My Body is My Temple: Utilizing the Concept of Dignity in Supreme Court Jurisprudence to Fight Sex Reassignment Surgery Requirements for Recognition of Legal Sex

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MY BODY IS MY TEMPLE: UTILIZING THE CONCEPT OF DIGNITY IN SUPREME COURT JURISPRUDENCE TO FIGHT SEX REASSIGNMENT SURGERY REQUIREMENTS FOR RECOGNITION OF LEGAL SEX

DORAN SHEMIN*

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* Juris Doctor Candidate, May 2017, American University Washington College of Law; Bachelor of Arts, 2014, University of Tennessee, Knoxville. I would like to thank the Journal staff for all of their hard work and dedication assisting me with this piece. To Professor Macarena Sáez: thank you for your invaluable guidance throughout the writing process. Finally, I would like to thank my family and friends for all of the love and support they have given me. I dedicate this comment to my best friends and parents, Randy and Kimberly Shemin, to whom I owe all of my success.
I. INTRODUCTION

Inaccuracy of gender on identification documents is a major problem for many transgender individuals in the United States.\(^1\) Some states make it easier than others to amend driver’s licenses, identification cards, and birth certificates.\(^2\) Some federal agencies only require a signed statement from a physician certifying that the individual is in the process of transitioning, which does not necessarily require surgery.\(^3\) However, in some states, a person must have sex reassignment surgery to amend a birth certificate or driver’s license.\(^4\)

Many transgender people do not want to have sex reassignment surgery.\(^5\) People have different goals for how they want to appear and can use things like clothing or make-up to express certain characteristics.\(^6\) Some prefer hormone therapy to develop certain secondary sex characteristics, such as muscle mass and facial hair, to appear more masculine or feminine.\(^7\) Moreover, many private insurance and Medicaid programs do not cover genital surgeries, making sex reassignment surgery an expensive procedure.\(^8\)

\(^1\) See Dean Spade, Documenting Gender, 59 HASTINGS L.J. 731, 751-59 (2008) (explaining issues with unemployment, sex-segregated facilities, and lack of access to appropriate healthcare).


\(^6\) Spade, supra note 1, at 754.

\(^7\) Id. at 754-55.

\(^8\) See id. at 755; see also Anne E. Silver, An Offer You Can’t Refuse: Coercing Consent To Surgery Through the Medicalization of Gender Identity, 26 COLUM. J. GENDER & L. 488, 498-99 (2014) (explaining that because insurance does not cover...
Some transgender people have started fighting back against sex reassignment surgery requirements. In May 2015, six transgender individuals filed a complaint alleging Michigan’s driver’s license policy, which requires an amended birth certificate and, in turn, sex reassignment surgery, violates their Constitutional rights.

This Comment advocates that transgender plaintiffs challenge state laws or regulations that require sex reassignment surgery and further recommends that transgender plaintiffs utilize the concept of dignity to fight these requirements. Part II of this Comment provides background on the lives of transgender individuals and explains sex reassignment surgery. Part III presents arguments using concepts of dignity from Supreme Court jurisprudence that are analogous for challenging sex reassignment surgery requirements for recognition of legal sex. Part IV concludes that jurisprudence involving dignity provides creative arguments for challenging sex reassignment surgery requirements to change identification documents.

many procedures, wealthy people have more access to medical care and thus legal rights).

9. See Complaint, supra note 5, at 1-6.

10. See id. at 34-40 (alleging violations of the right to privacy, the First Amendment, Equal Protection, the right to interstate travel, and the right to refuse unwanted medical treatment); see also ID Documents Center, Alabama, supra note 4. On August 23, 2016, this lawsuit was dismissed because the Michigan Secretary of State changed the driver’s license policy such that transgender individuals no longer have to prove that they have undergone sex reassignment surgery. Residents of Michigan can now use a U.S. passport to receive an updated Michigan ID. However, this litigation is still relevant because it demonstrates that transgender individuals are attempting to overturn sex reassignment surgery requirements through litigation. Order Granting Def.’s Converted Mot. Summ. J., Love v. Johnson, No. 2:15-cv-11834 (E.D. Mich. Aug. 23, 2016).


12. See infra Part II (explaining the concepts of transgender, how society generally determines if someone is transgender, and what sex reassignment surgery is and what it does to the body).

13. See infra Part III (analogizing Supreme Court jurisprudence regarding dignity from autonomy and equality to create bodily integrity arguments for transgender plaintiffs).

14. See infra Part IV (concluding that transgender plaintiffs can utilize dignity arguments to fight sex reassignment surgery requirements).
II. BACKGROUND

A. Conceptualizing Gender

For this Comment, it is most important to understand the concepts of sex, gender, gender identity, gender expression, legal sex, and transgender. Sex is a biological determination and can include a number of factors. However, doctors usually base sex on external genitalia and use it to make a determination about legal sex, or the sex marked on identification documents. The assignment of legal sex does not take into account gender identity, which is “a person’s own conception of how one fits into the social construct” of gender.

Gender is the “attitudes, feelings, and behaviors that a given culture associates with a person’s biological sex.” Gender expression relates to “how individuals outwardly indicate their gender identity to others, often through behavior, clothing, hairstyle, voice or body characteristics.”

Therefore, when someone’s gender identity is incongruent with their legal sex, they may be transgender and may seek to transition in order to live as the gender with which they identify. Importantly, some experts believe that gender identity is immutable.


16. See Silver, supra note 8, at 490 (explaining that chromosomes, internal sex organs, external genitalia, hormones, and secondary sex characteristics can help determine sex); see also Chinyere Ezie, Deconstructing The Body: Transgender and Intersex Identities and Sex Discrimination – The Need For Strict Scrutiny, 20 Colum. J. Gender & L. 141, 146-47 (2011).

17. See Ezie, supra note 16, at 146-47; see also Silver, supra note 8, at 490-92.

18. Silver, supra note 8, at 491.


20. Mottet, supra note 15, at 386 n.42.

21. The author will use “their,” “they,” and “them” to avoid the strict gender binary that comes with the use of “he/she,” “him/her”, and “his/hers.” See Lesbian, Gay, Bisexual, Transgender Resource Center, Gender Pronouns, Univ. Wis. MILWAUKEE, https://uwm.edu/lgbtrc/support/gender-pronouns/ (last visited Aug. 5, 2016).

22. See Silver, supra note 8, at 491.

23. See M. Dru Leveassereu, Gender Identity Defines Sex: Updating the Law to Reflect Modern Medical Science is Key to Transgender Rights, 39 Vt. L. Rev. 943, 980-81, n.214 (2015) (noting that many experts agree that since gender identity is
Transgender people face many challenges in everyday exchanges and activities.\textsuperscript{24} One major obstacle is discrimination in employment.\textsuperscript{25} If an individual does not have a passport or Social Security card, they must present a birth certificate for the employer to file an I-9 Employment Eligibility Verification Form.\textsuperscript{26} Although most identification documents list sex instead of gender, many people view these terms as synonymous, especially in the identification document context.\textsuperscript{27} The danger posed here is that the employer could discriminate against a transgender individual whose appearance does not match their identification document.\textsuperscript{28} Discrimination could include getting fired, not getting promoted, or not getting hired at all.\textsuperscript{29}

Other problems can arise during travel and other exchanges with people in the community.\textsuperscript{30} For example, if a transgender individual does not have a corrected identification document, they may have to “out” themselves during a routine security check at the airport or while trying to purchase a gift with a credit card.\textsuperscript{31} Moreover, if a transgender individual goes to a sex-segregated facility, they may be assigned with the gender based on birth sex instead of gender identity.\textsuperscript{32}

\textbf{B. Amending Identification Documents}

Birth certificates are generally the first form of personal identification that Americans receive and they play an important role in personal

\begin{footnotesize}
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\item actually biological it is immutable).
\item See generally Mottet, supra note 15, at 393-96 (detailing different social circumstances where the law does not adequately protect transgender individuals while they try to participate in society).
\item See Spade, supra note 1, at 751-52.
\item See Mottet, supra note 15, at 393-94.
\item See Complaint, supra note 5, at 2, n.2 (acknowledging that people use “sex” and “gender” synonymously for identifying people as male or female on legal documents).
\item Id.
\item See Mottet, supra note 15, at 394; see also ALLY WINDSOR HOWELL, TRANSGENDER PERSONS AND THE LAW 17 (2013). But see Macy v. Holder, No. 0120120821 (E.E.O.C. Apr. 20, 2012) (finding that discrimination based on gender identity, change of sex, or transgender status is a cognizable claim under Title VII).
\item See Mottet, supra note 15, at 395.
\item See id.
\item See Spade, supra note 1, at 752-53 (explaining that many transgender individuals have issues accessing sex-segregated social services because those programs usually place people on the basis of birth sex, and sex-segregated detention facilities pose a threat of violence for transgender individuals).
\end{enumerate}
\end{footnotesize}
documentation.\textsuperscript{33} Birth certificates help verify children’s ages when they enter school or help to obtain a work permit.\textsuperscript{34} They have become critical pieces of information for access to insurance and pension plans, as well as placement of people in sex-segregated facilities, such as shelters or drug treatment programs.\textsuperscript{35}

Birth certificates are also important for obtaining other types of personal identification documents.\textsuperscript{36} Driver’s licenses, state identification cards, and passports all require proof of a person’s identity.\textsuperscript{37} Once one obtains these different forms of identification, one can easily participate in a number of normal activities, such as driving and traveling internationally.\textsuperscript{38}

The federal government and state governments have different rules, statutes, or regulations that dictate how one can amend these forms of identification.\textsuperscript{39} For example, the federal government only requires that a doctor certify that a person who wants to amend their gender on a Social Security card is undergoing appropriate medical treatment.\textsuperscript{40} Some states require the same to amend a driver’s license, birth certificate, or both.\textsuperscript{41} Alternatively, some states require a court order for a new driver’s license or birth certificate.\textsuperscript{42}

Yet, other states require the most invasive action possible: sex

\begin{thebibliography}{99}
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\item 34. See Spade, \textit{supra} note 1, at 765-66.
\item 35. See id. at 765-66, 770.
\item 36. See id. at 770.
\item 37. See Mottet, \textit{supra} note 15, at 391-92.
\item 38. See id.
\item 39. See generally \textit{ID Documents Center, Alabama}, \textit{supra} note 4 (providing information on state laws regarding the identification document change).
\item 41. See D.C. CODE § 7-210.01(a)(2) (West 2015); see also \textit{ID Documents Center, District of Columbia}, NAT’L CTR. FOR TRANSGENDER EQUALITY, http://www.transequality.org/documents/state/district-columbia (last updated July 20, 2016).
\item 42. See generally \textit{ID Documents Center, South Carolina}, NAT’L CTR. FOR TRANSGENDER EQUALITY, http://www.transequality.org/documents/state/south-carolina (last updated July 20, 2016).
\end{thebibliography}
reassignment surgery. Some of these states require an amended birth certificate to get a new driver’s license; however, to get the amended birth certificate one must have the surgery. Others require confirmation of the surgical procedure for a new driver’s license but will not amend a birth certificate under any circumstances.

C. What Sex Reassignment Surgery Entails

For those states that require confirmation of sex reassignment surgery to amend a particular identification document, it is important to know what actually happens during the transition process and the surgery. Normally, transgender individuals are forced to “attend therapy and live as the ‘opposite’ sex for as long as two years” before they can access sex reassignment surgery and other similar procedures. Sometimes, before a doctor will perform a surgery, the individual must live as the gender with which they identify for at least a one-year period so that the individual can adjust to fully living as that gender before making any irreversible changes to the body. If the individual’s doctor determines that surgery is necessary, the doctor could recommend or perform many different procedures, including a vaginoplasty (creation of a vagina and surrounding tissues) or a hysterectomy (removal of the uterus and sometimes the ovaries and fallopian tubes). Moreover, some transgender individuals may take hormones so that secondary sex characteristics, such as facial hair,

43. See Spade, supra note 1, at 756.
47. See Silver, supra note 8, at 500.
D. Dignity in Supreme Court Jurisprudence

Over time, the concept of dignity has crept into the Supreme Court’s jurisprudence. At first, the Court used dignity in cases about contracts and the state. The first time that the term “dignity” appeared in a Supreme Court opinion was in Chisholm v. Georgia, limiting dignity to mean respect for the state.

Dignity has developed as a rationale for finding in favor of individuals instead of the state. Initially, the Court used the term “dignity” when discussing dignitaries and other elite individuals; but after World War Two, the Court began to use dignity for all individuals. The Court has also found dignity in an individual’s ability to make personal choices and to demonstrate autonomy, which the state should not impede upon. Overall, the Supreme Court has used dignity to preserve different kinds of rights in five ways: institutional status, equality, liberty, personal integrity, and collective virtue.

This Comment will focus on the ideas of dignity from autonomy and equality to create arguments for transgender individuals who want to challenge sex reassignment surgery requirements. Autonomy is the idea that people have dignity because they are free to make their choices. Dignity from equality comes from a dignity in the lack of discrimination, especially over immutable characteristics.

50. See id. at 511-12 (noting that transgender people have many different medical options when transitioning); Spade, supra note 1, at 754-55.


52. See DALY, supra note 51, at 70.

53. 2 U.S. 419 (1793).

54. See DALY, supra note 51, at 72; see also Henry, supra note 51, at 196-97 (noting that the Court in Chisholm held that a state can be sued).

55. See DALY, supra note 51, at 81.

56. See id.

57. See id. at 91-93, 97-100. See generally Henry, supra note 51, at 206-12.

58. See generally Henry, supra note 51, at 189-90 (referring to different conceptions of dignity as “institutional status as dignity, equality as dignity, liberty as dignity, personal integrity as dignity, and collective virtue as dignity.”).

59. See generally DALY, supra note 51, at 91-93; Henry, supra note 51, at 206-12.

60. See Henry, supra note 51, at 206-12.

61. See id.
1. **Dignity from Autonomy**

The Supreme Court has protected the individual right to make choices and control their own life.\(^{62}\) In *Lawrence v. Texas*,\(^{63}\) the Court found that Texas’s anti-sodomy statute was unconstitutional because it impeded on homosexual individuals’ choices regarding personal relationships.\(^{64}\) Justice Kennedy stated that the Constitution protects the right for people to make private decisions regarding their sexual partners.\(^{65}\)

Following *Lawrence*, the Supreme Court continued to expand dignity from autonomy by recognizing dignity in a person’s right to choose a spouse.\(^{66}\) In *Obergefell v. Hodges*,\(^{67}\) the issue was whether the states could restrict marriage so that only heterosexual people could marry or if the state had to recognize same-sex marriages from other states.\(^{68}\) The Court determined that the Fourteenth Amendment bestows upon a person the protection to make choices that are central to a person, including decisions about personal identity.\(^{69}\) It found that same-sex couples could marry without interference from the state.\(^{70}\)

The Court has also found that the state cannot make choices for individuals or keep individuals from making certain decisions that permanently affect a person’s own body.\(^{71}\) This jurisprudence highlights another facet of autonomy, bodily integrity.\(^{72}\) One of the first times that the

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64. See id. at 578.

65. See id.

66. See *Obergefell*, 135 S. Ct. at 2604-05.


68. See id. at 2593.

69. See id. at 2597-98.

70. See id. at 2607.


Court invoked the idea of bodily integrity was in *Skinner v. Oklahoma.* In *Skinner,* the subject of the litigation was a law that called for the forced sterilization of people who were "habitual criminals." The Court invalidated the law because it violated the fundamental right to procreation and noted that this procedure irreversibly changes the course of a person's life.

The other cases that involve bodily integrity clearly discuss the right to choose. In *Roe v. Wade,* the Supreme Court found that women have a right to abortion. In *Roe,* Texas statutes criminalized abortions. The Court discussed the many life-changing effects of pregnancy and childrearing, concluding that so long as the pregnancy is within the first trimester, a woman should be able to make the decision to have an abortion without government interference.

The Court further analyzed abortion rights in *Doe v. Bolton.* The statute in *Bolton,* unlike the statute in *Roe,* criminalized abortions but had exceptions. The statute created four substantial obstacles to severely restrict access to abortions. First, in examining the hospital accreditation requirement, the Court noted that medical staff could perform other non-abortion surgeries in appropriately licensed facilities that were not accredited in the same manner that the statute required for abortions. Second, in holding the committee approval requirement was unconstitutional, the Court found that it "substantially limited" the woman's right to choose an abortion along with her physician's medical

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73. 316 U.S. 535 (1942).
74. See id. at 536.
75. See id. at 541.
76. See Stenberg, 530 U.S. 914; Casey, 505 U.S. 833; Bolton, 410 U.S. 179; Roe, 410 U.S. 113.
77. 410 U.S. 113 (1973).
78. See id. at 163 (holding that prior to viability, a woman can choose to have an abortion free from state regulation).
79. Id. at 117-18.
82. See id. at 183 (asserting several exceptions, if pregnancy was due to rape, would endanger the mother's life, or would permanently injure her health, and if the fetus would very likely have a permanent mental or physical defect).
83. See id. at 193, 198-200 (finding that the hospital accreditation, committee approval, two-doctor concurrence, and residency requirements were invalid).
84. See id. at 192-95 (finding that there is no reason why a fully licensed hospital would be the only appropriate location to perform an abortion).
judgment. It also determined the requirement was repetitive and unnecessary, mentioning the lack of an equal committee approval requirement for any other surgical procedure. Third, the Court determined that the concurrence requirement not only impeded the attending physician’s ability to adequately provide medical assistance to the patient, but also restricted the patient’s right to fulfill her medical needs. Fourth, the residency requirement was unconstitutional because the state could not present a proper reason for the policy; therefore, the Court found that this requirement violated the right to travel because the statute would keep out-of-state residents from receiving medical care in Georgia. The rationale underlying the decision to invalidate these requirements was that the requirements significantly burdened the woman’s right to choose an abortion.

In Planned Parenthood of Southeastern Pennsylvania v. Casey, the Court explicitly accepted a woman’s right to bodily integrity. In Casey, a Pennsylvania law had essentially outlawed abortion by imposing different requirements for a woman to choose the procedure. The Court found that the spousal notification requirement was invalid but upheld the others. The Court also determined that the trimester framework, first discussed in Roe was no longer workable and instead adopted a viability framework. The central holding from Casey is that any obstacle that creates an undue burden on the woman’s right to choose would be invalid.

Finally, Stenberg v. Carhart recognized a woman’s right to choose a
specific kind of abortion during the pre-viability period.\textsuperscript{98} A Nebraska statute banned and criminalized a type of "partial birth abortion."\textsuperscript{99} But in effect, it banned both versions because the legislature failed to differentiate between Dilation and Extraction and Dilation and Evacuation procedures.\textsuperscript{100} Also, doctors could potentially use either procedure during both the pre-viability and post-viability phases of the second trimester of a pregnancy.\textsuperscript{101} The Court found that the Nebraska law violated a woman's right to choose because it banned a specific abortion method and did not provide an exception to preserve the health of the mother.\textsuperscript{102} It reasoned that through regulating the methods of abortion, Nebraska created a number of health risks for women and placed an undue burden on women seeking an abortion.\textsuperscript{103}

2. Dignity from Equality

The Court has also found that people are dignified when they are treated equally under the law. In \textit{Heart of Atlanta Motel, Inc. v. United States},\textsuperscript{104} the Court found that Congress had the constitutional right to legislate so that public accommodations could not discriminate based on race.\textsuperscript{105} The Heart of Atlanta Motel refused to serve African-American patrons prior to the Civil Rights Act of 1964; the motel filed suit to challenge the law in order to continue this practice.\textsuperscript{106} In upholding the Civil Rights Act of 1964, the Court explained that the primary purpose of the Act was to "vindicate the deprivation of personal dignity that . . . accompanies denials of equal access to public establishments."\textsuperscript{107} Further, in \textit{J.E.B. v. Alabama ex rel T.B.},\textsuperscript{108} Alabama used its peremptory

\begin{itemize}
  \item \textsuperscript{98} See \textit{id.} at 945-46.
  \item \textsuperscript{99} See \textit{id.} at 921-22.
  \item \textsuperscript{100} See \textit{id.} at 939-40 (explaining that a plain language reading covers both Dilation and Extraction (where a foot or arm is brought down through the cervix) and Dilation and Evacuation (where the body, except for the head, is brought through the cervix) procedures even if the law's aim was only to cover one type of procedure).
  \item \textsuperscript{101} See \textit{id.} at 930 (stating that the Nebraska law applied to both pre and post-viability abortions).
  \item \textsuperscript{102} See \textit{id.} at 938.
  \item \textsuperscript{103} See \textit{id.} (noting that a complete ban on a certain abortion procedure would present a significant health risk to women).
  \item \textsuperscript{104} 379 U.S. 241 (1964).
  \item \textsuperscript{105} See \textit{id.} at 261 (holding that Congress had the power to pass the Civil Rights Act of 1964 under the commerce power).
  \item \textsuperscript{106} See \textit{id.} at 243 (providing case's procedural posture).
  \item \textsuperscript{107} See \textit{id.} at 250 (internal quotations omitted).
  \item \textsuperscript{108} 511 U.S. 127 (1994).
\end{itemize}
strikes to remove all of the potential male jurors, leaving an all-female jury to decide a case with a male defendant.\textsuperscript{109} The Court found that Alabama’s use of peremptory strikes violated the Fourteenth Amendment because, similar to striking jurors based on race, the state struck jurors based solely on their gender.\textsuperscript{110} Here, state actors blatantly discriminated against potential male jurors and the Court reasoned that these types of actions signal state approval of discrimination, which can lead to distrust of the legal system.\textsuperscript{111}

III. ANALYSIS

A. Sex Reassignment Surgery Requirements Violate Transgender Individuals’ Dignity From Autonomy and Bodily Integrity

Autonomy includes the right to choose one’s beliefs, to choose how one wants to live his or her life, and, most important for this analysis, the right to choose what happens to his or her own body – in other words, bodily integrity.\textsuperscript{112} The Supreme Court has created useful precedents in its sexual orientation and abortion rulings.\textsuperscript{113} Accordingly, transgender plaintiffs should use the arguments from these cases to create analogous arguments to fight against sex reassignment surgery requirements.\textsuperscript{114}


When a state requires sex reassignment surgery for the issuance of documents that reflect a different gender, the state is violating transgender individuals’ ability to make autonomous decisions.\textsuperscript{115} These requirements force transgender people to make irreversible changes that can drastically alter the course of their lives.\textsuperscript{116}

In \textit{Lawrence v. Texas}, the Supreme Court determined that people have

\textsuperscript{109} See id. at 129-31.

\textsuperscript{110} See id. at 129 (holding that gender, just like race, is not a valid characteristic on which to judge a person’s competence or impartiality).

\textsuperscript{111} See id. at 140 (explaining the harm that prejudicial jury selections can cause in the community).


\textsuperscript{113} See, e.g., Obergefell, 135 S. Ct. at 2597-98; Roe, 410 U.S. at 153.

\textsuperscript{114} See \textit{Obergefell}, 135 S. Ct. at 2597-98 (discussing the right to make autonomous choices); Planned Parenthood of Southeastern Pennsylvania \textit{v.} Casey, 505 U.S. 833, 857 (recognizing that \textit{Roe} created a rule regarding bodily integrity).

\textsuperscript{115} See \textit{Lawrence}, 539 U.S. at 574; \textit{Obergefell}, 135 S. Ct. at 2597-98.

\textsuperscript{116} See \textit{Lawrence}, 539 U.S. at 574; \textit{Obergefell}, 135 S. Ct. at 2597-98.
the right to choose their sexual partners, whether a person is heterosexual or homosexual. The right to choose our partners, and therefore our own intimate conduct, are paramount to our ability to live our lives with the liberty that the Constitution assures.

The rationale used in Lawrence can be applied to challenge sex reassignment surgery. Just as homosexual couples have the right to control their private conduct, so do transgender individuals. The right for the transgender individual to control his or her own life is arguably more intuitive because this conduct – the choice to have or not to have sex reassignment surgery – does not affect or involve another person; no one else has to consent except for the individual.

In Lawrence, the Court acknowledged that the majority (meaning elected officials) legislates in a way that enforces the majority’s views of the world. Just as the majority in Texas sought to criminalize conduct that it found offensive, sex reassignment surgery requirements do the same thing to transgender individuals. Transgender individuals do not fit into the majority’s idea of what male and female is, and therefore, the majority seeks to control them. Although transgender individuals who do not have sex reassignment surgery do not face criminal sanctions, they may be denied societal benefits similar to people who have criminal convictions on record; it can affect important opportunities, such as employment and housing, when identification documents do not reflect a person’s gender.

117. See Lawrence, 539 U.S. at 578 (holding that the Texas statute criminalizing homosexual conduct did not further a state interest).

118. See id. (stating that the Due Process Clause of the Fourteenth Amendment gives homosexual couples the right to participate in conduct in the privacy of their homes without government intrusion).

119. See id. at 578-79 (noting that the Fourteenth Amendment promises us personal liberty).

120. See id. (finding dignity in personal conduct with which the government cannot interfere).

121. See id; see also Silver, supra note 8, at 502 (explaining that choosing appropriate medical treatment respects autonomy).

122. See Lawrence, 539 U.S. at 578 (noting that the state was infringing on personal, private conduct and that people have the right to do what they want in their private lives).

123. Id. at 571 (quoting Planned Parenthood of Southeastern Pennsylvania v. Casey to highlight the fact that the majority cannot legislate its own morals).

124. See id. at 575.

125. Cf. id. at 571, 575, 578-79 (explaining that the majority cannot use its power to enforce its views on the rest of society).
identity. Transgender individuals deserve the same right to control their own lives, as set out in Lawrence. Yet, because sex reassignment surgery requirements impede that self-determination, they are prohibiting transgender individuals from making important life decisions. These requirements keep transgender individuals from functioning as other citizens in our society, similar to the way the misdemeanor charges in Lawrence affected gay couples; because the state is withholding societal benefits from individuals who have not had sex reassignment surgery, the state is taking away meaningful choice. A transgender individual is therefore forced to have a surgery that they may not want or need. The only alternative is that they are denied equal employment opportunities, fair access to certain kinds of medical care or social services, and the right to travel without being questioned about the state of their body, along with the potential of automatically becoming an “other” the moment that they must show an ID that is not congruent with their gender identity.

The argument from Lawrence that the Fourteenth Amendment protects autonomy interests can be imputed to fight sex reassignment surgery requirements. The Court determined that the state could not impede upon private, consensual conduct and that the state’s interest did not further a legitimate goal. That is also true in the case of sex reassignment surgery requirements. It appears that the only interest the government has in a person’s genitalia is to keep them within the boundaries of what society deems acceptable. Although society inherently defines

126. See id. at 575 (mentioning that the Texas criminal statute did not have trivial consequences because the misdemeanor charge would stay on a person’s record); see also Spade, supra note 1, at 751-53.

127. Cf. Lawrence, 539 U.S. at 579 (acknowledging that people can use freedom to create and mold their own lives).

128. Cf. id. (stating that people can apply the Fourteenth Amendment to create new and greater freedoms).

129. See id. at 575 (discussing that when the state criminalized homosexual conduct, it opened up homosexual people to discrimination).

130. Cf. id. at 575-76.

131. Cf. id. (noting that the Texas criminal statutes had far-reaching effects that could follow convicted individuals forever even though they only participated in private, consensual conduct); Spade, supra note 1, at 751-52, 756.

132. See Lawrence, 539 U.S. at 578.

133. See id. (holding that the State cannot legislate in a way that demeans the existence of certain groups, and in this case, homosexual adults).

134. See id.

135. See Chai R. Feldblum, The Right to Define One’s Own Concept of Existence:
individuals based on gender, the state does not have a true legal reason to concern itself with what is, or is not, in a person’s pants.\textsuperscript{136} No one is required to show their genitals during a traffic stop or credit card purchase, where we must show an ID, to confirm if we are the gender that our driver’s license or birth certificate says.\textsuperscript{137} Similar to how criminalizing homosexual acts does not further any legitimate state interest, neither do laws requiring sex reassignment surgery in identifying people – sex reassignment surgery does not change eye color, skin color, height, weight, blood type, fingerprints, or DNA; so long as our identification documents show the legal name and an up-to-date photo, there is no trouble in identifying a person.\textsuperscript{138} And even still, some of these potential changes, such as hair color, do not impede on the identification of a person as a lot can change in the time between the states’ issuance of an identification card and present-day.\textsuperscript{139}

It is of the utmost importance for transgender individuals to have up-to-date identification documents because of the negative consequences that stem from the lack of an accurate document that reflects their current gender.\textsuperscript{140} Therefore, just like the statutes in \textit{Lawrence} do not further a legitimate state interest, neither does sex reassignment surgery requirements.\textsuperscript{141} The Court expanded the right of autonomy to make personal and intimate decisions in \textit{Obergefell v. Hodges}.\textsuperscript{142} \textit{Obergefell} recognized that the fundamental right to marry included same-sex couples.\textsuperscript{143} The Court explained that the Due Process Clause of the Fourteenth Amendment contemplates choices that are so fundamental that they shape our personal identity and beliefs.\textsuperscript{144} The rationale was that the state should not be able to

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\textsuperscript{136} See id.

\textsuperscript{137} Cf. \textit{Lawrence}, 539 U.S. at 578 (explaining that the state does not have a place in our personal or private lives).

\textsuperscript{138} See id. at 578 (finding that the government does not have any place in an individual’s personal life and cannot control a person’s destiny by regulating conduct).

\textsuperscript{139} See, e.g., \textit{Renewing Your License}, TENNESSEE DEP’T OF SAFETY & HOMELAND SEC., https://www.tn.gov/safety/article/dlrenew (last visited Aug. 6, 2016) (showing that people in Tennessee get new driver’s licenses every five years).

\textsuperscript{140} See Spade, \textit{supra} note 1, at 751-53 (describing different issues that arise from not having accurate identification documents).

\textsuperscript{141} See \textit{Lawrence}, 539 U.S. at 578 (stating that Texas did not have a legitimate state interest in intruding on the lives of homosexual adults).

\textsuperscript{142} See 135 S. Ct. 2584 (2015).

\textsuperscript{143} See id. at 2607-08.

\textsuperscript{144} See id. at 2599.
impede on interests that are central to a person’s identity; these determinations “shape a person’s destiny.”

Moreover, the Court recognized how the lack of choice in whether or not their marriage “counts” burdened same-sex couples from functioning in society; the lack of recognition kept couples from the benefits and choices that marriage brings. Allowing same-sex couples to marry helps them function within the community. When the state recognizes the legitimacy of a marriage, the couple can, among other things, make medical decisions for each other as well as receive tax and survivor benefits.

These same issues affect transgender individuals. When the state does not recognize their gender unless they have surgery, it bars them from opportunities and benefits. Gender identity is immutable and fundamental to a transgender person’s identity; a transgender individual wants to live their life to the fullest and function in society the same way that people whose gender identity happens to match their genitalia do.

Just as same-sex couples could not make medical decisions for his or her spouse or receive survivor benefits, denial of one’s gender identity and rendering proper identification documents contingent on sex reassignment surgery prevents that individual from participating in everyday activities such as securing employment or purchasing alcoholic beverages with their driver’s license.

The concern in Obergefell was not the marriage certificate but the access to benefits that stemmed from a marriage between heterosexual couples and not homosexual couples; similarly, the issue for transgender individuals is not the identification document itself, but the benefits that

145. See id. (citing Lawrence v. Texas to demonstrate that marriage is a similar decision to that of sexual partners in the way that the state should not interfere with those decisions).

146. See id. at 2601-02 (stating that marriage expands governmental rights, benefits, and responsibilities).

147. See id. (listing all of the benefits that come from a recognized marriage).

148. See id. at 2601.

149. See id. at 2599, 2601-02 (explaining the benefits that people miss out on when the state does not recognize a status or person).

150. Cf. id. at 2601-02 (noting all the government benefits denied to same-sex couples in states that did not recognize those marriages).

151. Cf. id. at 2602 (explaining that objections to certain practices or people should not be the subject of discriminatory legislation). See generally Levasseru, supra note 23, at 980-81, n.214 (demonstrating many experts agree that gender identity is actually biological and therefore immutable).

152. See Obergefell, 135 S. Ct. at 2601-02 (listing the everyday benefits opposite-sex couples enjoy while same-sex couples do not).
stem from a correct document. States that refused to recognize marriage certificates for same-sex couples ultimately denied the homosexual community all the benefits that stem from marriage.\textsuperscript{153} The states in \textit{Obergefell} only made legal benefits available to those who fit into the historically recognized version of marriage and sex reassignment surgery requirements have similar consequences.\textsuperscript{154}

2. \textit{Bodily Integrity and Abortion Jurisprudence Provide Arguments for Challenging Sex Reassignment Surgery Requirements.}

States that require sex reassignment surgery for issuance of new documentation are trying to force transgender individuals into the historic gender binary.\textsuperscript{155} States do not have a legitimate interest in restricting accurate documentation unless a specific surgical procedure is performed, just as it did not make sense for the state to restrict marriage so that only opposite-sex couples could get married.\textsuperscript{156}

Included in dignity is the right to control one's body—bodily integrity.\textsuperscript{157} The Constitution prohibits states from making choices in regards to or forcing someone to do something to their body, especially if it has permanent, life altering effects.\textsuperscript{158} There is no legitimate government interest in conditioning accurate documentation on someone undergoing a specific surgical procedure, just as it does not have a legitimate cause to restrict marriage to only opposite-sex couples. Unwarranted government infringement on bodily integrity, like sex reassignment surgery requirements, has been deemed unconstitutional through decades of abortion jurisprudence.\textsuperscript{159}

For the purposes of discussing bodily integrity, imagine this scenario: Jack lost a significant amount of weight and wanted to update his driver’s license so his photograph would match his current appearance.\textsuperscript{160} Without

\textsuperscript{153} See id.
\textsuperscript{154} See id.
\textsuperscript{155} See id. (explaining the historical idea of marriage, how it has evolved, and how history and tradition should not dictate our views of fundamental rights).
\textsuperscript{156} See id. at 2605 (noting that the state cannot exclude same-sex couples from marriage on the “same terms and conditions” as heterosexual couples).
\textsuperscript{159} See, e.g., \textit{Casey}, 505 U.S. 833; \textit{Roe}, 410 U.S. 113.
\textsuperscript{160} See, e.g., Complaint, supra note 5, at 19 (explaining that one of the plaintiffs changed her name and her photograph to reflect her current appearance but her I.D.
the new photo, individuals who review his driver’s license do not believe that the person pictured is Jack. A potential employer has already denied Jack a job. One day, Jack attempts to buy some wine but the cashier at the liquor store tells him that he is not who he says he is, harassing him about his ID and appearance.

Jack decides to go to the local Department of Motor Vehicles (“D.M.V.”) and asks to update the photograph on his driver’s license. The clerk tells Jack that the only way the D.M.V. is able to change the photo on Jack’s driver’s license is if he can prove that he has had gastric bypass surgery so that the weight loss is permanent. Jack does not want gastric bypass surgery, nor does he or his doctor think gastric bypass surgery is medically necessary to maintain Jack’s weight loss. Consequently, Jack has continuous problems whenever he has to show his ID.

This scenario is analogous to the challenges transgender individuals encounter all of the time when faced with sex reassignment surgery requirements. Jack may ask himself, “Why is my weight defining who I am? Why does the government not protect me because of my weight?” While a transgender individual asks, “Why do my genitals define who I am? Why does the government not protect me because of what my genitals look like?”

In both situations, the government does not have viable reasons to

erroneously stated that she is male).

161. See id.; see also Def.’s Mot. to Dismiss, supra note 44, at 32-33; Spade, supra note 1, at 751-52 (explaining the employment difficulties transgender individuals encounter due to identification document inaccuracy)

162. See, e.g., Def.’s Mot. to Dismiss, supra note 44, at 18-19; Spade, supra note 1, at 751-52.

163. See Complaint, supra note 5, at 20.

164. See id. (stating that one of the plaintiffs went to update her driver’s license and the clerk told her that she could not unless she had sex reassignment surgery); see also Gastric Bypass Surgery, U.S. NAT’L LIBR. OF MED., https://www.nlm.nih.gov/medlineplus/ency/article/007199.htm (last updated Aug. 1, 2016) (explaining gastric bypass surgery).

165. See Complaint, supra note 5, at 18 (mentioning that one of the plaintiffs does not desire sex reassignment surgery); see also Spade, supra note 1, at 755 (noting that genital surgeries are not medically necessary for all transgender individuals).

166. See Complaint, supra note 5, at 32-33; see also Silver, supra note 8, at 499.

167. See, e.g., Roe v. Wade, 410 U.S. 113, 162 (1973) (explaining that the state cannot legislate in a way that overrides the right of a pregnant woman); see also Silver, supra note 8, at 499 (noting that there is a myth that surgical procedures define transgender individuals).
require individuals to undergo surgical procedures to prove they are.  Even weight, which is a mutable characteristic, meaning it can change, should not be subject to identification regulation.  Therefore, gender and genitals, even more so, should not be subject to regulation.  The underlying question is, should we force people to undergo surgical procedures for legal recognition?  

This concept of bodily integrity was initially discussed in *Skinner v. Oklahoma*.  In *Skinner*, the Court invalidated an Oklahoma law that called for forced sterilization of certain kinds of criminals.  Under this law, if a jury found that a defendant was a “habitual criminal,” then part of his or her punishment would be sterilization against his or her will.  The Court recognized that forced sterilization had an irreparable effect as it would destroy the possibility for a person to procreate; the court stated that procreation was a “basic civil right of man.”  Allowing the state to forcefully subject someone to such a procedure would have devastating effects on the individual and had the potential to destroy an entire race.  In his concurrence, Justice Jackson found that the majority members of the legislature legislated in a way that the sterilization law violated the dignity of society’s minority members.

Sex reassignment surgery requirements essentially take away the choice for transgender individuals to choose how to express their gender and live their lives, just like the individuals in *Skinner* no longer had a choice to procreate.  In *Skinner*, defendants were already losing many freedoms due to their criminal convictions.  

168.  See *Roe*, 410 U.S. at 162 (stating that the state’s interests in protecting the health of the pregnant woman and protecting the potential life are separate and distinct); *Silver*, supra note 8, at 499.  
172.  *Id.*  
173.  *See id.* at 541-42 (stating that the law only applied to criminals who committed certain offenses under Oklahoma law).  
174.  *See id.* at 536-37.  
175.  *See id.* at 541.  
176.  *See id.* (noting that the law had the power to cause an entire group of people to disappear).  
177.  *See id.* at 548 (Jackson, J., concurring).  
178.  *See id.* at 541 (majority opinion) (noting that sterilization violated the individual’s right to procreation).  
179.  *See id.* (explaining that procreation is a basic civil right that sterilization takes away; a person would no longer be able to choose to procreate).
would have forever lost the ability to procreate in addition to the loss of those societal benefits they are already denied due to their status.\footnote{See id. at 536, 541 (noting that criminals who were convicted of certain offenses for a third time were subject to the sterilization law and that the law would forever deprive a criminal defendant of the ability to procreate).}

Similarly, transgender individuals already lose many freedoms due to the inaccuracy of their legal sex on identification documents and they are not able to fully participate in society.\footnote{Cf. id. (discussing the devastating effects of forced sterilization and the lack of choice to procreate).} The status of a transgender individual’s body is already hindering participation in society because the individual is denied jobs and housing opportunities due to their inaccurate identification documents.\footnote{See id. at 541 (stating that the sterilization law essentially picked out a certain undesirable group to receive “oppressive treatment”).} And, similar to sterilization, sex reassignment surgery is a permanent and invasive procedure.\footnote{See id. at 541-42 (explaining why the sterilization law was invalid).} Sex reassignment surgery requirements are invalid just like the extreme procedure that the Supreme Court invalidated in \textit{Skinner}.\footnote{See id. at 536-37, 541 (explaining the way the law works and finding that the law takes away the defendant’s choice to procreate).}

Just as in \textit{Skinner}, the majority in a particular state is legislating against transgender individuals in the hopes of making them fit into a rigid idea of what society believes males and females should look like.\footnote{Id. at 541 (noting that forced sterilization could cause a minority group to disappear because they have traits that the majority does not like).} The defendants subject to the law in \textit{Skinner} did not consent to the sterilization procedure, and similarly, transgender individuals are not truly able to consent because the societal benefits create a lopsided scale in the choice between sex reassignment surgery and those benefits, or lack of self-mutilation and no benefits.\footnote{See id. at 536 (stating that the majority could try to eliminate a minority group); id. at 546 (Jackson, J., concurring) (acknowledging that the majority is trying to experiment on a group that they do not accept).} Instead, the majority has legislated in a way that takes away the dignity of choice and autonomy from an already marginalized group who simply seek to live their lives just as everyone else does.\footnote{Id. at 541 (explaining that forced sterilization violated the defendant’s liberty); id. at 546 (Jackson, J., concurring) (labeling the sterilization as an experiment the
Moreover, the Supreme Court’s abortion jurisprudence demonstrates that choice regarding one’s body preserves bodily integrity. In *Roe v. Wade*, the court found that a woman’s right to choose to have an abortion was a fundamental right; this decision also implicitly preserves a woman’s right to bodily integrity. In effect, the criminalization of abortion severely reduced a woman’s choice in reproductive healthcare options, and therefore the right to control her body. Thus, the only options were to endure, at the very minimum, the physical and psychological pain and discomfort of childbirth and then the rearing of an undesired child or risk severe health consequences or life.

Similarly, sex reassignment surgery requirements put transgender persons in an arduous position. These laws force transgender individuals to choose between a life without legal benefits, recognition of their true identity, and the freedom to live their lives as they so choose, and undergoing an unwanted, painful procedure, violating their bodily integrity. Sex reassignment surgery requirements, similar to the contested statutes in *Roe*, try to force transgender individuals into making a specific and irreversible decision regarding their body—a surgery that the majority is performing on the minority, which violates dignity; Silver, *supra* note 8, at 498-99.


191. See *id.*; see also *Casey*, 505 U.S. at 857 (explaining that *Roe v. Wade* created a rule enforcing autonomy and bodily integrity).

192. See *Roe*, 410 U.S. at 120 (noting that Jane Roe could not find a physician to perform an abortion for her because her pregnancy was not life-threatening); see also *id.* at 169-170 (Stewart, J., concurring) (stating that women should be free to decide whether to maintain a pregnancy without government intrusion).

193. See *id.* at 153, 156; see also Neff, *supra* note 78, at 350 (explaining when a pregnant woman determines that she does not want to have a child, she is no longer participating in the pregnancy; if the state does not allow her to choose an abortion, then the state is forcing her to be pregnant).

194. See *Silver*, *supra* note 8, at 500-01 (stating that sex reassignment surgery requirements do not allow transgender individuals to have a variety of choices in their gender expression).

195. See *Roe*, 410 U.S. at 153; see also *id.* at 507 (noting that conditioning legal benefits and recognition on sex reassignment surgery can render medical decisions involuntary because it keeps an individual from truly acting freely in electing to have a procedure (quoting the AM. MED. ASS’N, COUNCIL ON ETHICAL AND JUDICIAL AFFAIRS, COURT INITIATED MEDICAL TREATMENT IN MEDICAL CASES, CEJA REPORT 4-A-98 (1998) http://www.ama-assn.org/amal/pub/upload/mm/code-medical-ethics/2065a.pdf)).
amounts to self-mutilation. The Court in *Roe* implicitly found that outright restrictions on abortions kept women from exercising control over their bodies. The same is true for sex reassignment surgery requirements because the state does not have a compelling reason to regulate this type of personal decision.

Unlike the state interest of regulating access to abortion services after the first trimester, the state does not have a legitimate interest in the appearance of one’s genitals. In *Roe*, the Court realized that the state did have some interest in the pregnancy upon entering the second trimester because “the first trimester mortality rate in abortion may be less than mortality in normal childbirth.” Conversely, there is no legitimate state interest in the manner in which a transgender person chooses to transition; they may not need or want to have sex reassignment surgery and would prefer to solely use other means of gender expression to live their life as the gender with which they identify.

Just as a pregnant woman should be able to make medical decisions with her doctor and without the state imposing regulations pre-viability, the state should not impose invasive, transformative medical procedures on transgender individuals. State imposition severely interferes with the doctor-patient decision-making process as well as the decisions about one’s life path. The right to have an abortion affords some individuals the right to retain control over the directions of their lives; for example, women may be more capable of retaining employment and housing that fit within their means or desires. Transgender individuals should also maintain the

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196.  See *Roe*, 410 U.S. at 153; see also Silver, *supra* note 8, at 501 (proffering the idea that legal benefits from surgery makes surgical requirements involuntary).


198.  Cf. *Roe*, 410 U.S. at 163 (finding that the state can only regulate abortion when the pregnancy reaches a “compelling” point).

199.  Cf. id. at 162 (explaining that the state does not have a legitimate interest in a woman’s pregnancy during the first trimester).

200.  See id. at 163 (recognizing that the state has a compelling interest once the fetus is viable).

201.  Cf. id. (noting that the doctor and the patient determine the best course of treatment during the pregnancy and that the state should not interfere during the first trimester).

202.  Cf. id. (explaining that the patient and doctor should make decisions regarding medical treatment).

203.  See id. at 153 (noting all of the different ways that pregnancy affects a woman’s life).

204.  See id. (discussing how bearing and rearing children can impede on a woman’s
decision-making ability over their bodies and should therefore not lose the opportunity to secure employment or an apartment due to discrimination based on inaccurate identification documents.\textsuperscript{205} Because transgender individuals are forced to choose between legal recognition and an expensive, painful, and sometimes undesired surgery, a transgender individual loses bodily integrity.\textsuperscript{206} The state should allow transgender people to live their own lives in the way that they see fit, without government intrusion; it cannot regulate legal sex in a manner that violates bodily integrity by requiring unwanted, invasive procedures.\textsuperscript{207} Sex reassignment surgery requirements violate a person’s right to make medically autonomous decisions that contravenes the Fourteenth Amendment.\textsuperscript{208} Just as the Court found a right to choose to have an abortion, it would also find that transgender individuals must be free from coercion and should choose to have sex reassignment surgery only if they desire.\textsuperscript{209}

Similar to \textit{Roe, Doe v. Bolton}\textsuperscript{210} analyzed Georgia’s statutes criminalizing abortion.\textsuperscript{211} One can impute the Court’s reasoning in holding these requirements unconstitutional to the context of sex reassignment surgery requirements.\textsuperscript{212} First, many of the requirements in \textit{Bolton} kept women from making appropriate healthcare choices with her physician.\textsuperscript{213} Georgia’s two-doctor concurrence, committee approval, and hospital accreditation requirements signaled a distrust of a woman’s right to choose the procedures upon her body in consultation with a licensed medical physician.\textsuperscript{214} The Court repeatedly stated that these requirements did not

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  \item life choices and be mentally and physically taxing).
  \item 205. \textit{See id.} (explaining that pregnancy and child rearing permanently affects a woman’s life course).
  \item 206. \textit{See id.; see also id.} at 169-70 (Stewart, J., concurring) (noting that a woman gives her physical and emotional self during a pregnancy).
  \item 207. \textit{Cf. id.} at 163 (finding that women, under the guidance of a physician, cannot be completely barred from choosing an abortion).
  \item 208. \textit{Cf. id.} at 164 (concluding that the Texas abortion statute violates the liberty interest from the Fourteenth Amendment).
  \item 209. \textit{Cf. id.}
  \item 210. 410 U.S. 179 (1973).
  \item 211. \textit{See id.} at 181-82 (noting that the Georgia’s statutes were significantly different from those in Texas and warranted consideration even though the opinions were announced on the same day).
  \item 212. \textit{See id.} at 201.
  \item 213. \textit{See id.} at 195, 197-200 (finding that requirements that doctors only perform abortions in certain accredited hospitals and only after two other colleagues and an abortion committee give approval, were invalid).
  \item 214. \textit{See id.} (noting that the requirements in Georgia did not adequately serve the
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satisfactorily take the patient’s needs into account.\textsuperscript{215} In states that require sex reassignment surgery for an amended identification document, transgender individuals are denied the right to choose an appropriate course of action with their physician.\textsuperscript{216} The state is certainly creating a major obstacle to a transgender individual’s legal identity recognition by requiring transgender people to undergo surgeries that they either do not want or need.\textsuperscript{217} The state has no legitimate interest in the way a transgender person expresses their gender identity.\textsuperscript{218} Just like the Georgia statutes in Bolton demonstrated a distrust of a woman’s right to choose what happens to her body, states that require sex reassignment surgery refuse to recognize that transgender people can fully be themselves without undergoing a painful procedure that is designed to fit these individuals into society’s ideal of who is male or female.\textsuperscript{219} These requirements are essentially defining transgender individuals by their surgeries.\textsuperscript{220}

Similar to Georgia’s presumption it knew what was best for the women in its state, by requiring sex reassignment the government is posturing as if it has superior knowledge of how people should fit into the binary gender framework.\textsuperscript{221} In doing this, the state conveys to transgender citizens that it does not trust transgender people’s transitions unless they undergo an invasive, irreversible procedure to prove they truly want to be, and are, the gender with which they identify.\textsuperscript{222} The sex reassignment surgery requirements force transgender individuals to choose between living with full legal benefits and the integrity that stems from control over their

\begin{itemize}
  \item \textsuperscript{215} See id. (determining that Georgia’s requirements excluded particular healthcare options while infringing on a patient’s rights to choose certain procedures).
  \item \textsuperscript{216} Cf. id. at 195, 197-200 (explaining that a woman would not be able to make personal decisions regarding an abortion with her physician due to Georgia’s restrictive requirements).
  \item \textsuperscript{217} See Complaint, supra note 5, at 11, 18, 19.
  \item \textsuperscript{218} Cf. Bolton, 410 U.S. at 197-200 (noting that the two-doctor concurrence requirement as well as the committee approval requirement for an abortion did not serve the state’s interest and infringed on a person’s right to choose the best course of medical treatment with a doctor).
  \item \textsuperscript{219} Cf. id. (explaining that the state’s overbearing requirements for a woman to receive an abortion unduly infringes on her right to make medical decisions with the best judgment of her licensed physician).
  \item \textsuperscript{220} Cf. id.
  \item \textsuperscript{221} Cf. id. (demonstrating that the state only wanted women to be able to get an abortion on the state’s terms).
  \item \textsuperscript{222} Cf. id. (recognizing that the only way a woman could have an abortion with the advice of her doctor was if other physicians approved the abortion).
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bodies.\textsuperscript{223} Like the women in \textit{Bolton}, the state is not satisfactorily taking into account the needs of transgender individuals or the community as a whole.

Moreover, the Georgia residency requirement from \textit{Bolton} highlights another interesting problem with sex reassignment surgery requirements.\textsuperscript{224} The Georgia residency requirement limited abortion access such that only Georgia residents could access abortion services.\textsuperscript{225} Requiring sex reassignment surgery to receive amended identification documents results in discrimination of transgender people depending on the state in which they were born.\textsuperscript{226} States that require sex reassignment surgery are forcing citizens born in that state to alter their bodies, perhaps in contradiction to their desires and the best medical judgment of their physicians, while also keeping them from legal recognition in their state of residence.\textsuperscript{227} The state is forcing a choice between physically being and legally being within the state, and therefore creating a culture in which individuals are not provided the dignity of making autonomous choices.\textsuperscript{228}

An exemplar case on this point, \textit{Planned Parenthood of Southeastern Pennsylvania v. Casey},\textsuperscript{229} explicitly stated that a central piece of abortion jurisprudence is that the choice to have an abortion helps maintain bodily integrity.\textsuperscript{230} The plurality upheld the decision in \textit{Roe}, deeming it the case that set the rule for personal autonomy and bodily integrity; \textit{Casey} reinforced government limitations pertaining to sanctioning medical treatment.\textsuperscript{231}

\textit{Casey} created the undue burden test, which set limitations on the ways a

\textsuperscript{223} \textit{Cf. id.} (stating that women cannot make adequate decisions when the government is pushing them towards a certain choice).
\textsuperscript{224} \textit{Id.} at 200.
\textsuperscript{225} \textit{Id.}
\textsuperscript{226} \textit{Cf. id.} (finding that the Privileges and Immunities clause of the Constitution protects people who are non-residents that enter a state to seek medical services); Complaint, \textit{supra} note 5, at 37-38 (explaining that Michigan’s driver’s license policy and sex reassignment surgery requirement splits Michigan residents into two groups, those born in Michigan and those born in a different state).
\textsuperscript{227} \textit{See KY. REV. STAT. ANN.} § 213.121(5) (West 2015); \textit{MICH. COMP. LAWS ANN.} § 333.2831(c) (West 2015); \textit{N.M. STAT. ANN.} § 24-14-25(D) (West 2015); \textit{see also Bolton}, 410 U.S. at 200 (explaining that in only allowing Georgia residents to have abortions in the state did not adequately protect others who seek to obtain medical care).
\textsuperscript{228} \textit{Cf. Bolton}, 410 U.S. at 201 (concluding that the Georgia abortion requirements violated the autonomy interest the Fourteenth Amendment protects).
\textsuperscript{229} 505 U.S. 833 (1992).
\textsuperscript{230} \textit{Id.} at 857 (plurality opinion) (reaffirming the rule from \textit{Roe}).
\textsuperscript{231} \textit{Id.}
state can restrict access abortion services. Under the Casey framework, states cannot restrict a woman's right to choose an abortion if it causes an undue burden on that right. For example, the Court found that Pennsylvania's reporting requirement was invalid because it forced married women to give reasons why they did not notify their husbands of the abortion. While this seemingly does not translate to the issues of sex reassignment surgery requirements, as they do not involve the potential of another human life, the undue burden test is an important part of legal recognition of a right to choose and is quite applicable.

The right to have an abortion, or the legal recognition of the right to choose, and in turn, the right to control one's body, is analogous to the right of legal recognition of one's gender identity as sex and control over one's body by not having an invasive procedure. In fact, the undue burden framework from Casey provides a system in which transgender plaintiffs can challenge sex reassignment surgery requirements. Similarly, if the state creates requirements that cause an undue burden on a person's right to make autonomous choices such that a person cannot maintain their bodily integrity, the courts can hold that those requirements are invalid.

Sex reassignment surgery requirements do in fact create an undue burden on transgender individuals' autonomy. These requirements do not allow for a true choice; instead, they become an involuntary procedure because the consequences of not having the surgery are extremely detrimental.

232. See id. at 878-79 (explaining that states cannot legally implement undue burdens that prevent women from seeking an abortion before the fetus is viable).

233. Id.

234. Id. at 901 (maintaining that spousal reporting requirements are unconstitutional under the undue burden framework).

235. See id. at 878 (noting that the undue burden analysis protects the right to an abortion while also protecting the State's interest in the potential life of the fetus).

236. See id. (recognizing that the right to an abortion from Roe v. Wade is a central right of a woman's ability to make autonomous choices).

237. See id. (explaining that unnecessary health regulations that keep a woman from seeking an abortion, or keeps a woman from choosing, are an undue burden on the right to choose); see also Silver, supra note 8, at 507 (noting that when legal benefits and recognition are conditioned on the completion of sex reassignment surgery, the state is making an individual's consent to surgery involuntary).

238. Casey, 505 U.S. at 878-79 (summarizing the undue burden analysis for determining if a law impedes on a woman's right to choose an abortion).

239. Cf. id. (finding that health regulations that present a major obstacle to a woman seeking an abortion are undue burdens, which the law does not permit).

240. Cf. id. 878 (noting that health regulations that create an undue burden on autonomous choice are unconstitutional).

241. Cf. id. (finding that a regulation is not an undue burden so long as the measure
There are also many benefits that a transgender person forfeits if they do not have the surgery, so much so that it is impossible to fathom that those benefits would not cloud an individual’s decision-making process of whether to have sex reassignment surgery or not.242

The Court in Casey found that the state could regulate abortion to promote the health of the woman so long as it does not create an undue burden.243 Quite the opposite, sex reassignment surgery requirements do not promote health.244 These requirements force transgender individuals to endure a health risk, which in turn promotes lack of understanding and imposes the legislative majority’s opinion of the proper physical appearance of gender.245

Finally, Stenberg v. Carhart246 presented another challenge to a woman’s autonomy.247 The Nebraska law made abortion procedures a Class III felony, which could result in imprisonment for up to twenty years and a hefty fine of twenty-five thousand dollars.248 A doctor would also lose his or her license to practice medicine in the state.249 The law did not have an exception to preserve the health of the mother.250

In this case, the state was trying to restrict the methods that doctors could use to perform second trimester abortions.251 In doing so, the state severely limited a woman’s right to choose.252 Again, the Court in Stenberg noticed the majority legislated against the minority, the minority being those who seek an abortion.253 The state essentially told women there are only certain

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242. Cf. id. (explaining that a regulation must be related to the goal of a woman choosing childbirth over an abortion).

243. See id.

244. See id. (explaining that states can promote a woman’s health without creating an undue burden).

245. Cf. id. (finding that a regulation is not an undue burden so long as the measure is reasonably related to the goal of the state).


247. See id. at 920 (conveying the continuous debate over the right to abortion).

248. See id. at. 922 (discussing the punishments for performing a “partial birth abortion”).

249. Id.

250. See id. at 921-22 (quoting the statute, which stated the only time a doctor could perform a partial birth abortion was to preserve the life, not the health, of the mother).

251. See id. at 924, 945-46 (finding that banning the dilation and evacuation, also known as D&E, abortion procedure created such an undue burden that women could not make an abortion decision).

252. Id.

253. See id. at 946 (Stevens, J., concurring); see also id. at 951-952 (Ginsburg, J., concurring).
"acceptable" methods in tending to their bodies, and the state legislature had superior knowledge of what was best for them.\footnote{254}

Now, imagine that Jack, who wants his photo I.D. to reflect his weight loss, cannot do so without gastric bypass surgery.\footnote{255} The state has decided that, without gastric bypass surgery, people who have lost weight cannot change their documents to reflect who they are by denying changing the recorded weight and photograph on the card because the state does not believe there is a permanent alteration.\footnote{256} This is an inane scenario because the state is mandating that only one physical characteristic can define him; however, this is exactly what happens to transgender individuals.\footnote{257} In fact, sex reassignment surgery could be considered even more absurd because weight is more or less visible, but genitals are never visible since people are usually clothed.\footnote{258} A person is not asked to reveal their weight, nor their genitals, for that matter, when they are pulled over while driving or purchasing a drink at a bar.\footnote{259}

States that require sex reassignment surgery for amended identification documents are telling transgender individuals the same thing.\footnote{260} In effect, the state conveys to transgender people that there is only one way for them to truly be who they are, male or female, which is to undergo an invasive, painful, and risky surgery.\footnote{261} The state mandates transgender individuals' health choices by forcing them to fit into what the state believes is the \textit{correct} version of being male and female.\footnote{262} These requirements force a

\footnotesize{254. See id. at 920, 930-31 (noting that the legislation sought to define appropriate methods of abortion); see also id. at 946-947 (Stevens, J., concurring) (arguing that the state did not have a legitimate interest in dictating a procedure other than the one that the patient and her doctor agree upon). But see Gonzales v. Carhart, 550 U.S. 124, 160 (2007) (upholding a law that banned intact D&E abortion procedures).}

\footnotesize{255. Cf. id. (stating that the requirements for an abortion limited a woman's choice to get an abortion).}

\footnotesize{256. Id.}

\footnotesize{257. Cf. id. (noting that requirements to undergo a procedure infringed on a person's ability to control what happens to his or her body).}

\footnotesize{258. Cf. id. (finding that the state did not have a legitimate interest in woman's pregnancy to impose the abortion requirements).}

\footnotesize{259. Id.}

\footnotesize{260. Cf. id. at 946-47 (Ginsburg, J., concurring) (agreeing with Chief Judge Posner that statutes that burden fundamental rights are a way for the state legislature to demonstrate their disdain for certain rights such as abortion).}

\footnotesize{261. Cf. id. at 931 (recognizing that a state regulation cannot force women to use riskier methods of abortion).}

\footnotesize{262. Cf. id. at 930-31 (legislating in a manner that shows what the majority of Nebraska \textit{believes} is appropriate).}
certain version of an identity onto a person who may not need their genitalia to be congruent with their gender identity and the state should not be involved with, nor does it have any interest in, that decision.  

B. Sex Reassignment Surgery Requirements Violate Transgender Individuals’ Dignity From Equality.

The Supreme Court has recognized that dignity develops from equal treatment under the law. In Heart of Atlanta Motel, Inc. v. United States, the Court ruled the Heart of Atlanta Motel could not legally discriminate against African-American patrons. It upheld the Civil Rights Act of 1964 and explained that the Act’s purpose was to provide dignity to those who had suffered unequal treatment in the past, especially in public accommodations.

Moreover, in J.E.B. v. Alabama ex rel T.B., the Court determined that the state could not discriminate on the basis of gender. It found that Alabama’s use of peremptory strikes violated the Fourteenth Amendment because the state was striking jurors based solely on their gender. The Supreme Court reasoned that peremptory strikes based solely on gender signaled to the public that the state thought certain individuals were not qualified to participate in the public sphere.

Sex reassignment surgery presents the same problems. Transgender people’s gender identity is an immutable characteristic similar to race. Neither a business, like the Heart of Atlanta Motel, nor the state can discriminate against people because of their race or gender. However,

263. Cf. id. at 945-46 (concluding the Nebraska law created an undue burden on the woman’s right to choose an abortion).
266. See id. at 261 (finding that the Civil Rights Act applied to motels).
267. See id. at 261-62.
269. Id. at 129.
270. See id. (holding that gender, just like race, is not a valid characteristic on which to judge a person’s competence or impartiality).
271. See id. at 142.
272. Cf. Heart of Atlanta Motel, Inc., 379 U.S. at 250 (declaring that deprivation of dignity accompanies denial of equal access to public establishments); id. at 129 (holding that gender is an unconstitutional qualification for juror participation).
273. See Heart of Atlanta Motel, Inc., 379 U.S. at 250; see also J.E.B., 511 U.S. at 129 (holding that gender, like race, is immutable).
274. See J.E.B., 511 U.S. at 142 (discussing lack of trust in the state if it outwardly
sex reassignment surgery requirements demonstrate that the state allows discriminatory actions by refusing to protect transgender individuals from them.\(^{275}\)

Under current laws that require sex reassignment surgery for new identification documents, transgender individuals potentially face scrutiny and discriminatory practices in everyday activities such as finding a job or traveling.\(^{276}\) Store clerks can discriminate against a transgender individual because their driver’s license does not match their appearance.\(^{277}\) If a person refuses to have sex reassignment surgery, the consequences are detrimental and the state promotes their unequal treatment by requiring the surgical procedures in the first place. In requiring sex reassignment surgery, the state is accepting that businesses and other public accommodations discriminate against its residents based on an immutable characteristic that does not fit society’s understanding of gender.\(^{278}\) The unequal treatment that results from lack of surgery, and therefore incorrect documents, renders the transgender individual’s consent to sex reassignment surgery involuntary.\(^{279}\)

Let us revisit Jack from the discussion of bodily integrity. Jack could not obtain a new identification document unless he had gastric bypass surgery, and because he did not want or need the surgery, he is discriminated against in public accommodations.\(^{280}\) Because his appearance did not match his identification, people harassed him at the liquor store and rejected him for jobs, thereby paralyzing Jack’s ability to fully participate in society.\(^{281}\)

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discriminates against its own citizens over a trait they cannot control); *Heart of Atlanta Motel, Inc.*, 379 U.S. at 250; *see also* Leveasseru, supra note 23, at 980-81, n.214 (noting that many experts agree that gender identity is actually biological and therefore immutable).

275. *Cf. J.E.B.*, 511 U.S. at 130-31 (stating that intentional discrimination based on gender violates equal protection); *Heart of Atlanta Motel, Inc.*, 379 U.S. at 257 (noting that discrimination interrupts commercial activities).

276. *Cf. Heart of Atlanta Motel, Inc.*, 379 U.S. at 257 (asserting that discriminating during commercial activities in public accommodations disrupts economics).

277. *Cf. J.E.B.*, 511 U.S. at 142 (viewing a person simply based on one characteristic denotes he or she is inferior).

278. *Cf. id.* at 142 (stating that viewing a person simply based on one characteristic denotes they are inferior).

279. *Cf. id.* at 145-46 (stating that everyone, regardless of race or gender, should be able to freely participate in American society).

280. *Cf. id.* (noting that every American citizen should be able to freely participate in society regardless of race or gender); *id.* at 257 (acknowledging that racial discrimination has long interrupted public transactions and commerce).

281. *See id.* (holding that the state cannot discriminate on the basis of gender during
Discrimination based solely on weight is ludicrous but the discrimination a transgender person faces due to an inaccurate identification document is even more absurd. Transgender people seek to participate in society as the gender with which they identify. One's gender identity is immutable, and therefore, states with sex reassignment surgery requirements are discriminating against an individual based on an immutable characteristic. Sex reassignment surgery will not change anything about the person’s gender identity and it only imposes an unequal requirement on a marginalized group in society. A person should not need to prove that they have undergone surgery to fully participate in society as an American citizen.

IV. CONCLUSION

States that require sex reassignment surgery to receive updated identification documents violate transgender individuals' dignity in many ways; from autonomy, from bodily integrity, and from equal treatment under the law. Transgender individuals should utilize dignity arguments from Supreme Court jurisprudence to challenge sex reassignment surgery requirements.

Transgender individuals can, and should, fight these requirements and regain the right to bodily autonomy and maintain their dignity under the

 Jury selection).

282. Cf. id. (holding that the state cannot discriminate on the basis of gender); Heart of Atlanta Motel, Inc., 379 U.S. at 257, 261 (explaining that public accommodations cannot discriminate against people due to their race). But see, e.g., United States v. Santiago-Martinez, 58 F.3d 422, 422-23 (9th Cir. 1995) cert. denied, 516 U.S. 1044 (1996) (holding that peremptory strikes allegedly based on obesity are not constitutionally prohibited).

283. Cf. J.E.B., 511 U.S. at 145-46 (noting that all American citizens should be able to freely participate in the public sphere).

284. See id. (finding that the state could not discriminate based on gender because, like race, gender is something that a person cannot change).

285. See id. (invalidating Alabama's use of peremptory challenges was an improper use of power against a particular group, men).

286. Id.

287. See, e.g., Complaint, supra note 5, at 7-8; Def.'s Mot. to Dismiss, supra note 44; see also Roe v. Wade, 410 U.S. 113 (1973).

In doing so, transgender individuals should point out the state’s flawed attempts to unconstitutionally legislate their bodies into what makes the majority comfortable. The state does not have any legitimate interest in what a person’s genitalia looks like, how it functions, or whether it matches a person’s gender identity. As Justice Kennedy stated in *Obergefell v. Hodges*, “If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied.”


290. *Obergefell*, 135 S. Ct. at 2605; *Lawrence*, 539 U.S. at 571; *Stenberg*, 530 U.S. at 946; *Casey*, 505 U.S. at 878; *Bolton*, 410 U.S. at 197-200; *Roe*, 410 U.S. at 162; *Skinner*, 316 U.S. at 541.

291. *Obergefell*, 135 S. Ct. at 2605; *Lawrence*, 539 U.S. at 578; *Stenberg*, 530 U.S. at 945-46; *Bolton*, 410 U.S. at 197; *Roe*, 410 U.S. at 162; *Skinner*, 316 U.S. at 541.

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