

“PLEASE WRITE ‘E’ IN THIS BOX”
TOWARD SELF-IDENTIFICATION AND RECOGNITION OF A THIRD
GENDER:
APPROACHES IN THE UNITED STATES AND INDIA

*Jennifer Rellis**

INTRODUCTION

One to four percent of the world population is intersexed, not fully male or female.¹ This biological fact is hard to reconcile with the tradition of conferring rights by looking below the belt buckle. The soundness of the practice of allocating rights on the basis of sex depends on two concepts. First, that sex is fixed at birth. Second, that everyone fits neatly into boxes labeled male and female. Today, medical science is becoming increasingly skilled at altering a persons' birth sex through hormones and surgery and the prevalence of intersexed individuals reveals the male-female binary as a social construct. Law has not kept pace with these developments. This Article will examine the human rights abuses encountered by two minority sexual groups, one in the United States and one in India, stemming from the collision² of law, biology, and societal expectations.

Americans cannot conceive of a sexual identity outside the male-female binary and therefore, the medical standard of care for intersexed infants in the U.S. calls for corrective surgery aimed at “normalizing” external genitalia to fit societal expectations. These procedures are medically unnecessary; they are not

* B.A. George Washington University; M.F.A. University of Pittsburgh; J.D. University of Pittsburgh. I would like to acknowledge Jeanette Hahn, for first telling me about the hijra, and Professor Elena Baylis for suggesting I research intersex infants in the United States. Professor Baylis, along with Linda Wharton and Susan Frietsche, also provided insightful comments and edits on this paper. I appreciated the opportunity to discuss this paper with Professor Nancy Ehrenreich while she was a visiting instructor at the University of Pittsburgh. An earlier draft of this paper won an Honorable Mention in the University of Pittsburgh 2006 Global Studies Research Symposium.

¹ Kate Haas, *Who Will Make Room for the Intersexed?*, 30 AM. J.L. & Med. 41 (2004).

² I've adopted this metaphor from Julie Greenberg's article. *See infra* note 3.

performed to preserve the infant's health. In addition, the surgeries often occur without the consent of the child patient or the informed consent of the parent. These procedures disproportionately target males who are diagnosed as having inadequate genitals, even though they will be able to function as males—by having intercourse and possibly fathering children. There is a growing movement to stop intersex infant surgery or at least require parental informed consent. While important, focusing on surgery ignores other legal pitfalls, particularly the problematic recognition intersex Americans will face if they try to marry or change identification documents like birth certificates or drivers licenses.

In contrast to the U.S., India recognizes the possibility of a third gender because of a visible historical sexual minority group called the hijra, which includes intersexed men who identify as women and other transgendered or transvestite men who act and dress as women. This recognition may be due to the religious underpinnings of the group and the prominent role that hijras play in Indian culture, offering blessings at auspicious events such as births and marriages. Intersexed hijras only include men who identify as women—never women who identify as men. Therefore, they are a subset of the intersex population in the United States. But unlike the intersex infant population in the U.S., the hijras never complete the identification as women through the surgical construction of a vagina. One obvious reason for this is that the group has a long tradition that predates such complicated surgical procedures. But more than that, the group identity embraces the “third”—the space between male and female. The hijras, although historically discriminated against on the basis of laws imported by their British colonizers, are beginning to gain legal recognition in India when they self-identify as a third gender.

Part I of this Article defines intersexuality and highlights the legal and societal complications that occur when the concept of the fixed male-female gender binary is challenged. Part II describes the unique role of the hijra in India, revered and discriminated against, and suggests that India is beginning to legally recognize a third-gender through the hijra's grass-roots advocacy. Part III contrasts the experience of intersexed individuals in the United States by describing the current protocol to deal with the "medical emergency" of the birth of an intersexed child. This section forecasts legal issues facing intersexed individuals who wants to exist as a third-gender and not conform to the male-female binary through an examination of caselaw on transsexuals in the marriage and employment context. In the Conclusion, I advocate that statutory reform is necessary to ensure intersexed receive equal rights and suggest the fundamental right to privacy and bodily integrity under the Fourteenth Amendment Due Process Clause as a Constitutional source for these rights.

I. NOT MALE, NOT FEMALE: DEFINING INTERSEXUALITY AND ITS COLLISION WITH LAW, MEDICINE, AND SOCIETAL CONSTRUCTS.

Before examining specific examples of intersexed individuals in India and the United States, it is important to define core terms. While we often conflate sex and gender, they are distinct. Sex identifies men and women based on biology while gender is determined by social construction.³ Another way of looking at this is to consider sex as fixed and constant across culture (unless there are surgical or medical interventions) while gender is mutable and determined by dress and behavior that identify the individual as male or female within his or her society.

³ Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision between Law and Biology*, 41 ARIZ. L. REV. 265, 271 (1999).

Sex is typically determined at birth by focusing on external genitalia.⁴ This is problematic in two particular cases. The first case is where the sexual organ is ambiguous because it can be classified as either an abnormally small penis or a large clitoris. The second situation occurs when genitals do not correspond to chromosomal sex. For example, individuals with Androgen Insensitivity Syndrome or AIS have male XY chromosomes but female external genitalia because of an insensitivity to androgen, a steroid hormone that directs the development of masculine sex characteristics.⁵ Determining sex by only looking at external sex organs is also an erroneous inquiry because it ignores other significant biological sex characteristics including genetic chromosomal makeup (XX for females, XY for males); reproductive sex glands; internal and external sexual organs; hormones; and secondary sexual features such as facial hair or breasts.⁶

One to four percent of the world population is estimated to be intersexed—not clearly male or female when all primary and secondary sexual characteristics are examined.⁷ This could equal 2.7 million people in the United States alone.⁸ To put this figure in context, even if the intersexed population in the U.S. was as low as one-tenth of one percent, intersexed individuals would be as common as people with Down's Syndrome.⁹ This is a significant population.

To further complicate sex and gender categories, gender identity is a distinct concept—one that is focused on the individual's self-identification as male

⁴ *Id.* at 271-272.

⁵ Phyllis Randolph Frye, *The International Bill of Gender Rights vs. The Cider House Rules: Transgenders Struggle with the Courts over what Clothing they are Allowed to Wear on the Job, which Restroom they are Allowed to Use on the Job; Their Right to Marry, and the Very Definition of Their Sex*, 7 WM. & MARY J. OF WOMEN & L. 133, 169 (2000).

⁶ Greenberg, *supra* note 3 at 278.

⁷ Haas, *supra* note 1 at 41. For a fuller discussion of the wide variety of intersex conditions, see Greenberg, *supra* note 5 at 281-290.

⁸ Greenberg, *supra* note 3 at 267.

⁹ Frye, *supra* note 5 at 168.

or female, regardless of whether this gender choice matches up with his or her external sex organs and other biological sex markers.¹⁰ Having a gender identity that differs from your biological sex could lead an individual to become a transvestite (temporarily perform the gender of the opposite sex through dress and behavior); a transsexual (permanently change your biological sex through medical intervention); or classification as a “third gender” – a refusal to identify exclusively as male or female.

Of these three choices, desiring to live as a third gender is more disconcerting to society than either transvestitism or transsexualism because it challenges the sex binary. Questioning the male-female sex binary shakes the foundation of other societal values that depend on this binary such as compulsive heterosexuality and the nuclear family. With the distinctions of sex, gender, and gender identity in mind, we can begin to examine how historical and current societal practices in the U.S. and India cope with intersexed individuals who challenge the male-female sex binary.

II. INDIA: ACCEPTANCE OF A THIRD GENDER.

A. Hijra: India's Third Gendered People

In India, the hijra (pronounced HIJ-ra) community has existed for more than four thousand years¹¹ and currently are believed to number half a million.¹² The word “hijra” designates an alternative gender to the male-female binary; the

¹⁰ INTL GAY & LESBIAN HUMAN RIGHTS COMM'N, *Sexual Minorities and the Work of the United National Special Rapporteur on Torture* 2 (June 5, 2001), available at <http://www.iglhrc.org/files/iglhrc/reports/torturereport.pdf> (last visited Dec. 12, 2005).

¹¹ PEOPLES' UNION FOR CIVIL LIBERTIES, KARNATAKA, *Human Rights violations against the transgender community* (September 2003) 17 available at <http://ai.eecs.umich.edu/people/conway/TS/PUCL/PUCL%20Report.pdf> (last visited Dec. 12, 2005) [hereinafter PUCL Report].

¹² Paul Watson, *Offering India's Voters a Unique Perspective*, LOS ANGELES TIMES, May 9, 2004 at A3.

term translates as eunuch or hermaphrodite.¹³ The hijra's primary origin myth, based on the episode in the Ramayana where Rama is banished, illustrates this third gender identity. In the story, when Rama tells a group of tearful men and women who are lamenting his banishment to leave and return to the city, a group of people "who are not men and not women" do not know what to do and remain with him.¹⁴ Rama rewards the hijra for their loyalty by giving them the power to bless auspicious occasions such as marriage and childbirth through customary singing and dancing known as badhai.¹⁵

As one might expect from this origin myth, irregular male sex organs are central to the group's definition.¹⁶ The hijra include both ceremonially emasculated males and intersexed people whose genitals are "ambiguously male-like at birth."¹⁷ Unlike intersexed in the U.S., all hijras have a female gender identity. There are no ambiguous females who identify as males in the group. Instead, all hijras dress and act as women even though they are not biological women, nor are they surgically altered to have vaginas like intersexed people in America.

Although one might label the hijra as transvestites, especially those who are not born intersexed, Serena Nanda, the only anthropologist who has studied the group extensively for several years, traces elements of both a female and male group identity in her book *Neither Man Nor Woman: The Hijras of India*.¹⁸ The

¹³ SERENA NANDA, *NEITHER MAN NOR WOMAN: THE HIJRAS OF INDIA* 13 (1990).

¹⁴ *Id.* at 13; PUCL Report, *supra* note 11 at 17-18 (describing alternative origin myths for the hijras).

¹⁵ PUCL Report, *supra* note 11 at 18.

¹⁶ Nanda, *supra* note 13 at 14.

¹⁷ *Id.*

¹⁸ Coincidentally, John Money, the American creator of gender normalizing surgeries discussed at length *infra* in Section III.A of this Article, wrote a forward to the book. In his forward, he does not advocate for labeling the hijra as a third gender and discounts their identity as hermaphrodites. Instead, he defines them as "women-mimetics" or acting like women. This forward seems to be at cross purposes with Nanda's definition of hijras as an alternative gender.

hijra are “not men” because of their imperfect or absent penis.¹⁹ In fact, when Nanda would ask “What is a hijra?,” the hijra would lift her skirt and point to her ambiguous or mutilated genitals.²⁰ Other components of the hijra definition as “not male” include: not having the same sexual feelings as men do (e.g. sexual desire for women), wearing female clothing, jewelry, and bindi; walking like women; taking female names.²¹ However, even if hijras are like women in terms of their dress and mannerisms, it is clear that they are also not women. Nanda classifies their female behavior as burlesque—dancing, smoking, and acting in sexually explicit ways that would be inappropriate for the traditional Indian female role.²² Hijras also work in male occupations such as construction.²³ Finally, hijras do not have female sex organs and are not able to have children.²⁴

How does Indian society cope with the hijra’s choice to embrace a third gender identity as “not men, not women”? The evidence is mixed, although it does seem that the hijra have been accepted to a higher degree than their American intersexed counterparts. Nanda seems to say that while the hijra are accepted, they are also ostracized. The hijra identity is “deeply rooted” in Indian culture, which she believes has religious underpinnings in the Hindu belief that all people contain male and female attributes.²⁵ The hijra also seem to play a sanctioned role in Hindu society through the practice of badhai—a contradictory ritual where infertile hijras bless births and marriages.²⁶ However, Nanda notes that hijras as “neither man nor woman, call into question the basic social

¹⁹ *Id.* at 15

²⁰ *Id.*

²¹ Nanda, *supra* note 13 at 15-17.

²² *Id.* at 18.

²³ *Id.* at 17.

²⁴ *Id.* at 18.

²⁵ *Id.* at 19-21.

²⁶ Nanda, *supra* note 13 at 18.

categories of gender on which Indian society is built. This makes hijras objects of fear, abuse, ridicule, and sometimes pity.”²⁷ Attitudes toward the hijra are also colored by the fact that many work as prostitutes because they find it difficult to find appropriate employment because of societal discrimination.²⁸

B. English colonization began an era of state sanctioned discrimination.

British colonization of India in the mid 1850s began an era of systemic state-sanctioned discrimination for the hijra.²⁹ The primary instruments of this discrimination were laws including (1) the Criminal Tribes Act of 1871: An Act for the Registration of Criminal Tribes and Eunuch and (2) Section 377 of the Penal Code, which criminalized non-procreative sexual acts.³⁰

The Criminal Tribes Act required all members of criminal tribes to register with the authorities, operating under the assumption common to India’s caste system that all members of certain communities were criminal and unclean from birth.³¹ Article 26 of this Act specifically targeted hijra practice by providing:

Any eunuch so registered who appears, dressed or ornamented like a woman, in a public street or place, or in any other place, with the intention of being seen from a public street or place, or who dances or plays music, or takes part in any public exhibition, in a public street or place or for hire in a private house may be arrested without warrant, and shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.³²

²⁷ *Id.* at 23.

²⁸ PEOPLES’ UNION FOR CIVIL LIBERTIES, KARNATAKA, *Human Rights Violations against Sexual Minorities in India* 32 (February 2001) available at <http://pucl.org/Topics/Gender/2003/sexual-minorities.pdf> (last visited Dec. 12, 2005) [hereinafter PUCL HR Report],

²⁹ Joseph T. Bockrath, *Bhartia Hijro Ka Dharm: The Code of India’s Hijra*, 27 LEGAL STUD. FORUM 83 (2003) (no page numbers in the source).

³⁰ *Id.*, PUCL Report, *supra* note 28 at 43-48

³¹ PUCL Report, *supra* note 28 at 44.

³² Bockrath, *supra* note 29.

By forbidding the hijras to dress as women and perform in the street, the Act practically criminalizes the group's entire identity.³³ Additionally, Article 29 of the Act further eroded the legal identity of the group by prohibiting hijras from making a gift or a will.³⁴ Although now repealed, the attitudes in this historical act are reflected in the "contemporary perception of hijras as thieves as well as the brutal violence which is inflicted against them."³⁵

Another colonial remnant, Section 337 of the Penal Code is still on the books, even though Britain and other former British colonies such as South Africa have repealed similar laws.³⁶ This law criminalizes even consensual homosexual contact and case law has broadened the interpretation of the Act's prohibition on "carnal intercourse" to include oral sex, anal sex, and thigh sex; "[b]asically any form of sex which does not result in procreation comes within the rubric of Sec 377."³⁷ As hijras by definition are men or at least not biological women who have sex with men, Section 377 can be used to criminalize their consensual sexual expression. As many hijras make a living through prostitution, they are particularly susceptible to prosecution under this law. In practice, the law is used "to target, harass, and punish lesbian, gay, bisexual, and transgender persons."³⁸ One police tactic is to physically attack, rape, or blackmail this group of people and use the threat of prosecution under Section 377 to make sure the victim does not report their crimes to other authorities.³⁹ Although there are no cases using

³³ *Id.* at n. 29

³⁴ *Id.* at n.30

³⁵ PUCL Report, *supra* note 11 at 46.

³⁶ PUCL HR Report, *supra* note 28 at 11, *Change Laws to Protect Rights of Sexual Minorities*, THE HINDU, Oct. 24, 2004.

³⁷ PUCL report, *supra* note at 11 at 47.

³⁸ U.S. STATE DEPT BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, *India: Country Reports on Human Rights Practices -2004*, (February 28, 2005) available at <http://www.state.gov/g/drl/rls/hrrpt/2004/41740.htm> [hereinafter State Dept. Report].

³⁹ *Id.*

Section 337 to prosecute consensual sex, the continued existence of this law on the books stigmatizes the gay and transgendered community and forces them to keep silent about human rights abuses perpetrated by the police.⁴⁰

Aside from the potential criminal sanctions imposed by Section 377 and the historic criminalization of the hijra identity perpetrated by the Criminal Tribes Act, the hijras are further marginalized by India's policy of only recognizing two sexes on official identity papers.⁴¹ These identity cards require citizens to identify as male or female but not as a third sex, making the "transgender status of hijras a legal nonentity."⁴² Furthermore, India does not recognize sex changes on identity cards, which makes it impossible for an intersexed or male hijra to choose a legal female identity.⁴³ This policy has the effect of denying hijras numerous rights contingent upon the state identity card including "the right to vote, the right to own property, the right to marry, the right to claim a formal identity through a passport and a ration card, a driver's license, the right to education, employment, health so on." ⁴⁴

Essentially, India's laws and policies, derived from colonial law, have criminalized the hijra status. The Indian Constitution has an equal protection clause that prohibits discrimination on the basis of religion, race, caste, sex or place of birth.⁴⁵ This constitutional guarantee has not barred the State's discriminatory practices, possibly because the equal protection clause does not prohibit discrimination on the basis of sexual orientation⁴⁶ or gender identity. In

⁴⁰ PUCL Report, *supra* note 11 at 48.

⁴¹ *Id.* at 50. Of course, most societies also discriminate in this manner.

⁴² *Id.* at 50-51.

⁴³ *Id.* at 51.

⁴⁴ *Id.* at 50.

⁴⁵ *Id.* at 89 (see Arts. 14, 15).

⁴⁶ PUCL HR Report, *supra* note 28 at 12.

discussing the Election Commission's decision to include eunuchs on the electoral roll, one editorial writer notes that the government previously excluded hijras in spite of the Constitution's equal protection guarantee.⁴⁷ Even if there had not been a blanket ban on participation, "most [hijras] were overlooked in the counting," or had to identify as male against their wishes in order to exercise their rights, or were embarrassed to venture beyond their community and face potential discrimination because of their identity.⁴⁸

C. An end to discrimination? Allowing self-identification and recognition of a third gender.

The political landscape in India is changing and there is growing recognition of the discrimination hijras face due in large part to non-governmental advocacy groups. The Indian National Human Rights Commission (NHRC), established by the Human Rights Act of 1993,⁴⁹ serves the purpose of investigating human rights abuses through research, intervening in human rights proceedings, reviewing the Constitution and implementing measures to safeguard constitutional rights.⁵⁰ While laudable, the National Human Rights Commission's attention is not focused on hijras. The NHRC website does not mention the hijras anywhere—in the index of human rights cases or human rights issues.⁵¹ In fact, the NHRC has stated that "gay and lesbian rights [are] not under its purview",⁵² suggesting it will not act on behalf of the hijra, as the group is often considered in relation to the gay rights movement.

⁴⁷ *M, F, E or More?*, THE TELEGRAPH, Mar. 12, 2005.

⁴⁸ *Id.*

⁴⁹ See NAT'L HUMAN RIGHTS COMM'N NEW DELHI, INDIA <http://nhrc.nic.in/>

⁵⁰ See Chapter III Section 12 of the Human Rights Act *available at* <http://nhrc.nic.in/>.

⁵¹ See <http://nhrc.nic.in/>

⁵² State Dept. Report, *supra* note 38.

Advocacy that is not being done by the NHRC is being undertaken by NGOs and hijras themselves. First, NGOs are campaigning for the repeal of Section 377.⁵³ Second, hijra candidates are running for local, national and state elections now that they are listed on the electoral rolls.⁵⁴ The hijras have formed their own political party, Jiti Jitai (translated as “We Have Already Won, which references the “sexual mystique” they wield); six hijras have won recent local and state elections and four eunuch candidates ran in the 2004 election.⁵⁵ Based on their own experience being discriminated against, the hijra platform champions the rights of India’s other poor exploited citizens.⁵⁶ However, two elections initially won by hijras have been nullified by courts who ruled that the candidates were men and could not therefore take posts that were reserved for women.⁵⁷ Judicial decisions like these could have a detrimental impact on the hijra’s ability to gain political office in order to publicize and ameliorate the discrimination they and other minorities face. While reserving posts for women is important, hijras should be considered for similar political treatment or be permitted to take a small percentage of these posts, as it is doubtful that they will be elected in large enough numbers to dilute female representation in government.

Finally, the hijra identity is being recognized in an unexpected location: as an alternative to choosing a male or female sex identity on Indian passports.⁵⁸

⁵³ *IPC Section Biased Against Sexual Minorities*, THE HINDU, Dec. 17, 2003, *Change Laws to Protect Rights of Sexual Minorities*, THE HINDU Oct. 24, 2004

⁵⁴ *M, F, E or More?*, THE TELEGRAPH, Mar. 12, 2005.

⁵⁵ Paul Watson, *Offering India’s Voters a Unique Perspective*, LOS ANGELES TIMES, May 9, 2004 at A3.

⁵⁶ *Id.*

⁵⁷ PUCL Report, *supra* note 11 at 13. Unlike in the United States, it is a common practice for other governments, particularly in emerging democracies that use a parliamentary system, to exclusively reserve select positions for certain minorities.

⁵⁸ India Passport Information Booklet 2 available at http://passport.nic.in/P1_instruction.pdf

Hijras now have the option of writing in “E” for eunuch.⁵⁹ This first step in state recognition is probably connected to the advocacy efforts described above and hijras leaving their insular community to serve in elected office. The “E” designation is noteworthy because it allows the individual to self-identify outside the male-female binary. The passport application does not require detailed proof to request the “E” status; it is as simple as checking the box. Advocates applaud the “E” designation and say that it will make travel easier, as hijras will no longer have to dress as men if they leave the country in order to match the gender identity on their passport.⁶⁰ Others are critical of the use of eunuch, preferring the broader term of “transgender,” which includes transsexuals and intersexed.⁶¹ Concurrent with the creation of the “E” option, the Ministry of External Affairs also is allowing people to change their sex on their passports with a sworn affidavit and medical certification.⁶²

The “E” designation suggests that India has a broader view of gender beyond the male-female binary. An “E” or third gender identity option on the passport is an important first step in state recognition of the hijra identity and should be applied to other state forms of identification to ensure inclusion. This first step shows a recognition of a third gender identity that is absent in the United States, particularly at the federal level, where recent marriage and identification legislation mandates identification as male or female.⁶³

⁵⁹ *M, F, E or More?*, THE TELEGRAPH, Mar. 12, 2005, Chandrima S. Bhattacharya, *‘Third sex’ in passports*, THE TELEGRAPH, Mar. 9, 2005.

⁶⁰ Shibu Thomas, *Column for eunuchs in passport form*, MID-DAY MUMBAI, Mar. 9, 2005.

⁶¹ Chandrima S. Bhattacharya, *‘Third sex’ in passports*, THE TELEGRAPH, Mar. 9, 2005.

⁶² Shibu Thomas, *Column for eunuchs in passport form*, MID-DAY MUMBAI, Mar. 9, 2005.

⁶³ See Federal Defense of Marriage Act, 104 H.R. 3397 (1996), which establishes a federal definition of marriage as between a man and woman, and the REAL ID Act of 2005, 109 H.R. 418, (2005), which requires that state issued drivers licenses and identification cards identify a person’s gender. DOMA assumes the existence of two sexes by limited marriage to a man and a woman. Both acts also implicitly assume that every person falls into a categorical box labeled male or female.

III. UNITED STATES: OBSTACLES TO THE LEGAL RECOGNITION OF A THIRD GENDER.

A. *Intersex surgery in the United States*

In the United States, prior to the 1930s, society placed intersexed individuals in the male-female binary according to their dominant physical characteristics.⁶⁴ The next stage of medical “treatment” consisted of hormones and surgical procedures to turn intersexed adults into “normal” women and men.⁶⁵ However, while doctors assigned infants to a sex at birth, they waited until puberty before treating the intersex individual.⁶⁶ It was not until the 1950’s that Dr. John Money, a professor and researcher at Johns Hopkins University, established the current standard of care: genital reconstructive surgery as close to birth as possible.⁶⁷ In contrast to the previous model where doctors waited to intervene until puberty, Money’s theory posits that intersex is a social and medical emergency to be treated immediately.⁶⁸ Two primary theories underlie Money’s medical protocol. First, by placing nurture over nature, he theorized, “children are not born with a gender identity, but rather form an understanding of gender through their social upbringing.”⁶⁹ Therefore, the earlier the surgical intervention, the better chance that the child would conform to his or her assigned gender upbringing. Second, Money posited, “the only way to ensure that both the family and the child would accept the child’s gender was if the child’s genitals looked clearly male or female.”⁷⁰ Put in other words, Money’s theory boils down to the

⁶⁴ Haas, *supra* note 1 at 44.

⁶⁵ *Id.* Use of quoted terms (treatment and normal) in the original. I use quotations once to convey Haas’ questioning of these terms but will not carry through with this convention through the rest of the paper.

⁶⁶ Erin Lloyd, *Symposium Report: Intersex Education, Advocacy & The Law: The Struggle for Recognition and Protection*, 11 CARDOZO WOMEN’S L.J. 283, 291 (2005).

⁶⁷ Haas, *supra* note 1 at 45.

⁶⁸ Lloyd, *supra* note 66 at 291.

⁶⁹ Haas, *supra* note 1 at 45.

⁷⁰ *Id.*

belief that any child could develop a male or female gender identity “if you made their bodies look right...and made them and their parents believe the gender assignment.”⁷¹

In 1972, Money publicized his theory of gender reconstructive surgery, trumpeting the case of Bruce Reimer as a great success.⁷² This case is frequently referred to as the “John/Joan” case.⁷³ John was not intersexed but a male identical twin whose penis was seriously burned during a circumcision procedure when he was eight months old.⁷⁴ Fearing their son would be considered defective without a penis, his parents consented to genital reassignment surgery at the advice of Dr. Money.⁷⁵ John was turned into Joan by surgically removing his penis and creating a vagina from his scrotum.⁷⁶ The doctors also removed John’s internal male reproductive organs and prescribed female hormones at the onset of puberty to begin breast development and other female characteristics.⁷⁷

However, the John/Joan case was anything but the success Dr. Money posited it to be. Family and friends observed that Joan acted as a tomboy and did not fit in socially as a girl.⁷⁸ At fourteen, John rejected his assigned gender of Joan and began living as a boy.⁷⁹ Subsequently, he had surgeries to reduce breast growth and construct a penis; he later married a woman and adopted her three

⁷¹ INTERSEX SOC’Y OF N. AM., *What’s wrong with the way intersex has traditionally been treated?* <http://www.isna.org/faq/concealment>, (last visited Dec. 12, 2005).

⁷² Haas, *supra* note 1 at 45.

⁷³ Hazel Glenn Beh & Milton Diamond, *An Emerging Ethical and Medical Dilemma: Should Physicians Perform Sex Assignment Surgery on Infants with Ambiguous Genitalia?* 7 MICH. J. GENDER & L. 1, 6 (2000).

⁷⁴ Nancy Ehrenreich, *Intersex Surgery, Female Genital Cutting, and the Selective Condemnation of ‘Cultural Practices’*, 40 HARV. C.R.-C.L. L. REV. 71, 102 (2005).

⁷⁵ *Id.*

⁷⁶ *Id.* at 103.

⁷⁷ Haas, *supra* note 1 at 45.

⁷⁸ Beh & Diamond, *supra* note 73 at 10, (noting that Joan refused girl toys, activities, clothes, and was caught urinating standing up and trying to use the boy’s bathroom).

⁷⁹ *Id.* at 11.

children.⁸⁰ However, David Reimer—the name John adopted when he re-identified as a male—committed suicide in 2004, a death that his family attributes to a life long depression caused by his incorrect gender assignment.⁸¹

Looking beyond the clinical records of the John/Joan shows that this case hardly supports Money's theory that children can successfully be raised in any gender identity. Although the supposed success of John's reassignment was widely disseminated, the rejection of John's assigned female gender was not.⁸² The medical establishment continues to assume the validity of Money's model and its theoretical underpinnings. Moreover, other countries have adopted the U.S. model.⁸³ Despite the prevalence of the practice, "there is no research showing that intersexuals benefit psychologically from the surgery performed on them as infants and toddlers....[and n]o follow-up studies were ever done...."⁸⁴ Gender normalizing surgery lacks reliable empirical support⁸⁵ and is beginning to be questioned by advocates, including intersex Americans.⁸⁶

Even though physicians are aware that gender reassignment surgery is not based on sound medical research and that there are further concerns about consent to the procedure, which will be discussed below, the surgical approach

⁸⁰ *Id.* at 11-12

⁸¹ Report of A Public Hearing By the Human Rights Commission of the City and County of San Francisco, *A Human Rights Investigation Into the Medical "Normalization" of Intersex People*, 46-47 (Apr. 28, 2005) available at [http://www.sfgov.org/site/uploadedfiles/sfhumanrights/Committee_Meetings/Lesbian_Gay_Bisexual_Transgender/SFHRC%20Intersex%20Report\(1\).pdf](http://www.sfgov.org/site/uploadedfiles/sfhumanrights/Committee_Meetings/Lesbian_Gay_Bisexual_Transgender/SFHRC%20Intersex%20Report(1).pdf) (last visited Nov. 24, 2005) [hereinafter SF HRC Report].

⁸² Beh & Diamond, *supra* note 73 at 10.

⁸³ Haas, *supra* note 1 at 46.

⁸⁴ *Id.*

⁸⁵ 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, 482 (2001).

⁸⁶ See generally Intersex Society of North America webpage <http://www.isna.org/>; Intersex Initiative webpage <http://www.intersexinitiative.org/>; Bodies Like Ours Webpage <http://www.bodieslikeours.org/>; SF HRC Report, *supra* note 81.

Dr. Money promulgated remains the standard of care.⁸⁷ The Intersex Society of Northern America estimates that one or two of every thousand live births are followed by surgical alteration of the genital organs.⁸⁸ Haas posits that five children are subjected to genital surgery every day in the United States.⁸⁹ Reconstruction of genital organs so they match societal expectations is not simple. Intersexed children undergo an average of three to five operations and some undergo more than twenty.⁹⁰ It is no wonder that intersexed children begin to feel like lab rats, particularly as the surgeries are accompanied by painful therapy and a humiliating focus on their genital organs, which are continually manipulated and inspected.⁹¹ If an individual rejects his or her surgically assigned gender later in life, these earlier procedures often make further surgery impossible because of lost or altered tissue.⁹² Surgically altering intersex individuals at birth can prohibit self-identification as a different gender at a later age, denying the person the ability to undergo further surgery to match their biological sex with their gender identity and receiving full societal recognition.

More troubling, is that intersex surgery is targeted at nonconforming men. Ehrenreich notes that 90% of intersex surgery “is aimed at changing the intersex child into a girl,”⁹³ as was the case with John/Joan. Alice Dreger notes some of the medical rationales for this phenomenon, all which link back to preserving patriarchal gender roles:

⁸⁷ INTERSEX SOC'Y OF N. AM., *What do doctors do now when they encounter a patient with intersex?* http://www.isna.org/faq/standard_of_care, (last visited Dec. 12, 2005)

⁸⁸ Ehrenreich, *supra* note 74 at 73; see also <http://www.isna.org/faq/frequency> for more detailed statistics, including an estimate that one in every 100 children differs in some way from the normal male or female.

⁸⁹ Haas, *supra* note 1 at 41.

⁹⁰ Ehrenreich, *supra* note 74 at 105.

⁹¹ *Id.* at 107.

⁹² *Id.* at 113.

⁹³ *Id.* at 125.

[S]urgeons seem to demand far more for a penis to count as 'successful' than for a vagina to count as such. Indeed, the logic behind the tendency to assign the female gender in cases of intersexuality rests not only on the belief that boys need 'adequate' penises, but also upon the opinion among surgeons that a functional vagina can be constructed in virtually everyone [while] a functional penis is a much more difficult goal. This is true because much is expected of penises, especially by pediatric urologists, and very little of vaginas...⁹⁴

This is exactly the rationale that Dr. Money used to convince John/Joan's parents—that the only appropriate medical and social response to John's damaged penis was to surgically change him into Joan. Dreger notes that the high standards that doctors, including Money, seem to set for male sexual adequacy is contradicted by other research that shows "any penis is a big enough penis for male adjustment."⁹⁵

Another reason why most intersex surgeries are aimed at producing women is based on a sexist reproduction rationale. Dreger notes that doctors are more concerned with preserving the fertility of those born with ovaries as opposed to testes, even though some men with micropenises will be able to father children.⁹⁶ Accordingly, babies who lack a Y chromosome are always declared girls to conserve their fertility and are surgically altered to fit that role.⁹⁷

Intersex surgery in the U.S. is barbaric in practice, aimed at nonconforming men, and without empirical support that the procedure is necessary for the psychological health of intersexed people. Compounding these problems, there is a growing realization that parental consent to these life altering procedures is inadequate. Dreger terms the U.S. medical protocol as "monster ethics," stating that doctors ignore "ethical guidelines that would be applied in nearly any other medical situation.... Patients are lied to; risky procedures are performed without

⁹⁴ Alice Domurat Dreger, *Ambiguous sex—or ambivalent medicine?*, HASTINGS CTR. REP., May-June 1998. (citation omitted) (no page numbers in source).

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

follow-up; consent is not fully informed; autonomy and health are risked because of unproven (and even disproven) fears that atypical anatomy will lead to psychological disaster.”⁹⁸ Clinicians posit the birth of an intersex child as a medical emergency, urging parents to surgically establish a sex to rear the child in even though “the intersex state is typically not life threatening.”⁹⁹ In short, the protocol followed in the John/Joan case is still being used today.

The Constitutional Court in Columbia is the only court to have considered the constitutionality of gender reconstructive surgery.¹⁰⁰ This court’s analysis questions the model of medical secrecy followed in America. Although initially finding that an intersex surgery violated a “fundamental right to human dignity and gender identity” and requiring the patient’s own informed consent,¹⁰¹ the court retracted from this position in two later cases, allowing for informed written parental consent with detailed information, including pros and cons or the procedure, and time to consider the options.¹⁰²

Haas argues that Columbia’s heightened informed consent model should be adopted in the U.S.¹⁰³ Certainly, fully informed consent and other alternatives like assigning and raising a child in one gender without surgical intervention¹⁰⁴ should be considered. While steps in the right direction to end barbaric U.S. practices, focusing on genital corrective surgery keeps us trapped in the gender binary. Ehrenreich acknowledges this when she attempts to discount the “corrective”

⁹⁸ *Id.*

⁹⁹ Beh & Diamond, *supra* note 73 at 43-44.

¹⁰⁰ Haas, *supra* note 1 at 49; see Part III of the article, pgs. 49-54 for a detailed discussion of these three cases.

¹⁰¹ *Id.* at 49-50.

¹⁰² *Id.* at 53-54.

¹⁰³ *Id.* at 61-64.

¹⁰⁴ Assignment without surgery is advocated by the ISNA (see <http://www.isna.org/faq/patient-centered>).

rationale behind intersex surgery, finding that “[o]nly in a society in which sex is understood in binary terms (everyone is either male or female) does the hermaphroditic body become abnormal. Rather than conceptualizing such individuals as a ‘normal’ third sex or as occupying various points along a sex continuum, our society chooses to see them as suffering abnormalities that require repair.”¹⁰⁵

Ehrenreich stops short of advocating that society recognizes intersex individuals as a third sex.¹⁰⁶ Although radical, I advocate that such an approach is necessary to address the collision between law and biology. The next section of the paper addresses legal classifications based on sex, specifically marriage and employment discrimination, that depend on a fixed binary. Intersexed individuals—the third gender—challenge this assumption and will have difficulty fitting into these legal classifications, especially if they try to change their sex later in life like David Reimer in the John/Joan case did. If the sex of an intersexed person is challenged in court, our legal framework must recognize both biological complexity and the individuals’ self-identity. We must look beyond genital surgery to ensure intersexed individuals do not suffer human rights abuses.

B. Problematic legal recognition of transsexuals and intersexed individuals.

Our history has shown the fallacy in using binary classifications as a proxy for individual rights. First, *Brown v. Board of Education*¹⁰⁷ began the process of eradicating the “separate but equal” architecture that divided blacks and whites on

¹⁰⁵ Ehrenreich, *supra* note 74 at 117-118.

¹⁰⁶ *Id.* at 130.

¹⁰⁷ *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954)

the basis of race. The next binary to be questioned was sex.¹⁰⁸ Now, the male-female binary is under further challenge and our understanding of sex must be expanded to include sexual minorities such as homosexuals, transgendered, and intersexed.

Protection for sexual minorities is emergent at best.¹⁰⁹ As recently as the 1970's, homosexuals faced blatant discrimination at their jobs and in their family life, where courts refused to recognize same-sex marriages or extend child custody and visitation to same-sex partners.¹¹⁰ Homosexuals have greater constitutional protection today.¹¹¹ However, protection varies greatly on the local level and one commentator has noted that "comprehensive equality [is] a yet unattained goal."¹¹²

Emerging protection of homosexual conduct has slowly and inconsistently extended to groups like transsexuals and intersexed.¹¹³ One court has explicitly

¹⁰⁸ Craig v. Boren, 429 U.S. 190, 197 (1976) (holding that statutory classifications that distinguish between males and females are subject to equal protection clause scrutiny and must serve important governmental objectives and be substantially related to the achievement of those objectives).

¹⁰⁹ Susan J. Becker, *Many Are Chilled, But Few Are Frozen: How Transformative Learning in Popular Culture, Christianity, and Science Will Lead to the Eventual Demise of Legally Sanctioned Discrimination Against Sexual Minorities in the United States*, 14 AM. U.J. GENDER SOC. POL'Y & L. 177, 182-186 (2006)

¹¹⁰ *Id.* at 182-83.

¹¹¹ Greater protection of homosexuals can be seen in all facets of the law. Romer v. Evans, 517 U.S. 620, 635 (1996) (holding that a "bare desire to harm a politically unpopular group" cannot constitute a legitimate government interest for equal protection purposes and using this reasoning to invalidate a state constitutional amendment that would exclude gays and lesbians from protection under the states' antidiscrimination law); Lawrence v. Texas, 539 U.S. 558, 575 (2003) (invalidating a Texas state criminalizing sexual acts between same sex partners, reasoning that "[w]hen homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres."). Also, Price Waterhouse and Oncale have broadened protection for homosexuals who face employment discrimination, discussed *infra* in section III.B.2. In family law, some states have begun to recognize same sex unions and sexually minorities are no longer automatically ruled unfit for child visitation and custody rights. Becker, *supra* note 111 at 184.

¹¹² Becker, *supra* note 109 at 185.

¹¹³ As early as the 1970's, Mary Dunlap noted that the law's insistence on classifying all individuals as male or female would disadvantage sexual minorities, which she defined as homosexuals, transsexuals, and "other persons of nontraditional sexual identifications." Mary C. Dunlap, *The Constitutional Rights of Sexual Minorities: A Crisis of the Male/Female Dichotomy*, 30 HASTINGS L.J. 1131, 1131 n.4 (1978-1979). Furthermore, she predicted that nonconforming sexual minorities would experience legal coercions toward conformity in the realms of family law, education, and employment. *Id.* at 1131-35.

said that intersexed is not a suspect class for Fourteenth Amendment equal protection purposes.¹¹⁴ Homosexuals generally live within the male-female binary, even though they challenge traditional heterosexual assumptions about male and female roles. On the other hand, transsexuals and intersexed challenge the male-female binary head on—by seeking to either transition from one sex to another or by not fully expressing one biological sex.

Even though the primary focus of my analysis is on intersexed, as there is so little case law on the rights of intersexed, I will also look at cases involving transsexuals to examine how and if the law permits an individual to discard birth sex and self-identify as male or female. I acknowledge that transsexuals do not make a perfect analogy. Unlike intersexed, many transsexuals have a definitive birth sex. Still, transsexuals challenge the expectation that sex is fixed at birth. Moreover, intersexed may want to change their sex, as David Reimer in the John/Joan case did, if they do not identify with their assigned gender. Haas argues that intersexed individuals prior to genital reconstruction surgery are in a better position to obtain court-recognition of their self-identified sex because they have “unclear genitals,” citing one case where an intersexed plaintiff succeeded in altering his birth certificate.¹¹⁵ Given societal attitudes and legal precedent viewing gender as fixed and binary, one case does not establish a rule that all courts will acknowledge an intersexed individual’s self-identity.

Looking at how courts classify transsexuals in the gender binary could be a good predictor of how courts will construct an intersexed individual who

¹¹⁴ DiMarco v. Wyo. Dep’t of Corr., 300 F. Supp.2d 1183, 1195 (D.Wyo. 2004)(denying intersexuals’ 8th Amendment and Equal Protection claims for being placed in solitary confinement due to her intersex status while recognizing a due process claim “[c]onsidering Plaintiff was only placed in segregated confinement due to a genetically created ambiguous gender and the [prison] had plenty of time to develop other more respectable less harsh alternatives for Plaintiff.”).

¹¹⁵ Haas, *supra* note 1 at 60-61.

challenges that binary. Even if definitively born into one sex, transsexuals join the intersexed in the space “in between” male and female when they are transitioning from one sex to another. Courts have been asked to classify transsexual plaintiffs who are very similar to a would-be intersexed plaintiff. For example, some transsexual plaintiffs seeking the protection of Title VII have male external genitalia but take female hormones and dress and behave as women.¹¹⁶ Transsexualism and intersexed conditions exist on a continuum and may be more closely related than previously considered.¹¹⁷

Sex classification is legally relevant when amending identifying documents like birth certificates and drivers licenses¹¹⁸ and when seeking equal treatment in employment, marriage, and less commonly, professional competitive sports.¹¹⁹ I will focus on marriage and employment, as these are the most developed areas of this emerging legal challenge. U.S. courts have been unwilling to grant affirmative rights to homosexuals and transsexuals when the right to marry is at issue. Individuals who do not conform to the fixed gender binary have been more successful when confronting discrimination at work. Employment discrimination

¹¹⁶ This was the factual situation in *Etsitty v. Utah Transit Auth.*, No. 2:04CV616, 2005 U.S. Dist. LEXIS 12634 (D. Utah June 24, 2005). *See also* *Johnson v. Fresh Mark, Inc.*, 337 F. Supp. 2d 996, 1000 (N.D. Ohio 2003) (noting that it was unclear factually whether the plaintiff's sex was ambiguous because of an intersexed condition or as a result of medical attempts to transform from a male to a female.).

¹¹⁷ *See* *Johnson v. Fresh Mark, Inc.*, 337 F. Supp. 2d 996, 1000 n. 5 (N.D. Ohio 2003); *Kastl v. Maricopa County Cmty. College Dist.*, No. 02-1531, 2004 U.S. Dist. LEXIS 29825, *7 n.5 (D. Ariz. June 2, 2004) (acknowledging the plaintiff's argument that “designation as a biological female and possession of male genitalia are not mutually exclusive states....Medical evidence suggests that the appearance of genitals at birth is not always consistent with other indicators of sex.”). *Schroer v. Billington*, 424 F. Supp. 2d 203, 213 fn.5 (D. D.C. 2006) (“If, as some believe, sexual identity is produced in significant part by hormonal influences on the developing brain in utero, this would place transsexuals on a continuum with other intersex conditions such as AIS, in which the various components that produce sexual identity and anatomical sex do not align.”)

¹¹⁸ *See* ISNA website for concerns about the newly enacted REAL ID Act of 2005, 109 H.R. 418, (2005), which requires uniform machine-readable identification across states where gender is categorized by birth certificate, even if this does not match up with an individual's self-identified gender. www.isna.org/news/realID.

¹¹⁹ *In re Estate of Gardiner*, 22 P.3d 1086 (Kan. Ct. App. 2001).

cases brought under Title II show that courts are increasingly willing to recognize diversity beyond the gender binary.

1. Marriage

The right to marry is constitutionally protected.¹²⁰ Marriage is the gateway to a host of other rights, including spousal support, inheritance, immigration benefits, and survivorship rights. This right has not been extended to same sex couples under the federal constitution.¹²¹ Only a handful of states recognize same sex civil unions or marriages under their own constitutions.¹²²

If most states define marriage as being between one man and one woman, how do courts determine who qualifies as male and female when a transsexual or intersexed individual wants to marry? While there are no reported decisions of litigated intersexed marriages, there are some cases on transsexual marriage.¹²³ Even though nearly half of all states allow transsexuals to legally change their birth sex on state issued identification such as birth certificates after sex reassignment

¹²⁰ *Loving v. Virginia*, 503 U.S. 946 (1967), *Zablocki v. Redhail*, 434 U.S. 374 (1978). Yet the fundamental right to marry is balanced about a state interest in regulating the marriage state through procedural marriage requirements that prohibiting categories of people from marrying each other, such as homosexuals and close family members.

¹²¹ Several of the Justice considered the effect of the *Lawrence* decision on same sex marriage. Justice O'Connor, concurring in judgment under an Equal Protection rational basis review, argued that *Lawrence* could not be used to strike down the same sex marriage prohibition because the state had a legitimate interest in promoting opposite sex marriage. 539 U.S. at 585 (O'Connor, J., concurring). Justice Scalia criticizes Justice O'Connor's reasoning, calling her argument conclusory and based on the state's moral disapproval of gay marriage. *Id.* at 601 (Scalia, J., dissenting).

¹²² *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993) gave same sex couples the right to marry under the state Constitution's equal protection clause, however a subsequent Constitutional amendment took this right away. In Massachusetts, *Goodridge v. Dep't of Public Health*, 798 NE.2d 941 (Mass. 2003) same sex couples were granted access to marry under state equal protection clause. In Vermont, same sex couples can now enter into civil unions through a state statutory right *Baker v. State*, 744 A.2d 864 (Vt. 1999). Most recently, the Supreme Court of New Jersey determined that denying committed gay partners the right to marry violated the State Constitution's equal protection clause and ordered the state legislature to allow committed gay couples to marry or enact a statutory scheme providing similar benefits to marriage. *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006)

¹²³ For a recent survey of these cases, see Katie D. Fletcher, *In re Marriage of Simmons: A Case for Transsexual Marriage Recognition*, 37 LOY. U. CHI. L.J. 533, 546-554 (2006).

surgery,¹²⁴ this is no guarantee that the self-identified sex will control if the marriage is later challenged.¹²⁵

So, how do courts decide? In the vast majority of cases, courts reject self-identified sex and rely on biology, which is viewed as objective and fixed.¹²⁶ *Littleton v. Prange*¹²⁷ is just such an example. In this case, the court ruled that a male-to-female transsexual could not bring a wrongful death claim as a surviving spouse because her marriage to a male was an invalid same-sex relationship. In reaching the judgment, the court looked at the plaintiff's birth certificate and concluded her marriage to a man was void and conferred no legal benefits because she "was created and born a male. Her original birth certificate, an official document of Texas, clearly so states."¹²⁸ This analysis does not consider the plaintiff's own gender identification as a woman, the surgical procedures she underwent, or the change of her name or sex on her birth certificate.¹²⁹ It also wiped clean the couple's seven-year union, which the husband entered into with full knowledge of the plaintiff's sex reassignment surgery ten years earlier.¹³⁰

The minority judicial view allows for self-identification over birth sex and recognizes the complex biological continuum between male and female. This viewpoint is encapsulated in *M.T. v. J.T.*¹³¹ Nearly thirty years ago, a New Jersey court validated a marriage between a man and a male-to-female transsexual. To

¹²⁴ *Id.* at 555.

¹²⁵ *Id.* at 565-66. Fletcher notes that "...a transsexual individual, even with a birth certificate indicating their identified sex, may still encounter legal issues in the courtroom. Absent a statute or enforcement of an existing statute clearly allowing a transsexual's reassigned sex and/or court decisions recognizing a transsexual's reassigned sex, transsexual marriage rights with respect to their identified sex will continue to be nonexistent." *Id.*

¹²⁶ Greenberg, *supra* note 3 at 294, *see also* 297-298 for a listing of state and federal statutes that make this classification.

¹²⁷ 9 S.W.3d 223 (Tex. App. 1999)

¹²⁸ *Id.* at 231.

¹²⁹ *Id.*

¹³⁰ *Id.* at 225.

¹³¹ 355 A.2d 204 (N.J. Super. Ct. App. Civ. 1976)

reach this result, the court had to markedly disagree with other courts who had concluded that sex is “irrevocably cast at the moment of birth” and that biological sex was the determining factor of marital capacity.¹³² While recognizing that a person could change their role in the male-female binary he or she was born into, the court does not go as far as to recognize a third gender category. The court’s holding is limited: “...for marital purposes if the anatomical or genital features of a genuine transsexual are made to conform to the person’s gender, psyche or psychological sex, then identity by sex must be governed by the congruence of these standards.”¹³³ This rule recognized that the plaintiff should be considered female and therefore the marriage was valid.¹³⁴

According to the *M.T.* court, transsexual marriage required “congruence” and a fixed role in the binary, even if that role had changed since birth. This reasoning suggests that an intersexed person could enter into a valid opposite sex marriage as long as his or her external genitals and gender identity were congruent. In the immigration context, another court took a slightly broader view. The Board of Immigration Appeals refused to accept the narrow definition proposed by the Department of Homeland Security: to determine the validity of a marriage by looking at the common meanings of the terms man and woman as they are used in the federal Defense of Marriage Act.¹³⁵ In analyzing the plaintiff’s sex, the court acknowledged the complexity of biological indicators of sex, citing the eight different factors used to determine sex discussed in Julie Greenberg’s article, and made an analogy to intersexed individuals who lacked congruence in

¹³² *Id.* at 86.

¹³³ *Id.* at 87.

¹³⁴ *Id.* at 88.

¹³⁵ *In re Lovo-Lara*, 23 I. & N. Dec. 746, 752 (B.I.A. 2005)

these factors.¹³⁶ The court ended up validating the marriage of a male to a male-to-female transsexual under North Carolina law¹³⁷ by looking at the petitioner's current birth certificate, which she had amended to designate herself as a female.¹³⁸

Judicial recognition that sex is more complicated than XX or XY chromosomes is important to ensure intersexed people are not denied the right to marry. Although still a minority view in the marriage context, courts are beginning to recognize and protect biological complexity in employment discrimination cases under Title VII.

2. Employment Discrimination

In the marriage cases discussed above, the majority judicial position is that biological sex is a fixed male-female binary—a viewpoint that denies basic human rights to intersexed people who fall outside the binary. In contrast, an emerging trend in Title VII employment discrimination cases is a judicial recognition of biological complexities underlying the male-female binary. Courts are more willing to protect transsexual and intersexed individuals from discrimination in the workplace while reluctant to grant affirmative rights in the marriage context.

Title VII makes it unlawful for any employer “to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment,

¹³⁶ *Id.* noting that medical experts use the following factors to determine sex: (1) genetic or chromosomal sex; (2) gonadal sex; (3) internal morphologic sex; (4) external morphologic sex; (5) hormonal sex; (6) phenotypic sex; (7) assigned sex and gender of rearing; (8) sexual identity. Greenberg's article also influenced a Kansas court in validated a marriage between a man and a male-to-female transsexual. *In re Estate of Gardiner*, 22 P.3d 1086 (Kan. Ct. App. 2001). However, this result was overturned by the Kansas Supreme Court. *In re Estate of Gardiner*, 42 P.3d 120 (Kan. 2002).

¹³⁷ The court emphasized that the law of the state where the couple celebrated the marriage governed the issue and that regulation of marriage is an exclusive state matter. 23 I. & N. Dec. at 751. Refusing to preempt state law with federal law, even in the immigration context, will allow some states to recognize a broader concept of marriage.

¹³⁸ *Id.* at 753.

because of such individual's race, color, religion, sex, or national origin."¹³⁹ Sex refers to biology and implicitly assumes that the plaintiff's sex will conform to the fixed male-female binary.¹⁴⁰ This definition leaves out two overlapping classes of people: intersexed whose biological sex determinants are ambiguous or transsexuals who have or are in the process of transitioning from one sex to another.¹⁴¹

Recent court decisions suggest the judiciary is willing to complicate Title VII's presumptions about sex in order to protect intersexed or transsexuals from discrimination in the workplace. This represents a significant shift from older cases, exemplified by Seventh Circuit's opinion in *Ulane v. Eastern Airlines, Inc.*,¹⁴² "*Ulane II*." Karen Ulane was a male-to-female transsexual who worked as an airline pilot for Eastern Airlines until she was discharged after sex reassignment surgery.¹⁴³ Her attorney advocated that Eastern Airlines fired Ms. Ulane "for no reason other than the fact that she ceased being a male and became a female."¹⁴⁴ The district court, in *Ulane I*, held that Ms. Ulane stated a Title VII claim because being fired for being a transsexual was discrimination "because of sex."¹⁴⁵ The Seventh Circuit reversed and held that Title VII does not protect transsexuals.¹⁴⁶ The court, reluctant to liberally interpret the statute, reasoned that "because of sex"

¹³⁹ 42 U.S.C.S. § 2000e-2 (a)(1)(2006).

¹⁴⁰ Zachary A Kramer, *Some Preliminary Thoughts on Title VII's Intersexions*, 7 Geo. J. Gender & L. 31, 37 (2006).

¹⁴¹ *Id.*

¹⁴² 742 F.2d 1081 (7th Cir. 1984) *cert denied* 471 U.S. 1917 (1985).

¹⁴³ *Id.* at 1082-84.

¹⁴⁴ *Id.* at 1082.

¹⁴⁵ *Ulane v. Eastern Airlines, Inc.*, 581 F.Supp. 821, 827 (N.D.Ill. 1983)

¹⁴⁶ 742 F.2d at 1083.

should be limited to its plain meaning—"that it is unlawful to discriminate against women because they are women and against men because they are men."¹⁴⁷

Five years later, the sex stereotyping theory of *Price Waterhouse v. Hopkins*¹⁴⁸ opened the door to a new approach that would circumvent cases such as *Ulane II*. *Price Waterhouse* said that employers should not evaluate employees to see if their behavior and appearance match societal stereotypes as to male and female roles.¹⁴⁹ The plaintiff, Ann Hopkins, alleged that the Price Waterhouse firm had discriminated against her because of sex when considering whether she would be promoted to partner. While Ms. Hopkins' clients were extremely pleased with her work, the firm found her too abrasive and lacking interpersonal skills.¹⁵⁰ In short, the firm reacted negatively to her brusque personality because she was a woman. One decision maker advised that in order to improve her chances to make partner, Ms. Hopkins' should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."¹⁵¹

The Supreme Court found these remarks to be impermissible considerations in an employment decision. In contrast to the Seventh Circuit in *Ulane II*, the Court interpreted Title VII more broadly by focusing on its remedial purpose. The Court concluded that:

In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender....we are beyond the day when an

¹⁴⁷ *Id.* at 1085. The court also noted that "[t]he total lack of legislative history supporting the sex amendment coupled with the circumstances of the amendment's adoption clearly indicates that Congress never considered nor intended that this 1964 legislation apply to anything other than the traditional concept of sex." *Id.*

¹⁴⁸ 490 U.S. 228 (1989)

¹⁴⁹ *Id.* at 250-51.

¹⁵⁰ *Id.* at 234.

¹⁵¹ *Id.* at 235.

employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for in forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.”¹⁵²

It was not long before transsexual employees latched onto the sex stereotyping theory as an end run around *Ulane II*.¹⁵³ *Price Waterhouse* has opened the door to unlocking the gender binary and protecting transsexuals and intersexed from discrimination in the workplace, although the Circuit Courts have not agreed on how to resolve the tension between *Ulane II* and *Price Waterhouse*.

Courts applying *Price Waterhouse* to sex stereotyping claims by transsexuals follow three paths. Courts in the Fifth¹⁵⁴ and Tenth¹⁵⁵ Circuits still view *Ulane II* as controlling and hold that transsexuals are not protected by Title VII. Courts in the Third,¹⁵⁶ Sixth,¹⁵⁷ and Ninth¹⁵⁸ Circuits find that *Price Waterhouse* controls and permits recovery for transsexuals who can properly plead a sex stereotyping theory. A court in the D.C. Circuit¹⁵⁹ seems to tread a middle approach—not finding *Price Waterhouse* a satisfying theory yet seeking to recognize biological complexity and discrimination against non-conforming

¹⁵² *Id.* at 250-51 (citations omitted).

¹⁵³ *Schroer v. Billington*, 424 F. Supp.2d 203, 207 (D. D.C. 2006) (“...a number of other courts have abandoned *Ulane* after *Price Waterhouse* and ruled that Title VII protects transsexuals who do not conform to their employers’ gender stereotypes.”)

¹⁵⁴ *Oiler v. Winn-Dixie Louisiana, Inc.*, No. 00-3114, 2002 U.S. Dist. LEXIS 17417 (E.D. La. Sept. 12, 2002).

¹⁵⁵ *Etsitty v. Utah Transit Auth.*, No. 04-cv-616, 2005 U.S. Dist. LEXIS 12634 (D. Ut. June 24, 2005).

¹⁵⁶ *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257 (3d Cir. 2001); *Mitchell v. Axcen Scandipharm, Inc.*, No. 05-243, 2006 U.S. Dist. LEXIS 6521 (Feb. 21, 2006).

¹⁵⁷ *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005) *cert. denied* 126 S. Ct. 624 (2005); *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004); *Doe v. United Consumer Fin. Serv.*, No. 1:01-cv-1112, 2001 U.S. Dist. LEXIS 25509 (N.D. Oh. Nov. 9, 2001). But the Sixth Circuit only goes so far in protecting transsexuals under Title VII. *See Johnson v. Fresh Mark*, 337 F. Supp.2d 996 (N.D. Oh. 2003) (holding that Title VII did not protect a transsexual plaintiff who failed to conform to generally accepted principles of sex segregated public bathrooms.) *aff’d* 98 Fed. Appx. 461 (6th Cir. 2004).

¹⁵⁸ *Kastl v. Maricopa County Cmty. Coll.*, No. 02-1531, 2004 U.S. Dist. LEXIS 29825 (D. Az. June 3, 2004).

¹⁵⁹ *Schroer v. Billington*, 424 F. Supp.2d 203 (D. D.C. 2006).

individuals. This third position is the best option because it recognizes the biological complexities long recognized in the medical community: that male and female are not exclusive categories. These three approaches diverge on three key issues. First, how to read the congressional intent of Title VII's "because of sex" requirement. Second, whether transsexuals challenge the gender binary or seek to conform to the binary by changing their gender. And third, what discrimination counts as sex stereotyping and what are universally accepted gender norms? Here, I utilize an example I have termed the "bathroom dilemma" that challenges use of sex-segregated bathrooms by individuals who are not clearly male or female.

A federal court in the Fifth Circuit found that Title VII did not protect a transvestite plaintiff, Peter Oiler, who cross-dressed as a woman in public (but never while working at truck driver for his employer Winn-Dixie) one to three times a month in order to express his feminine side and relieve stress.¹⁶⁰ Winn-Dixie fired Mr. Oiler because they feared that customers would recognize him while he was cross-dressed in public, disapprove of his lifestyle, and shop elsewhere.¹⁶¹ The court found that this action did not violate Title VII by agreeing with *Ulane II* that "because of sex" means biological sex and does not include sexual identity or gender identity disorders.¹⁶² As further support for this proposition, the court noted that thirty-one proposed bills to amend Title VII to include discrimination on the basis of sexual orientation have failed.¹⁶³ Further the court distinguished *Price Waterhouse* by finding "that this is not a situation where the plaintiff failed to conform to a gender stereotype. Plaintiff was not discharged

¹⁶⁰ Oiler v. Winn-Dixie Louisiana, Inc., No. 00-3114, 2002 U.S. Dist. LEXIS 17417 at * 5-10 (E.D. La. Sept. 12, 2002).

¹⁶¹ *Id.* at *9-10.

¹⁶² *Id.* at *30. Yet, no Congressperson has introduced a bill that addresses whether Title VII should prohibit discrimination based on sexual identity. Schoer, 424 F. Supp.2d at 212.

¹⁶³ *Id.* at *22-23.

because he did not act sufficiently masculine or because he exhibited traits normally valued in a female employee, but disparaged in a male employee. Rather the plaintiff disguised himself as a female for stress relief....”¹⁶⁴

Another federal court expressed its fear that the male-female binary must be enforced more blatantly. In *Etsitty v. Utah Transit Authority*,¹⁶⁵ the plaintiff, Krystal Sandoval Etsitty, was a pre-operative transsexual who still had male genitalia but was taking female hormones that changed her outward appearance. In other words, the plaintiff, just like an intersexed person, occupied a biological space “in-between” male and female. The defendant, the Utah Transit Authority, fired Ms. Etsitty after she told her supervisor that she would be appearing as a female at work and personnel became concerned that she would use a female bathroom even though she was a biological male.¹⁶⁶ This problem concerned the defendant because transit operators must use public restrooms along their routes and the defendant felt it would be impractical to arrange for a unisex bathroom.¹⁶⁷

While noting the tension between *Ulane II* and *Price Waterhouse*, the court held that transsexuals are not protected under Title VII absent a Congressional mandate.¹⁶⁸ The court reasoned that Title VII does not call for a complete rejection of sex-related conventions and expressed fear that “if something as drastic as a man’s attempt to dress and appear as a woman is simply a failure to conform to the male stereotype, and nothing more, that there is no social custom or practice associated with a particular sex that is not a stereotype.”¹⁶⁹ The court ruled that Ms. Etsitty failed to state a claim under *Price Waterhouse*’s sex stereotyping theory.

¹⁶⁴ *Id.* at *28.

¹⁶⁵ *Etsitty v. Utah Transit Auth.*, No. 04-cv-616, 2005 U.S. Dist. LEXIS 12634 (D. Ut. June 24, 2005).

¹⁶⁶ *Id.* at *3-4.

¹⁶⁷ *Id.* at *4.

¹⁶⁸ *Id.* at *8-9.

¹⁶⁹ *Id.* at *14-15.

The Utah Transit Authority did not require Ms. Etsitty to conform to gender appearance stereotypes but only “to conform to the accepted principles established for gender-distinct public restrooms.”¹⁷⁰ In reaching this conclusion, the court seems to reach outside the record of the case and rule based on presumed societal mores. Ms. Etsitty argued that defendant’s concern over restroom usage was pretextual because no one had complained to the defendant and the defendant had not even attempted to investigate reasonable alternatives.¹⁷¹ The court found that no studies were necessary to determine that “[c]oncerns about privacy, safety and propriety are the reason that gender specific restrooms are universally accepted in our society.”¹⁷² By allowing an employer to hide behind the bathroom dilemma without proving it was an actual problem, the court reinforced societal stereotypes instead of questioning them.

Other courts have been more willing to use *Price Waterhouse* to protect nonconforming individuals. *Smith v. City of Salem*¹⁷³ provided an apt opportunity for the Sixth Circuit to extend the protection of Title VII to a transsexual because the facts closely mirrored *Price Waterhouse*. Jimmie Smith, a transsexual employee of the fire department began expressing a more feminine appearance at work and his co-workers commented “that his appearance and mannerisms were not ‘masculine enough.’”¹⁷⁴ The court overruled the district court, which had followed *Ulane II* in holding that Title VII does not protect transsexuals, and read *Price Waterhouse* as expanding Title VII’s protections not only to sex discrimination but

¹⁷⁰ 2005 U.S. Dist. LEXIS 12634 at *16.

¹⁷¹ *Id.* at *17.

¹⁷² *Id.* at *18.

¹⁷³ 378 F.3d 566 (6th Cir. 2004)

¹⁷⁴ *Id.* at 568.

to gender discrimination, which it defined as “discrimination based on a failure to conform to stereotypical gender norms.”¹⁷⁵

Even though the Sixth Circuit expanded its definition of sex stereotyping to protect transsexuals, what counts as sex stereotyping is construed rather narrowly. *Johnson v. Fresh Mark, Inc.*¹⁷⁶ is a good indicator of the complex legal problems an intersexed plaintiff will face when challenging the gender binary at work. The plaintiff, Selena Johnson, worked at a Fresh Mark, a meat packing plant.¹⁷⁷ Although she was designated as a male at birth after a “cursory genital examination,” she began living as a female when she was a teenager.¹⁷⁸ After employees complained that Ms. Johnson used both the male and female restrooms, Fresh Mark told Ms. Johnson that she was required to use the male restroom because her state issued driver’s license identified her as male.¹⁷⁹ Ms. Johnson refused to work under this command because she feared for her own safety; Fresh Mark fired her for missing work.¹⁸⁰ The court found that Ms. Johnson did not have a *Price Waterhouse* sex stereotyping claim under Title VII because “Fresh Mark did not require Plaintiff to conform her appearance to a particular gender stereotype, instead, the company only required Plaintiff to conform to the accepted principles established for gender-distinct public restrooms.”¹⁸¹

One federal court has recognized that making individuals with non-conforming genitalia conform to the sex binary in choosing a restroom at work

¹⁷⁵ *Id.* at 573.

¹⁷⁶ 337 F. Supp.2d 996 (N.D. Oh. 2003) *aff’d* 98 Fed. Appx. 461 (6th Cir. 2004).

¹⁷⁷ *Id.* at 998.

¹⁷⁸ *Id.* The plaintiff posited that she may be intersexed but the court refused to consider whether there was a distinction between transsexualism and intersexuality since the plaintiff merely hypothesized about this alternative. *Id.* at 1000. Then, the court proceeded to chastise the plaintiff for failing to divulge her intersexed condition to the company as a “congenital abnormality.” *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 1000.

can lay the basis for a Title VII claim.¹⁸² Transsexual plaintiff Rebecca Kastl, was designated as a male at birth but began living as a woman and legally changed her name and drivers license to match her female gender identity.¹⁸³ Ms. Kastl continued to work as an adjunct faculty member at Maricopa County Community College during the time period when she transitioned from male to female.¹⁸⁴ The College required Ms. Kastl and another transsexual to use the men's restroom until they had completed sex reassigned surgery.¹⁸⁵ Plaintiff refused to follow this policy and the College fired her.¹⁸⁶ In denying the defendant's Rule 12(b)(6) motion to dismiss for failure to state a claim, the court recognized that being a biological female yet possessing male genitalia are not mutually exclusive because "[m]edical evidence suggests that the appearance of genitals at birth is not always consistent with other indicators of sex..."¹⁸⁷ For this reason, Ms. Kastl's claim survived a motion to dismiss because "to create restrooms for each sex but to require a woman to use the men's restroom if she fails to conform to the employer's expectations regarding a woman's behavior or anatomy, or to require her to prove her conformity with those expectations, violates Title VII."¹⁸⁸ The

¹⁸² Kastl v. Maricopa County Cmty. Coll., No. 02-1531, 2004 U.S. Dist. LEXIS 29825 at *10 (D. Az. June 3, 2004) (denying defendant's motion to dismiss for failure to state a claim). However, plaintiff's claim failed to survive the more stringent summary judgment standard. This may be because plaintiff's attorney failed to provide an adequate evidentiary record and poorly framed the issues for litigation. See Kastl v. Maricopa County Cmty. Coll., No. 02-1531, 2006 U.S. Dist. LEXIS 60267 (D. Az. Aug. 22, 2006) (granting summary judgment for defendant). The court struck several of plaintiff's evidentiary filings as untimely. *Id.* *9-11. The court also ruled that the plaintiff failed to establish a *prima facie* case that she was a member of a protected class (a biological female) because she failed to support her theory that there were other determinants of biological sex other than genitalia, hormones, and chromosomes. *Id.* at *16-20. Plaintiff also failed to challenge defendant's policy of segregating bathrooms by sex. *Id.* at *20. Despite this later ruling that ultimately dismissed plaintiff's claim, the court's earlier opinion is still a novel legal recognition of the potential expansiveness of *Price Waterhouse's* sex stereotyping theory.

¹⁸³ *Id.* at *3.

¹⁸⁴ *Id.* at *4.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ 2004 U.S. Dist. LEXIS 29825 at *7 n.5.

¹⁸⁸ *Id.* at *10.

Kastl court was one of the first to recognize that individuals with nonconforming genitalia should not be deprived of employment benefits and that this rule could not be “avoided because restroom availability is the benefit at issue.”¹⁸⁹

One court in the D.C. Circuit has confronted the tension between *Ulane II* and *Price Waterhouse* head on by suggesting that it is time for the law to recognize the biological complexities identified by the medical community—in short, to return to the district court’s opinion in *Ulane I*. In *Schroer v. Billington*,¹⁹⁰ the Congressional Research Service of the Library of Congress rescinded the employment offer of plaintiff Diane Schroer, a male-to-female transsexual who had interviewed for the position as a male, once she informed the Library that she would be reporting to work as a female.¹⁹¹ This employment decision provides a striking factual example reminiscent of *Ulane*: an employer hires a male employee and decides to fire that employee when she becomes a female. The court held that *Price Waterhouse*’s sex stereotyping did not protect Ms. Schroer because that theory “creates space for people of both sexes to express their sexual identity in non-conforming ways” and Ms. Schroer “does not wish to go against the gender grain, but with it” because “[s]he seeks to express her female identity, not as an effeminate male, but as a woman.”¹⁹² The crux of Ms. Schroer’s employment problems, according to the court, is that her employer is intolerant of individuals whose gender identity does not match his or her biological sex and this could not be remedied under *Price Waterhouse*’s sex stereotyping theory.¹⁹³

¹⁸⁹ *Id.*

¹⁹⁰ 424 F. Supp.2d 203 (D. D.C. 2006).

¹⁹¹ *Id.* at 205-06.

¹⁹² *Id.* at 210-11.

¹⁹³ *Id.* at 211.

The court returned to the reasoning of the district court's decision in *Ulane I*, which recognized that "sex is not a cut and dried matter of chromosomes...[but] encompasses sexual identity" that is protected by Title VII.¹⁹⁴ The court extrapolated that the Seventh Circuit's reason for overturning the district court's decision no longer held weight because subsequent Supreme Court decisions, such as protecting male-on-male sexual harassment in the workplace, applied Title VII in ways that were never contemplated by Congress.¹⁹⁵ The court proposed a new rule that would protect transsexuals under Title VII: "discrimination against transsexuals because they are transsexuals is 'literally' discrimination 'because of sex'....[this is] "a straightforward way to deal with the factual complexities that underlie human sexual identity. These complexities stem from real variations in how the different components of biological sexuality—chromosomal, gonadal, hormonal, and neurological—interact with each other, and in turn, with social psychological and legal conceptions of gender."¹⁹⁶ In support of this rule, the court describes intersexed conditions and further suggests that: "[d]iscrimination against such women...because they have testes and XY chromosomes, or against any other person because of an intersexed condition, cannot be anything other than 'literal discrimination because of sex.'"¹⁹⁷

After more than thirty years, it is time to return to the reasoning of *Ulane I* instead of contorting the sex stereotyping theory of *Price Waterhouse*. It is time for the law to recognize biological complexity and protect nonconforming individuals from discrimination because they challenge the notion of a fixed gender binary. This may be the civil rights struggle of our century, as the *Ulane I*

¹⁹⁴ *Id.* at 211-12 (citations omitted).

¹⁹⁵ 424 F. Supp.2d at 212 *citing* *Oncala v. Sundowner Offshore Servs.*, 523 U.S. 75, 79 (1998).

¹⁹⁶ *Id.* at 213.

¹⁹⁷ *Id.* at n.5 *citing* *Ulane*, 581 F. Supp. at 825.

court suggests when responding to Eastern Airline's argument that allowing a transsexual in the cockpit would lead the public to question the safety of airline travel. The court stated:

This is the kind of argument that opponents of civil rights litigation urged back in those long-ago days when we did not have anti-discrimination laws. We cannot serve blacks in this restaurant. Nobody will come in. We cannot employ a black to drive this bus. Nobody will ride the bus. We sure can't have any blacks carry the mail or work in a department store. We will lose customers. Well, the American public is a lot smarter than the bigots gave them credit for being, and those predictions did not prove to be true. I am old enough to remember when there were no blacks driving buses in Chicago or virtually none, no black sales clerks in department stores, no black mail carriers. We all know the extent to which those jobs have been opened up to persons of all races and sexes and how much better a society it has made us and how the insuperable problems that were supposed to come about just did not happen. The same thing is going to happen should Karen Ulane resume her seat in the cockpit....¹⁹⁸

The court's parade of horrors mocks the "legitimate" reasons employers give for firing plaintiffs who challenge the gender binary. In hindsight, these reasons for not affording civil rights to blacks seem ridiculous and they are no more believable as a basis for denying rights to transsexuals and the intersexed. These employment discrimination cases show an emerging trend of broadening statutory definitions to match the medical reality that some individuals do not neatly fall into one of two boxes labeled "male" and "female."

CONCLUSION

Why require birth certificates to designate children as male or female unless the purpose is to facilitate legal classifications on the basis of sex? A sizeable group, 1 to 4% of the world's population, cannot be categorized as fully male or female. Individuals who live outside this sex binary face potential human rights abuses. Intersexed infants in the U.S. are surgically altered to fit into this binary

¹⁹⁸ 581 F. Supp. at 832. By delivering his opinion in open court, Judge Grady's statement takes on an urgent tone.

and the hijras in India, who embrace a third gender identity, continue to battle societal discrimination. Legislators and courts will need to address this collision.

One path is through statutory reform to recognize the right to self-identify as a third gender. The broad judicial interpretations of Title VII should be codified to match the growing medical awareness of the complex varieties of biological sex and gender identity. Statutory provisions such as the federal DOMA and REAL ID Acts, which curtail the right to marry or limit state identification documents based on a view of sex as a fixed binary, should be repealed. These statutory changes could raise awareness of intersex status, such as the “E” passport designation in India has done.

There is a model for such statutory reform: the International Bill of Gender Rights (IBGR).¹⁹⁹ This bill has not yet been enacted as binding law in any jurisdiction.²⁰⁰ Drafted in 1993 and adopted in 1995 by the International Conference on Transgender Law and Employment Policy, the IBGR grants ten rights, beginning with the right to define gender identity. The bill expresses the viewpoint that gender is “ever-unfolding” and therefore “all human beings have the right to define their own gender identity regardless of chromosomal sex, genitalia, assigned birth sex, or initial gender role; and further, no individual shall be denied Human or Civil Rights by virtue of a self- defined gender identity which is not in accord with chromosomal sex, genitalia, assigned birth sex, or initial gender role.”²⁰¹ The bill additionally guarantees the right to secure and retain employment; the right to control and change one’s body to express self-defined

¹⁹⁹ Frye, *supra* note 5 at Appendix B; also available at <http://www.altsex.org/transgender/ibgr.html> (last visited Dec. 12, 2005)

²⁰⁰ Attempts to introduce an Equal Opportunity (Gender Identity and Sexual Orientation) Bill in Australia failed. See <http://www.democrats.org.au/campaigns/sexuality> (last visited Nov. 22, 2005).

²⁰¹ Frye, *supra* note 5 at Appendix B.

gender identity; right to competent medical care when changing one's body; the right to enter into marriage contracts regardless of their or their partner's assigned birth sex; and the right to conceive, bear, or adopt children.²⁰²

While the sweeping IBGR may not be enacted anywhere in the near future, it is inspiring local governments to enact laws that will protect intersexed people. For this reason, federal legislation such as the federal DOMA and REAL ID Acts is particularly troubling, since it bars state and local governments from granting expansive protection. In 1995, San Francisco recognized "gender identity" as a protected class in its nondiscrimination ordinance, targeted at accommodating all individuals and prohibiting gender discrimination in employment, housing, and public facilities.²⁰³ In the introduction to the ordinance, the drafters state that "a person's gender identity is that person's sense of self regarding characteristics labeled as masculine, feminine, both or neither. An individual determines their own gender identity and the sole proof of a person's gender identity is that person's statement or expression of their self identification."²⁰⁴ This view, which validates an individual's self-gender identity and recognizes a gender identity beyond the male-female binary, will protect intersexed individuals.

Statutory reform in the United States can be an immediate remedy while advocates begin building a constitutional right²⁰⁵ to self-identify outside the gender

²⁰² *Id.*

²⁰³ SAN FRANCISCO HUMAN RIGHTS COMM'N, *Compliance Guidelines to Prohibit Gender Identity Discrimination*, (Dec. 10, 2003) available at http://www.ci.sf.ca.us/site/sfhumanrights_page.asp?id=6274 (last visited Dec. 12, 2005).

²⁰⁴ *Id.*

²⁰⁵ Some plaintiffs have also advanced federal First Amendment claims arguing that they have a protected right to express their unique gender identity. Thus far, these claims have been unsuccessful. *Kastl v. Maricopa County Cmty. Coll.*, No. 02-1531, 2004 U.S. Dist. LEXIS 29825 at *31-33 (D. Az. June 3, 2004) (ruling that Plaintiff's First Amendment claim survives a motion to dismiss) *overruled by* *Kastl v. Maricopa County Cmty. Coll.*, No. 02-1531, 2006 U.S. Dist. LEXIS 60267 at *25-26 (D. Az. Aug. 22, 2006); *Doe v. Yunits*, 2000 Mass. Super. LEXIS 491 at *17 (Mass.

binary based on the fundamental right to privacy and bodily integrity derived from the Fourteenth Amendment's Due Process Clause.²⁰⁶ In the last forty years, the Court has expanded the right to privacy to include the right to obtain contraceptives²⁰⁷ and abortions²⁰⁸ and most recently, to protect private, consensual homosexual conduct from intrusion by the state.²⁰⁹ With each expansion of the right beyond the traditional family (a married, heterosexual couple), the right to privacy is positioned to challenge compulsory participation in the male-female binary.

This right to liberty makes explicit "a promise of the Constitution that there is a realm of personal liberty which the government may not enter."²¹⁰ Moreover, the Court has emphasized that

...the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define

Super. Ct. Oct. 11, 2000)(finding that plaintiff may be able to prove a liberty interest in her appearance) *overruled by* Doe v. Yunits, 15 Mass. L. Rep. 278 (Mass. Super. Ct. 2001).

²⁰⁶ Fourteenth Amendment protection of the intersexed has been suggested by other authors. See generally Chai R. Feldblum, "The Right to Define One's Own Concept of Existence: What Laurence Can Mean for Intersex and Transgender People," 7 GEO. J. GENDER & L. 115 (2006); Sara R. Benson, *Hacking the Gender Binary Myth: Recognizing Fundamental Rights for the Intersexed*, 12 CARDOZO J.L. & GENDER 31 (2005). Feldblum's article points out a core problem in this approach: the traditional view that the Fourteenth Amendment only provides a "negative right"—that is, one that prohibits government intrusion or differential treatment but not one that requires the granting of affirmative rights such as marriage. See Feldblum at 127-131. Feldblum suggests "...if the particular tilt at issue is related to a person's core, essential self-definition, then the government has a constitutional obligation to rectify any tilt created by background social norms. An individual's choice to marry, to have (or not to have) a child, to engage in satisfying sexual intimacy, or to live in the gender that matches his/her sense of identity all relate to a person's core, essential self-definition. In these areas, the Constitution places on the State not only a negative obligation not to criminalize the conduct or status in question, but concomitantly, a positive obligation to rectify tilts created by society for those individuals who are seeking to live their authentic selves." *Id.* at 130.

²⁰⁷ *Griswold v. Connecticut*, 381 U.S. 470 (1965) (striking down law banning the distribution of contraceptives), *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (expanding *Griswold* to unmarried individuals).

²⁰⁸ *Roe v. Wade*, 410 U.S. 113(1973); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

²⁰⁹ *Lawrence v. Texas*, 539 U.S. 558 (2003).

²¹⁰ *Id.* at 578 (2003) *citing* *Planned Parenthood v. Casey* 505 U.S. 833, 847 (1992).

the attributes of personhood were they formed under compulsion of the State.²¹¹

What is closer to the “heart of liberty” and “central to personal dignity and autonomy” than an individual’s chosen gender identity—to be granted full legal rights and protection against discrimination even if you do not fall into one of two neat societal boxes labeled male or female.²¹² Undoubtedly, the right to identify beyond the fixed male-female gender binary should not be tainted by state compulsion.

The societal belief that sex is a male-female binary fixed at birth leads to human rights abuses for individuals, particularly males, who do not conform to this model, whether this nonconformity is caused by biology, as for intersexed infants in the U.S., or choice and biology, as for the hijras in India. To end the discrimination caused by this expectation, countries should allow for self-identification as male, female, or a third gender.

* * *

²¹¹ *Id.* at 574 *citing* Casey, 505 U.S. at 851.

²¹² One court has recognized that requiring proof of sex before being allowed to use bathrooms segregated by sex could implicate the fundamental right to privacy. *Kastl v. Maricopa County Cmty. Coll.*, No. 02-1531, 2004 U.S. Dist. LEXIS 29825 at *19-23 (D. Az. June 3, 2004)