook); Shannon Bell, *Kate Bornstein: A Transgender Transsexual Postmodern Tiresias* (Oct. 20, 1994), at http://www.ctheory.net/text_file.asp?pick=61 (quoting Kate Bornstein). Sex is fucking, everything else is the gender galaxy.

n121. If we do not acknowledge the sex-gender distinction as a valid one how does that affect women's ability to organize and work for women's rights? It is helpful since it dethrones the idea that there is a biological, and objective, basis to sex. See Franke, *supra* note 29, at 3.

If we view gender as a galaxy of non-linear, fluid options, how does that affect the oppression of women? If we view gender as non-binary, non-linear, and fluid it is more difficult to discriminate based on gender. The more categories there are, and the less distinct, and the less easily recognizable they are, the more difficult it is to treat people differentially based on those categories. See, e.g., Frye, *supra* note 69, at 1-40.

Is there any harm to having more than two genders? Since having more genders does not erase any genders, I do not see any harm.

Is there a harm to seeing birth-assigned gender as invalid, seeing sex as invalid? People who were assigned female at birth are discriminated against. And, people who at some point in their lives identify as women are discriminated against. There is overlap in that discrimination and some difference. If one were treated as a girl/woman from age one to age one hundred, one will have a different experience than if one were treated as a girl/woman from birth to age thirty, and then treated as a man, or if one were treated as a boy from birth to age fifteen, and then as a woman. There is a need to work to end all gender discrimination. There is a need to organize. There is a need for affirmative action. "Assigned female at birth" is still a valid category under which people can organize. Women who were assigned female at birth (and all people who were assigned female at birth) can still use that category, but with the recognition that that category is not necessarily equivalent to one's gender identity, and that the assignment process is a problematic one. And, women can organize under the category of "woman," but with the understanding that that category refers solely to self-identification and not birth assignment.

n122. Until recently, the law's dealing with transgender people was dismal. In 2001, at the National Gay and Lesbian Taskforce's Creating Change Conference, there was a workshop on transgender legal victories. *Transgender Legal Victories Workshop, National Gay and Lesbian Taskforce Creating Change Conference* (Nov. 2001). Shannon Minter, the senior staff attorney at the National Center for Lesbian Rights, said that five

years ago, the workshop would have been thirty seconds long and consisted of: "Hi, there are no victories, end of workshop."

For examples of cases that rule against transgender people in particularly insulting ways, see *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984) (holding that Title VII does not apply to transgender people); *Frances B. v. Mark B.*, 355 N.Y.S.2d 712 (1974) (holding that no valid marriage was entered into between a transgender man and a non-transgender woman); *Littleton v. Prange*, 9 S.W.3d 223, 231 (Tex. App. 1999) (holding that a transgender woman's marriage is invalid).

n123. *Daly v. Daly*, 715 P.2d. 56 (Nev. 1986) (terminating the parental rights of a transgender father).

n124. *In re Estate Gardiner*, 42 P.3d 120 (Kan. 2002) (holding that the marriage between a transgender woman and a non-transgender man is void); *Littleton v. Prange*, 9 S.W.3d 223 (Tex. App. 1999).

n125. *Miranda v. I.N.S.*, 51 F.3d 767 (8th Cir. 1995) (denying asylum to a male to female transgender person, despite the fact that she would face social and medical hardship). Five years later, a gender non-conforming gay man was granted asylum in *Hernandez-Montiel v. I.N.S.*, 225 F.3d 1084 (9th Cir. 2000). In the latter decision, the word "transgender" was not used.

n126. For people who are not prisoners, insurance coverage for medical care is commonly decided on a case by case basis. See, e.g., *Pinneke v. Preisser*, 623 F.2d 546, 549 (8th Cir. 1980) (where the court found that Iowa's policy of denying Medicaid benefits for sex-reassignment surgery when it was a medical necessity for treatment of transsexualism was not consistent with the objectives of the Medicaid statute); *Doe v. Dep't of Public Welfare*, 257 N.W.2d 816, 820 (Minn. 1977) (where the court found that the denial of medical assistance benefits to adult male transsexual was arbitrary and unreasonable). Medical care for prisoners is often denied. See, e.g., *Meriwether v. Faulkner*, 821 F.2d 408, 413 (7th Cir. 1987) (denial of hormone treatment); *Supre v. Ricketts*, 792 F.2d, 958, 963 (10th Cir. 1986)(denial of estrogen treatment); *Lamb v. Maschner*, 633 F. Supp. 351, 353-54 (D. Kan. 1986) (denial hormone treatment and surgery).

n127. *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1085, 1087 (7th Cir. 1984).

n128. *Littleton*, 9 S.W.3d at 231.

n129. *Ulane*, 742 F.2d at 1085, 1087 (emphasis added).

n130. *Frances B. v. Mark B.*, 355 N.Y.S.2d 712, 717 (Sup. Ct. 1974).

n131. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989).

n132. *Hopkins*, 490 U.S. at 251.

n133. *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000).

n134. *Hartford*, 204 F.3d at 1200-02.

n135. *Hartford*, 204 F.3d at 1201.

n136. For additional recent cases which hold that transgender people are protected under sex discrimination laws, see *Lie v. Sky Publishing Corp.*, 15 Mass. L. Rep. 412 (Mass. Super. 2002) (A transgender woman was told by her employer that she had to wear men's clothing. The court found that she had established a prima facie case of sex discrimination.); *Jette v. Honey Farms Mini Market*, 2001 WL 1602799 (Mass. Comm'n Against Discrim., Oct. 10, 2001) (A transgender woman was not allowed to wear women's clothes - and was fired. The court found that she had a claim under sex discrimination.); *Millett v. Lutco, Inc.*, 2001 WL 1602800 (Mass. Comm'n Against Discrim., Oct. 10, 2001) (A transgender woman was issued a pretextual warning after disclosing that she is transgender. The court found that she had a claim under sex

discrimination.); *Doe v. Yunits*, No. 00-1060A, 2000 WL 33162199 (Mass. Super. Ct. Oct. 11, 2000)(order granting preliminary injunction)(holding that a transgender student who was told that she had to wear boys clothing may have a claim under state sex discrimination laws); *Rentos v. OCE-Office Sys.*, 72 Fair Empl. Prac. Cas. (BNA) 1717 (S.D.N.Y. 1996) (The court did not dismiss a case of a transgender woman who was discriminated against by her employer.); *Maffei v. Kolaeton Indus., Inc.*, 626 N.Y.S.2d 391 (N.Y. Sup. Ct. 1995 (A transgender woman was subjected to a hostile work environment. The court found that the municipal sex discrimination law applied.) See also National Center for Lesbian Rights, *Cases Recognizing Protection for Transgender People Under State Sex and Disability Discrimination Provisions*, at <http://www.nclrights.org/publications/transprotect0904.htm> (last visited Feb. 21, 2005).

n137. *Enriquez v. W. Jersey Health Sys.*, 777 A.2d 365 (N.J. Super. Ct. App. Div. 2001), cert. denied, 785 A.2d 439 (N.J. 2001).

n138. *Enriquez*, 777 A.2d at 368.

n139. *Enriquez*, 777 A.2d at 373.

n140. For cases which hold that transgender people are protected under disability protections, see *Doe v. Bell*, 754 N.Y.S.2d 846 (N.Y. Sup. Ct. 2003) (The court held that a transgender youth in the foster care system was protected by state disability protections in housing); *Lie*, 15 Mass. L. Rep. at 412 (A transgender woman was told by her employer that she had to wear men's clothing. The court found that she had established a prima facie case under disability protections.); *Jette*, 2001 WL 1602799 (A transgender woman was not allowed to wear women's clothes and was fired. The court found that she had a claim under disability protections.); *Millett*, 2001 WL 1602800 (A transgender woman was issued a pretextual warning after disclosing that she is transgender. The court found that she had a claim under disability protections.); *Yunits*, 15 Mass. L. Rptr. 278 (Mass. Super. Ct. Feb. 26, 2001)(The court found that a transgender student may be protected by disability law.); *Smith v. City of Jacksonville Corr. Inst.*, 1991 WL 833882 (Fla. Div. Admin. Hrgs.) (The court held that a person with gender dysphoria is covered by disability law.); *Doe v. Electro-Craft Corporation*, 1988 WL 1091932 (N.H. Super. Ct.) (The court held that transgender people are covered under disability in state employment laws.) See also National Center for Lesbian Rights, *Cases Recognizing Protection for Transgender People Under State Sex and Disability Discrimination Provisions*, at <http://www.nclrights.org/publications/transprotect0904.htm> (last visited Feb. 21, 2005).

n141. Enriquez, 777 A.2d at 380.

n142. Enriquez, 777 A.2d at 376-77.

n143. Those who argue for the use of disability law commonly assert that a) there currently are few effective protections for transgender people, and we have to use whatever we can; b) disability law is not stigmatizing; and c) transgender people should be allies to other people who are seen as 'different' in our society and, for better or for worse, disability law is the way that United States law deals with people who are different from a mythical norm. Those who argue against the use of disability law commonly assert that a) disability law is stigmatizing; b) disability law relies heavily on a medical model of being transgender (requiring a psychiatric diagnosis of 'gender dysphoria'), which works only for some transgender people and leaves out transgender people who have no access to the medical system; and c) transgender people, and all people, should be able to demand equal treatment without apologizing for their existence and claiming to have a disorder. For an excellent discussion, see Spade, *supra* note 36.

n144. E.g., Ann Arbor, Mich., Ordinance No. 10-99 (1999); Atlanta, Ga., Ordinance No. 00-0074 (2000); San Francisco, Cal., Ordinance No. 433-94 (1994). See Transgender Law and Policy Institute for a list of cities, counties, and states that have protections for transgender people, at <http://www.transgenderlaw.org/ndlaws/chart.pdf> (last visited Apr. 5, 2005).

n145. Assem. Bill 196, 2003-2004 Reg. Sess. (Cal. 2003) (amending Cal. Gov't Code 12926, adding 12949).

n146. There are a few exceptions. In January 2004, San Francisco passed Compliance Guidelines to Prohibit Gender Identity Discrimination that explicitly and in practice protect transgender people who do not identify as female or male. Compliance Guidelines, *supra* note 64. The Regulations interpret the San Francisco Administrative and Police Codes that list gender identity as one of the protected categories. San Francisco, Cal. Admin. Code 12A (2002) (general), 12B (2002) (employment, city contractors), 12C (2002) (public accommodations, city contractor); San Francisco, Cal.,

Mun. (Police) Code 33 (2002) (employment, housing, public accommodations, in city limits). The San Francisco Unified School District adopted Regulations that explicitly and practically protect transgender people who do not identify as female or male, at <http://www.transgenderlaw.org/college/sfusdpolicy.htm> (last visited Apr. 5, 2005). Further, there are laws, such as California's Assembly Bill 196, *supra* note 145, that were written without gendered language so as to be inclusive of people who do not identify as female or male.

n147. For cases that require that transgender people fit stereotypical gender norms, see *supra* note 5.

n148. The only legislative exception that explicitly states that a person's self-identified gender is the only criterion of that person's gender are the new S.F. Human Rights Comm'n, Compliance Guidelines, *supra* note 64. For discussion on requirements other than self-identification, see Spade, *supra* note 36.

n149. *Littleton v. Prange*, 9 S.W.3d 223, 223 (Tex. App. 1999).

n150. See, e.g., *In re Estate of Gardiner*, 42 P.3d 120 (Kan. 2002); *Goins v. West Group*, 635 N.W.2d 717 (Minn. 2001); *M.T. v. J.T.*, 355 A.2d 204 (N.J. Super. App. Div. 1976); *Frances B. v. Mark B.*, 355 N.Y.S.2d 712 (N.Y. Sup. Ct. 1974); *Hartin v. Dir. of Bureau of Records & Statistics*, 347 N.Y.S.2d 515 (N.Y. Sup. Ct. 1973); *Anonymous v. Weiner*, 270 N.Y.S.2d 319 (N.Y. Sup. Ct. 1966).

n151. For discussion, please see *supra* Part II.A.

n152. See, e.g., *Kantaras v. Kantaras*, No. 98-5375, slip op. at 40-55, 64, 795 (Fla. Cir. Ct. 2003), available at <http://www.transgenderlaw.org/cases/kantarasopinion.pdf>; *In re Estate of Gardiner*, 42 P.3d at 122-24; *M.T.*, 355 A.2d at 210; *Frances B.*, 355 N.Y.S.2d at 713-18; *Littleton*, 9 S.W.3d at 223, 225.

n153. No known case has been brought by a transgender person who does not (or is not made to) fit into a significant number of stereotypes. I suspect that this is so because many existing cases harp on stereotypes and it then seems futile. See supra note 5. I had conversations with transgender legal activists who are hesitant to push cases in which the transgender person does not fit stereotypes and has not had genital surgery.

n154. See supra note 150 for decisions in which courts fall heavily on the side of birth-assigned gender.

n155. Please see Part II.A.

n156. *Hartin v. Dir. of Bureau of Records & Statistics*, 347 N.Y.S.2d 515 (N.Y. Sup. Ct. 1973).

n157. *Hartin*, 347 N.Y.S.2d at 516.

n158. *Hartin*, 347 N.Y.S.2d at 517. The *Hartin* court asks whether a male to female transgender person is a woman. Its question is not as blunt as that of the *Littleton* court, which asks, "When is a man a man, and when is a woman a woman?" *Littleton v. Prange*, 9 S.W.3d 223, 223 (Tex. App. 1999).

n159. *Hartin*, 347 N.Y.S.2d at 517.

n160. *Hartin*, 347 N.Y.S.2d at 517-18.

n161. *Hartin*, 347 N.Y.S.2d at 517 (citing Comm. on Pub. Health of the N.Y. Academy of Med., *Change of Sex on Birth Certificates for Transsexuals* (Oct. 4, 1965)).

n162. Hartin, 347 N.Y.S.2d at 517.

n163. John Ohle also questions the objectivity of the initial birth assignment in Hartin. According to Ohle, the initial birth assignment is a doctor's perception. Perceptions can change. So, this perception also should be able to change. Moreover, other perceptions should count as well. Ohle, *supra* note 28, at 254.

n164. Hartin, 347 N.Y.S.2d at 518.

n165. *Anonymous v. Weiner*, 270 N.Y.S.2d 319 (N.Y. Sup. Ct 1966).

n166. *Weiner*, 270 N.Y.S.2d at 320.

n167. *Weiner*, 270 N.Y.S.2d at 320 (quoting Harry Benjamin, *Nature and Management of Transsexualism*, 72 *W. J. Surgery, Obstetrics & Gynecology* 105 (1964)).

n168. *Weiner*, 270 N.Y.S.2d at 321-22.

n169. *Weiner*, 270 N.Y.S.2d at 321. Jody Madeira sees *Weiner* as the beginning of a legal trend to value biology in determining transgender people's gender. Jody Lynee Madeira, *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, 146 (2002).

n170. *Weiner*, 270 N.Y.S.2d at 319-21. Throughout the entire case, only the medical and legal authorities are taken seriously. For an outline of the insulting language used to describe transgender people in *Weiner*, see Helen G. Berrigan, *Transsexual Marriage: A Trans-Atlantic Judicial Dialogue*, 12 *L. & Sexuality* 87, 89-91 (2002).

n171. Weiner, 270 N.Y.S.2d at 324.

n172. Frances B. v. Mark B., 355 N.Y.S.2d 712 (N.Y. Sup. Ct. 1974).

n173. Frances B., 355 N.Y.S.2d at 714.

n174. Frances B., 355 N.Y.S.2d at 714.

n175. Frances B., 355 N.Y.S.2d at 714.

n176. Frances B., 355 N.Y.S.2d at 713-14.

n177. Frances B., 355 N.Y.S.2d at 716-17. Melissa Aubin discusses how courts take it upon themselves to determine gender (and so whether or not one can marry). See Melissa Aubin, *Defying Classification: Intestacy Issues for Transsexual Surviving Spouses*, 82 *Or. L. Rev.* 1155 (2003).

n178. Frances B., 355 N.Y.S.2d at 714.

n179. Frances B., 355 N.Y.S.2d at 717.

n180. Frances B., 355 N.Y.S.2d at 717.

n181. Frances B., 355 N.Y.S.2d at 717. Mary Coombs argues that the court did not distinguish between potency and fertility (the latter having historically been a ground for

annulling a marriage.) Mary Coombs, *Sexual Dis-orientation: Transgendered People and Same-Sex Marriage*, 8 *UCLA Women's L.J.* 219, 252-53 (1998).

n182. Frances B., 355 N.Y.S.2d at 717. For a discussion of courts' requirement of penis-vagina-penetration in transgender cases, see Karla Robertson, Note, *Penetrating Sex and Marriage: The Progressive Potential of Addressing Bisexuality in Queer Theory*, 75 *Denv. U. L. Rev.* 1375, 1377-82 (1998).

n183. Frances B., 355 N.Y.S.2d at 717.

n184. Frances B., 355 N.Y.S.2d at 717.

n185. Frances B., 355 N.Y.S.2d at 713.

n186. Frances B., 355 N.Y.S.2d at 717.

n187. *M.T. v. J.T.*, 355 A.2d 204 (N.J. Super. Ct. App. Div. 1976).

n188. *M.T.*, 355 A.2d at 205.

n189. *M.T.*, 355 A.2d at 205.

n190. *M.T.*, 355 A.2d at 205 (quoting plaintiff's medical doctor).

n191. *M.T.*, 355 A.2d at 207 (quoting trial judge).

n192. M.T., 355 A.2d at 206.

n193. M.T., 355 A.2d at 206.

n194. M.T., 355 A.2d at 206. The court used a very limited view of heterosexual intercourse and of male sexual functioning.

n195. M.T., 355 A.2d at 206.

n196. M.T., 355 A.2d at 206.

n197. M.T., 355 A.2d at 210. John Fisher puts M.T. in the category of cases which acknowledge a transgender person's gender albeit after surgery. John Fisher, *Sex Determination for Federal Purposes: Is Transsexual Immigration Via Marriage Permissible under the Defense of Marriage Act?* 10 Mich. J. Gender & L. 237, 254 (2004). Terry Kogan finds M.T. problematic because of its emphasis on sexual function. Terry Kogan, *Transsexuals, Intersexuals, and Same-Sex Marriage*, 18 BYU J. Pub. L. 371, 385-86 (2004). I do not see this case as an advancement. This court did allow a transgender person to meet its standards. But I object to the standards: genital surgery and heterosexuality.

n198. Neither all men nor all women are heterosexual. To require heterosexuality for real manhood or real womanhood is homophobic. To require surgery discriminates against those transgender people who either do not want surgery or cannot afford it. Thus, a surgical requirement is either classist and/or forces genital surgery upon people who do not want it. See *supra* Part I.A.3. I find that the best requirement is that of self-identification. For examples of laws that honor self-identification, see *supra* note 146.

n199. Does "heterosexually functioning" refer to a specific act? If so, which one? Does it refer to penis/vagina penetration? Does it refer to penis/vagina penetration with

fertilization? Does it refer to the touching of a vagina by a person with a penis (with fingers, with the mouth, etc.)? Does it refer to the insertion of a dildo by a person with a vagina into the anus of a person with a penis? Does it refer to any sexual activity that any heterosexual couple engages in?

n200. *Goins v. West Group, Inc.*, 635 N.W.2d 717 (Minn. 2001).

n201. *Goins*, 635 N.W.2d at 720-21.

n202. *Goins*, 635 N.W.2d at 721.

n203. *Goins*, 635 N.W.2d at 722.

n204. *Goins*, 635 N.W.2d at 721.

n205. Jenifer Ross-Amato's article describes in detail the history of the *Goins* case. The article points out that it is problematic for the court to use "biological gender" without defining it. The article also points out the limitations of using a binary view of gender. Yet, the article leaves the sex-gender distinction in place. Jenifer M. Ross-Amato, *Transgender Employees and Restroom Designation - Goins v. West Group, Inc.*, 29 *Wm. Mitchell L. Rev.* 569, 588-90 (2002). Samantha Levy finds that the court's distinction between "gender" and "biological gender" in *Goins* is arbitrary. She does not argue that this distinction is the problem in and of itself. She advocates for the use of a different protected category, i.e. protecting transgender people under "transgender" or "gender identity," instead of under "gender." Samantha Levy, *Trans-Forming Notions of Equal Protection: The Gender Identity Class*, 12 *Temp. Pol. & Civ. Rts. L. Rev.* 141, 157-59 (2003). I do not think that the problem lies in protecting transgender people under "gender." Transgender people have a gender, and it is transgender people's gender that is at issue in these cases. I think the problem lies in having a binary, linear, static view of gender that has as its backdrop the mythical biological sex, i.e. is distinguished from sex. See *supra* Part II.

n206. Goins, 635 N.W.2d at 723. Richard Storrow describes this decision as one that eviscerates the Minnesota state protections by holding that transgender protections do not extend to bathrooms. Richard Storrow, *Gender Typing in Stereo: The Transgender Dilemma in Employment Discrimination*, 55 Me. L. Rev. 117, 151-53 (2003). I agree. It does not make much sense to say that a transgender person is protected in employment as long as they do not go to the restroom. Lisa Mottet also urges us to take restroom access seriously. Lisa Mottet, *Access to Gender-Appropriate Bathrooms: A Frustrating Diversion on the Path to Transgender Equality*, 4 Geo. J. Gender & L. 739 (2003).

n207. Goins, 635 N.W.2d at 726.

n208. *In re Estate of Gardiner*, 42 P.3d 120 (Kan. 2002).

n209. *Gardiner*, 42 P.3d at 121, 123.

n210. *Gardiner*, 42 P.3d at 121.

n211. *Gardiner*, 42 P.3d at 121-22.

n212. *Gardiner*, 42 P.3d at 124.

n213. *Gardiner*, 42 P.3d at 121-24.

n214. *Gardiner*, 42 P.3d at 123.

n215. *Gardiner*, 42 P.3d at 137. John Fisher points out that the court, though purportedly applying a common sense definition of "sex," is creating its own standards. Fisher, *supra* note 197, at 251-52.

n216. No matter what physical intervention J'Noel undergoes, this court will still make her lose: "Her female anatomy, however, is still all man-made. The body J'Noel inhabits is a male body in all aspects other than what the physicians have supplied." In re Estate of Gardiner, 42 P.3d at 124. John Ohle writes about the Gardiner court using the gender assigned at birth as the determining gender. Ohle, supra note 28, at 256.

n217. In re Estate of Gardiner, 42 P.3d at 124. Anthony Winer criticizes courts such as the one in Gardiner for using an assimilationist criteria, i.e., that in order to be a real woman, a transgender person must assimilate to, as much as possible, the stereotype of a woman. Winer, supra note 70, at 665.

n218. See Winer, supra note 70, at 665-66.

n219. In re Estate of Gardiner, 22 P.3d 1086, 1110 (Kan. 2001) (quoting William Reiner, To Be Male or Female - That Is the Question, 151 Archives Pediatrics & Adolescent Med. 224-25 (1997)).

n220. Doe v. Yunits, No. 00-1060A, 2000 WL 33162199, at 1 (Mass. Super. Ct. Oct. 11, 2000)(order granting preliminary injunction); Doe v. Yunits, 15 Mass. L. Rptr. 278 (Mass. Super. Ct. Feb. 26, 2001). The earlier and overruled decision, In Re Estate of Gardiner, though finding for the transgender person and doing so quite respectfully, did use the sex-gender distinction in describing transgender people. In re Estate of Gardiner, 22 P.3d at 1093. This court, however, spent pages detailing biological diversity, thus undoing the belief that gender is definitively assigned at birth or binary. Id. at 1093-1100. By dethroning birth assignment as binary ultimate truth, the court in effect moves away from the sex-gender distinction.

n221. Yunits, 2000 WL 33162199, at 1.

n222. Yunits, 2000 WL 33162199, at 1.

n223. Yunits, 2000 WL 33162199, at 1.

n224. Yunits, 2000 WL 33162199, at 1-8.

n225. Yunits, 2000 WL 33162199, at 3, 6.

n226. Yunits, 2000 WL 33162199, at 3. See also, e.g., Madeira, *supra* note 88, at 138 (quoting Stephen Whittle, *The Transgender Debate: The Crisis Surrounding Gender Identity* 5 (2000)).

n227. See Yunits, 2000 WL 33162199, at 2, 6-7.

n228. Yunits, 2000 WL 33162199, at 3. A physician was consulted, even in this case. Perhaps it will take a long time before we can talk about gender without citing a doctor. However, in this case, the physician did not testify as to the young woman's childhood, sexual practices, or medical history. Nor did he provide detailed information about her body. Yunits, 2000 WL 33162199, at 1, 3.

n229. *Doe v. Yunits*, 15 Mass. L. Rptr. 278, 283 (Mass. Super. Ct. Feb. 26, 2001).

n230. Yunits, 15 Mass. L. Rptr. at 282.

n231. The 2000 order ends on a positive: "Furthermore, this court trusts that exposing children to diversity at an early age serves the important social goals of increasing their ability to tolerate such differences and teaching them respect for everyone's unique personal experience." Yunits, 2000 WL 33162199, at 8. I would replace the word "tolerance." I do not want transgender people to be tolerated. I tolerate mosquitoes. I want transgender people to be celebrated.

n232. Yunits, 2000 WL 33162199, at 3-6.

n233. See *supra* Part I.B.1.

n234. Yunits actually refers to this as "sex-discrimination." Yunits, 2000 WL 33162199, at 6. I call it gender discrimination since I do not use the word sex as a noun. The relevant distinction here is that Yunits is using cases that also apply to non-transgender people when they are gender non-conforming as opposed to using cases that apply only to transgender people. I applaud the Yunits court in seeing transgender people as gender non-conforming - and so protected just as any other gender non-conforming person would be (whether we call that type of discrimination gender or sex discrimination though, of course, I would prefer we call it gender discrimination).

n235. Yunits, 2000 WL 33162199, at 6 (relying on *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989) (masculine woman) and *Rosa v. Park West Bank*, 214 F.3d 213 (1st Cir. 2000) (man dressed in feminine clothing)).

n236. Yunits, 2000 WL 33162199, at 6-7.

n237. Yunits, 2000 WL 33162199, at 6-7.

n238. Two authors point out that Yunits differs from prior transgender cases by its reliance on gender non-conformity cases, as opposed to transgender cases. Laura Grenfell discusses Yunits' rejection of traditional transgender cases and embracing of gender non-conformity cases. Grenfell calls the former "gender" discrimination cases, and the latter "sex" discrimination cases - thus reifying the sex-gender distinction, sex related to non-transgender women and men, and gender related to transgender women and men. Along the same sex-gender (biology is truth) lines, Grenfell describes the young woman as a "biological male." Laura Grenfell, *Embracing Law's Categories: Anti-Discrimination Laws and Transgenderism*, 15 *Yale. J.L. & Feminism* 51, 66 (2003). Sunish Gulati also discusses the difference between what she refers to as sex and gender discrimination

cases - using the former to refer to non-transgender women and men (gender non-conformity up to the point of being transgender), and the latter to refer to transgender cases. Again, using "sex" to describe non-transgender people and "gender" to describe transgender people gives more import to "sex." Sunish Gulati, Note, *The Use of Gender-Loaded Identities in Sex-Stereotyping Jurisprudence*, 78 N.Y.U. L. Rev. 2177, 2194-96 (2003). Though I do not like describing one set of cases as gender and another as sex, I agree with the authors that using gender non-conformity cases is what sets Yunits apart.

n239. It would be disrespectful to analyze the case of a transgender woman as the case of a gender non-conforming man or the case of a transgender man as the case of a gender non-conforming woman (i.e. not respecting the self-identified genders of the transgender people).

n240. Anna Kirkland sees Yunits as a case that does not require "rigid medical conclusions." Anna Kirkland, *Victorious Transsexuals in the Courtroom: A Challenge for Feminist Legal Theory*, 28 *Law & Soc. Inquiry* 1, 18 (2003).

n241. Compliance Guidelines, *supra* note 64.

n242. See *supra* Part II.A.

n243. See *supra* Part III.B.

n244. I want us to stop seeing birth-assigned gender as truth. See *supra* Part II for harm that is caused by seeing birth-assigned gender as absolute truth. One way to stop seeing birth-assigned gender as truth is to call it by its name: birth-assigned gender, i.e., assigned by a person, not by nature, not by a higher being.

n245. E.g. Ann Arbor, Mich., Ordinance 10-99 (Mar. 17, 1999); Benton County, Or., Ordinance 98-0139 (Aug. 14, 1998); Tucson, Ariz., Ordinance 9199 (Feb. 1, 1999); Seattle, Wash., Ordinance 119628 (Aug. 1999)(cited in Paisley Currah & Shannon

Minter, *Transgender Equality: A Handbook for Activists and Policymakers* 45-47, at <http://www.nclrights.org/publications/tghandbook.htm> (last visited Apr. 5, 2005).

n246. This definition arose out of discussions with the National Center for Lesbian Rights and Transgender Law and Policy Institute (2003).

n247. I suspect that we could not find a single person who fits every last gender stereotype.

n248. Jody Marksamer, *Wrong Bathroom: The Forces Behind the Legal and Social Exclusion of Transgender People from the Bathroom* (2003) (unpublished manuscript, on file with author).

n249. I recognize that getting rights for and protecting transgender people is difficult. And sometimes, the only way that a particular client can win a case is if medical experts testify for that client. This is a point of tension. I would like to move to a place where self-identification counts. And if a doctor's testimony is necessary, I hope that the testimony does not reinforce that only transgender people with the right kind of medical intervention are real transgender people. The only regulation that explicitly protects transgender people irregardless of any medical intervention or physical attributes and relies solely on self-identification is the S.F. Human Rights Commission's Compliance Guidelines, *supra* note 64. A discrimination investigator at the San Francisco Human Rights Commission whose work focuses on transgender discrimination says that the Commission has not had any difficulties enforcing the Regulations with self-identity as the only standard. Conversation with Marcus de Maria Arana, Regulation Revision Taskforce Meeting (Fall 2003). For discussion on the difficulty that medical standards create, see Spade, *supra* note 36.

n250. One of the arguments against self-identification that I have heard in many policy efforts is that if we allow transgender people to self identify and to access facilities according to self-identification, then we will have many men wearing dresses, claiming that they are women, and going into women's restrooms and locker-rooms to leer at and harass women. Conversations with opponents of Assem. Bill 196; conversations with members of the Regulation Revision Taskforce during the process of revising the Regulations to Prohibit Gender Identity Discrimination. This is a red herring. First, it is very unlikely that straight men will publicly self-identify as women just to go into the

women's restroom. San Francisco has had restroom access according to gender self-identification since 1996. During that time, the SF-HRC, which enforces the Regulations, has had not one complaint of a man pretending to be a woman to go into the woman's restroom. Conversation with Marcus de Maria Arana, Discrimination Investigator, SF-HRC, Regulation Revision Taskforce Meeting (Fall 2003). Second, if anyone enters a facility and leers or harasses, that person can be asked to leave under sexual harassment policies and/or laws.

n251. See A. Spencer Bergstedt, *Translegalities: A Legal Guide for MTF's* (1997).

n252. An excellent policy with regard to these concerns is S.F. Human Rights Commission's Compliance Guidelines, *supra* note 64. I strongly urge further adoption of these or similar regulations.

n253. Some policies attempt to directly address this concern. For instance, Boulder's anti-discrimination law requires that a worker "not change gender presentation in the workplace more than three times in any eighteen-month period." Ordinance No. 7040, cited in Currah & Minter, *supra* note 245.

n254. See *supra* Part I.A.2. For instance, a transgender person who identifies as third gender, and does so consistently, might be seen (incorrectly) by someone with a binary view of gender as presenting not sufficiently male or female, i.e. inconsistently.

n255. Thanks to Kate Kendell of the National Center for Lesbian Rights for a very helpful discussion on this point.

n256. Jody Marksamer, *Wrong Bathroom: The Forces Behind the Legal and Social Exclusion of Transgender People from the Bathroom* (2003) (unpublished manuscript, on file with author).

n257. I often hear the idea articulated that gender non-conforming people jeopardize the rights of more gender conforming transgender people. This is the same reasoning that

excludes transgender people from LGB movements and legislation. The argument is that we need to get rights for the more mainstream first, and for those more on the fringe later. For a good analysis of this view, see Mubarak Dahir, Debate over Transgender Inclusion, Bay Windows, Oct. 10, 2002, at <http://www.baywindows.com/news/2002/10/10/Columns/Debate.Over.Transgender.Inclusion-294614.shtml>. Similar divisions have arisen within the transgender communities. For instance, in the process of revising the Regulations to Prohibit Gender Identity Discrimination, some transgender people argued that they did not want to expand protections to transgender people who do not have surgery in fear that this would jeopardize the existing protections for transgender people who do have surgery. Regulation Revision Taskforce Meetings (fall 2003).

n258. Eli Clare, *Exile and Pride: Disability, Queerness, and Liberation* 138 (1999).