

# IMPOSSIBLE EXISTENCE: THE CLASH OF TRANSSEXUALS, BIPOLAR CATEGORIES, AND LAW

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[T]ranssexuality is not new. It has existed in every culture, in every society, for as long as there have been humans. In traditional Plains Native society in America and Canada, tribes had Berdache. These were transsexuals — persons who had been of the genital anatomy of one sex and experienced themselves as another. The tribe gave them a special, even mystical, place. They were seen as the gender of their experience, not their anatomy. Instead of being outcasts, they were honored, were able to marry and take their place in society. This tradition goes back thousands of years. It speaks to the backwardness of European tradition, that we have such a hard time integrating difference in our society.<sup>1</sup>

### AUTHOR PREFACE

*Marriages, queers, and legal discourse: is recognition of same-sex marriage a bomb we want to drop on the united states?<sup>2</sup> On ourselves? Before the issue of same-sex marriages is decided nationwide,<sup>3</sup> a number of legal perversions should be acknowledged and addressed by the queer rights movement.<sup>4</sup> Rationales used to prevent lesbians and gays<sup>5</sup> from marrying are generally premised on, among other arguments, repugnant and archaic stereotypes regarding procreation, religious edicts, and child rearing. Transsexuals, on the other hand, may be able to marry, but only if they can prove they are anatomically capable of fulfilling legally prescribed sexual roles within their marriages. Upon closer analysis, the root of the problem is patriarchy - the system of male supremacy that requires ubiquitous male presence and domination, even in the family. Volumes have been devoted to the conflict between patriarchal ideology and same-sex marriages, but relatively little attention has been paid to the issue of transsexual marriages. This paper will analyze how far the law will go to maintain the status quo, requiring one male per legally recognized union. In their most absurd terms, patriarchal constructs such as marriage and family are reinforced through law using what I call the one-penis-per-union rule.*

*In the following pages I am not advocating for the promotion of marriage*

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1. Laura Markowitz, *When the Mirror Goes Wrong: An Interview with Gary Sanders*, in *IN THE FAMILY*, Oct. 1995, at 13 (quoting Gary Sanders).

2. This paper is about challenging gender as a binary construct in law. Rules and social constructs are interwoven into every fabric of our lives. I purposely have not capitalized "united states" throughout this paper to illustrate that fact. Why do we capitalize some words, but not others? Who made up those rules?

3. See *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993) (holding that a ban on same-sex marriages may violate the Equal Protection Clause and Equal Rights Amendment to Hawaii's constitution).

4. "Queer" refers to the entire community of sexual nonconformists, including transgendered individuals, lesbians, gays, bisexuals, and omnisequals.

5. I include bisexuals in these groups when they are involved in same-sex relationships.

as an institution or for queer rights to marry. As the queer nation moves closer to attaining the privileges and benefits of marriage reserved for heterosexuals, the most heinous bases upon which these privileges are protected have been overlooked by some camps. I suggest we consider what the transsexual experience helps illuminate: the pervasiveness of patriarchy and heterosexual privilege under law.<sup>6</sup>

## I. INTRODUCTION

I has no gender. Neither does you. He and she definitely have a specific gender which is very helpful to all of - us - because we doesn't have a gender either. Does we? Back to he and she or rather to him and to her. He is masculine except when he is universal and means him and her and all of - us, who has no gender still. She is feminine, except of course when she is inanimate, like a ship or a salad, but six of one, half a dozen of the other, am I right? We still doesn't have a gender. You plural has no gender either. Unlike him and her, they has no gender whatsoever, which I will admit introduces some confusion, but we're almost finished so live with it. It has no gender at all, except when it refers to an infant about whose gender we are uncertain. Not unlike me. Or you.

- Kate Bornstein, *Hidden: A Gender*<sup>7</sup>

Transsexuals in the united states are legally impossible beings. Judicial and legislative interpretations of transsexuals' existence deem their lives, their relationships, and their realities inconceivable.<sup>8</sup> Courts insist that patriarchal, religious, and legally constructed institutions such as marriage and divorce, and the right to, or not to, procreate are reserved solely for heterosexuals, not homosexuals, not hermaphrodites, and not transsexuals.<sup>9</sup> The legal interpretation of

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6. Many of the transsexual marriage and divorce cases cited in this paper are old and were decided in the 1960s and 1970s. The law's erasure of transsexuals in marriage is a stagnant issue that should be revived in academic debates, both in light of the current trend in some queer camps' efforts to gain heterosexual privileges through marriage and in terms of recognizing patriarchy and oppression in the law.

7. KATE BORNSTEIN, *GENDER OUTLAW: ON MEN, WOMEN, AND THE REST OF US* 178 (1994) (quoting Act I, Scene 4 of Bornstein's play, "Hidden: A Gender").

8. See Leslie Pearlman, *Transsexualism as Metaphor: The Collision of Sex and Gender*, 43 *BUFF. L. REV.* 835, 839-40 (1995) (describing the problems transsexuals encounter, both before and after surgery, in the legal and medical communities because the transsexual's gender does not match his or her biological sex).

9. See Note, *Patriarchy Is Such a Drag: The Strategic Possibilities of a Postmodern Account of Gender*, 108 *HARV. L. REV.* 1973, 1980 (1995) (arguing that the institution of marriage and the right to procreate are state-conceived notions rather than institutions that existed before the state ordained them, and that the courts have used this distinction to deny non-heterosexuals the right to marry).

transsexuality at times limits acknowledgment of transsexual existence in relation to the presence or absence of a functional penis. At other times, laws and litigators refuse to recognize transsexuals at all.<sup>10</sup>

Courts repeatedly classify individuals based on their genital anatomy, rather than on the individual's own gender perceptions.<sup>11</sup> The gendered experiences of transsexuals exist on a continuum, somewhere between male and female.<sup>12</sup> This concept of sexual continuity, however, threatens the male-dominated power structure. As Martine Rothblatt aptly argues, "[i]f there are no hard and fast sex types, then there can be no apartheid of sex."<sup>13</sup> Because the legal, heteropatriarchal construct of marriage prescribes rigid sex and gender roles, it denies transsexual reality,<sup>14</sup> especially when transsexuality is juxtaposed against heterosexual relationships.

In this paper, I will explore how laws regarding marriage, along with other patriarchal constructs, are used to deny transsexual reality. Part II briefly describes one transsexual's life under British law and how the inconsistencies in British law parallel the legal treat-

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10. See Pearlman, *supra* note 8, at 837-38 (explaining that courts often insist on categorizing transsexuals based on their biological sex and then expect transsexuals to fulfill gender roles based on that sex).

11. In this paper I distinguish between sex and gender. The difference between sex and gender may be understood as follows:

Sex is used in its realist, essentialist sense to mean a fundamental, natural, biological determination of 'maleness' or 'femaleness' . . . gender, in contrast, is used in its constructivist, historical sense to mean a culturally determined, socially constructed, and historically variant description of those acts that compose how an individual does 'being male' or 'being female.'

Pearlman, *supra* note 8, at 837 n.6 (quoting Druann Pagliasotti, *On the Discursive Construction of Sex and Gender*, 20 COMM. RES. 472, 474-75 (1993)). See *id.* at 837-38 (observing that the legal system has not differentiated between sex and gender in its definitions).

12. I use the term "transsexual" to mean those individuals in the transgendered movement who are born with a sex – genitalia – that does not coincide with their gender identity. The transgender movement is comprised of two types of persons: transsexuals and cross-dressers. MARTINE ROTHBLATT, *THE APARTHEID OF SEX* 17 (1995). Transsexuals may "use sex hormones and sometimes plastic surgery to change their anatomy toward the other sex type . . . [In addition to the thousands of transsexuals who have genital reconstruction surgery] many more than this number simply use hormones to change their facial hair, voice, and physique." *Id.* Cross-dressers, on the other hand, use clothing and attitude "to give the appearance of belonging to the other sex or to an androgynous middle ground." *Id.* While both types of transgendered people will fit within the analyses of this paper, I will concentrate primarily on transsexuals. See generally Pearlman, *supra* note 8, at 840 (explaining that it is inaccurate to presume that there are only two sexes).

13. ROTHBLATT, *supra* note 12, at 19. Rothblatt, a transsexual activist, argues that the doctrine of sexual continuity is threatening because it destroys the male-dominated power structure. *Id.*

14. By "transsexual reality," I am not suggesting that all transsexuals share a single, global reality. Rather, I emphasize the fact that transsexuals *exist in reality* – a reality that cannot be polarized and which has yet to be uncategorically recognized in law.

ment of transsexuals in the united states in significant ways.<sup>15</sup> Part III examines several cases dealing with transsexual marriages in the united states. In Part IV, I explain why the concept of a sexual family is essential to patriarchal control and why courts are unwilling to include transsexual gender identities within that concept.<sup>16</sup> In Part V, I explore alternative legal standards that can be applied in cases involving transsexuals. Rather than classifying individuals based on their genitalia, courts should acknowledge one's gender identity, in the context of recognizing relationships. In other areas, as in assigning transsexuals to single-sex prisons, the need for binary sex classification is perhaps more obvious. I argue, however, that even those distinctions should disregard genitalia as a basis for classification and should instead follow a gender identity model. I will offer no conclusion. Instead, Part VI, is an inception: by pulling together the ideas proposed here, I encourage readers to continue considering these issues, to question the phenomenon of polarization in law, and to challenge legal norms and standards, even those which I propose.

As the following discussion proceeds, consider the situation of Kate Bornstein, a political activist and transsexual.<sup>17</sup> Born into a male body, Bornstein had surgery to re/construct her penis into a vagina.<sup>18</sup> She considered herself a lesbian and began dating Catherine Harrison.<sup>19</sup> Catherine, however, recently had sex reassignment surgery and is now David Harrison.<sup>20</sup> Considering how, where, and why sex-based dichotomies are drawn in our legal system, can Bornstein and Harrison get married? Moreover, do they, as a couple, exist under law? Sometimes? Ever?

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15. An examination of treatment of transsexuals in the United Kingdom is useful in part because one of the earliest legal tests developed to deny transsexual marriages is defined in a British case, *Corbett v. Corbett* (or *se. Ashley*) 1971 p. 83. The *Corbett* test is alive and well in many European jurisdictions. It is used in a modified form in the united states, and it examines three biological factors of transsexuality: 1) chromosomes; 2) gonads; and 3) genitalia at the time of birth. *Id.* at 106. In *Corbett*, the judge found a post-operative female transsexual to be male and declared her marriage to a congenital male null and void. *Id.*

16. I borrow and employ the concept of "sexual families" from Professor Martha Fineman. The sexual family signifies the traditional concept of family, having "a unit with a heterosexual, formally celebrated union at its core." See MARTHA FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* 143 (1995). See *infra* Part IV, discussing the connection between law's protection of the sexual family and its refusal to recognize transsexual unions.

17. For a complete story of Bornstein's life, see her memoir, *KATE BORNSTEIN, GENDER OUTLAW: ON MEN, WOMEN, AND THE REST OF US* (1994).

18. *Id.* at 16-17.

19. *Id.* at 225.

20. *Id.*

## II. U.K. AND GENDER CHOICE: NOW YOU SEE IT, NOW YOU DON'T

"Roles, blueprints, prescriptions ... It's all made-up and very, very small ... It's what's between your ears that counts!"

"... then why'dja bother changin' your body?"

"That's a whole 'nother issue! For me it was like trying to swim in a wedding gown! Very uncomfortable!"

- Diane DiMassa, *Hothead Paisan*<sup>21</sup>

Inconsistencies in Britain's laws illustrate how one European legal scheme erases transsexual reality. When Caroline Cossey, known as the model "Tula," had sex reassignment surgery<sup>22</sup> in 1974, her physical metamorphosis from man to woman made her *feel* simultaneously male, female, and neither.<sup>23</sup> Her experience under law was similar. Tula's passport states that she is female, but her birth certificate designates her as male.<sup>24</sup> The British health care system paid for her surgery to construct female genitals,<sup>25</sup> but if she commits a crime, she

21. Diane DiMassa, *A Poke in the Park*, HOTHEAD PAISAN, Issue 19, 1995, at 4.

22. In this context I use the phrase "sex reassignment surgery" as it is commonly used, to refer to the "ultimate" genital re/construction - removal of the vulva and attachment of simulacrum of a penis for female to male transsexuals or inversion of the penis to simulate a vagina for male to female transsexuals. In reality, though, transsexuals may undergo a series of surgeries to alter anatomy and may, in fact, never choose to re/construct their genitals. See *infra* note 180 (suggesting several levels of sex reassignment surgeries are available to most transsexuals). In this paper I use the terms "postoperative" and "pre-operative" to identify individuals who have or have not had genital re/construction. These words are in some ways misnomers, however, because they draw a bright line distinction between male or female assignment based on genitalia rather than on gender identity. For a closer look at how "completed sex reassignment" may be interpreted, see Part V.B.

23. Gretchen Edgren, *The Transformation of Tula: Transsexual Caroline Cossey*, PLAYBOY, Sept. 1991, at 102. My apologies to feminists opposing pornographic objectification of women. I initially retrieved this article from an electronic database.

24. *Id.*

25. *Id.* The fact that British health care pays for transsexual reassignment surgery eliminates an important class issue that exists in the United States, which does not provide federally funded health care coverage for this surgery. When courts declare that transsexuals must surgically conform their genitals to their gender identity, only those individuals who can afford the costly series of surgeries involved in sex reassignment will even be considered under the law. See, e.g., Jerold Taitz, *Judicial Determination of the Sexual Identity of Post-Operative Transsexuals: A New Form of Sex Discrimination*, 13 AM. J. L. & MED. 53, 55 (1987) (explaining the medical procedures involved in such surgery are expensive, time-consuming, and risky for patients). In *Rush v. Johnson*, a post-operative female transsexual challenged a state's refusal to reimburse her for medical bills related to her surgery. 565 F. Supp. 856 (N.D. Ga. 1983). The court held that because sex reassignment "constitutes major surgery with various attendant risks and complications," and because medical professionals do not all agree that such surgery is "effective treatment for transsexualism," sex reassignment surgery can be classified as "experimental." *Id.* at 868. The state did not compensate individuals undergoing "experimental" surgery. See *infra* Part V.B. (discussing health care and class issues related to sex reassignment surgery in the United States).

will go to a male prison.<sup>26</sup> She pays for health insurance at the higher rate charged to women, but cannot collect her pension until she's sixty-five, the age at which men can collect, although women are able to collect at age sixty.<sup>27</sup>

After sex reassignment surgery, Tula began dating a man who, with knowledge of her surgery, proposed marriage.<sup>28</sup> They obtained a marriage license without incident because no one asked to see her birth certificate.<sup>29</sup> Prior to their marriage, however, the government attempted to bar the ceremony.<sup>30</sup> A few days before the wedding, the lower court, in a ten to six decision, gave Tula permission to marry.<sup>31</sup> Once tabloids aired news of their union, though, Tula's in-laws urged her husband to divorce her, which he did.<sup>32</sup> One year and four months after Tula married, the European Court of Human Rights heard the government's appeal to the lower decision and held ten to eight against allowing Tula to change her birth certificate, and fourteen to four against her right to marry.<sup>33</sup> For two short months, Tula was married — something British courts have now rendered a legal impossibility.

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26. Edgren, *supra* note 23, at 102. The implications of placing a male to female transsexual in an all-male prison are highlighted in a recent Supreme Court case, *Farmer v. Brennan*, 114 S. Ct. 1970 (1994). In 1989, Dee Farmer was a pre-operative male to female transsexual exhibiting "feminine characteristics" whom officials placed in a male prison, where an inmate beat and raped her. 114 S. Ct. at 1975. The Court held that Farmer was not subjected to cruel and unusual punishment in violation of the Eighth Amendment because prison officials "must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and [the officials] must also draw the inference." *Id.* at 1979. See *supra* Part V.B. (discussing *Farmer* and other prison cases). See also ROTHBLATT, *supra* note 12, at 62 (noting that sex-based (mis)classifications have done nothing to prevent jail house rape).

27. Edgren, *supra* note 23, at 102.

28. Edgren, *supra* note 23, at 102.

29. Edgren, *supra* note 23, at 102.

30. Edgren, *supra* note 23, at 102.

31. *Cossey v. United Kingdom*, 184 Eur. Ct. H.R. (ser. A).

32. Edgren, *supra* note 23, at 102.

33. *Cossey*, 184 Eur. Ct. H.R. (ser. A). The Court in this case, as in other cases involving transsexuals in the United Kingdom, declined to amend her birth certificate or allow her to marry, based primarily on the privacy clause of Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, Europ. T.S. No. 5. See, e.g., *W. v. United Kingdom*, App. No. 11095/84, 63 Eur. Comm'n H.R. Dec. & Rep. 34 (1989); *J. v. United Kingdom*, App. No. 10622/83, 63 Eur. Comm'n H.R. Dec. & Rep. 37 (1988); and *Rees v. United Kingdom*, 106 Eur. Ct. H.R. (ser. A) (holding that while a name may be changed in other documents, the birth certificate cannot be amended if it reflects correct information at the time of birth). In 1971, the House of Commons passed the Nullity of Marriage Act of 1971, which declares any marriage of two parties who are not respectively female and male null and void.

### III. MARRIAGE IN THE UNITED STATES: A UNION MUST HAVE ONE AND ONLY ONE PENIS

And gender is not sane.

It's not sane to call a rainbow black and white.

It's not sane to demand we fit into one or the other only.

It's not sane that we classify people in order to oppress  
them as women or to glorify them as men.

Gender is not sane.

- Kate Bornstein<sup>34</sup>

Arbitrary legal classifications constructed by the hierarchical legal system in the united states are not new.<sup>35</sup> For example, most people recall the landmark case of *Plessy v. Ferguson*<sup>36</sup> as involving a "separate but equal" issue. Railway officers assigned Plessy, who "was seven-eighths Caucasian and one-eighth African blood," to a car designated for black passengers pursuant to a Louisiana statute.<sup>37</sup> Plessy, whose "colored blood was not discernible in him," remained in a car for white passengers until police forcibly removed and arrested him.<sup>38</sup> Although he challenged the railway's actions and the statute based on the Equal Protection Clause of the Fourteenth Amendment,<sup>39</sup> the implications of Plessy's lawsuit went far beyond Constitu-

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34. BORNSTEIN, *supra* note 7, at 123.

35. The following cases, for example, involved recognition and enforcement of arbitrary classification schemes based on biological characteristics of women: *Bledsoe v. Webb*, 839 F.2d 1357 (9th Cir. 1988) (upholding military policy grounded in archaic stereotypes and biological determinism which excluded all women from combat positions and combat-related civil service jobs); *Muller v. Oregon*, 208 U.S. 412 (1908) (holding that a statute restricting the number of hours a woman may work per day does not violate the Equal Protection Clause. Because women are physically weaker than men and responsible for the reproduction of the human race, they are "properly differentiated from the other sex and placed in a class by [themselves], and legislation designed for her protection may be sustained, even when like legislation is not necessary for men and could not be sustained." *Id.* at 419-420); and *Bradwell v. Illinois*, 83 U.S. 130, 133 (1872) (supporting a state statute excluding women from admission to the Illinois Bar because of women's reproductive capacity. "The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator." *Id.* at 141 (Bradley, J., concurring)).

36. 163 U.S. 537 (1896).

37. *Id.* at 540. The statute mandated that "[n]o person or persons, shall be admitted to occupy seats in coaches, other than the ones, assigned to them on account of the race they belong to." *Id.* The Court then stated that Plessy had "insisted upon going into a coach used by the race to which he did not belong." *Id.* at 541.

38. *Id.* at 541.

39. Plessy challenged the statute on Thirteenth Amendment "badge of inferiority" grounds as well, but the Court cursorily rejected this assertion as inaccurate and thus, "too clear for argument." *Id.* The Court then rejected Plessy's Equal Protection claim, noting that racially different treatment does not violate the Constitution, as long as each race is treated equally, albeit separately. *Id.*



tional doctrine.<sup>40</sup> On a deeper level, the case challenged the arbitrary nature of racial classifications.<sup>41</sup> The issue at hand was whether a person whose racial background is one-eighth black and seven-eighths white could be categorized as black and then be denied constitutional equality.<sup>42</sup>

Proponents of the view that law operates best as a system of bipolar, albeit hierarchical, categorizations suggest that law "is obliged to classify its material into exclusive categories; it is therefore, a binary system designed to produce conclusions of the yes or no type."<sup>43</sup> This theory reflects a sociological need for definitive categories, often referred to as classification anxiety.<sup>44</sup> The ability to label others creates order and eases this anxiety. In everyday encounters, we mentally categorize strangers according to race, sex, and age, among other things.<sup>45</sup> Yet, as *Plessy* illustrates, categorization in law, particularly where biology is a factor, can lead to arbitrary and unjust treatment.

Categorization on the basis of sex and genitalia is another example of biology and law in conflict.<sup>46</sup> As natural as the binary, sex-based classification scheme of male and female may seem, these

40. Remarking on the true meaning of the Oregon statute, Justice Harlan stated, "[e]very one knows that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied or assigned to white persons." 163 U.S. at 557 (Harlan, J., dissenting). Harlan further criticized the statute and the majority's holding by asking:

If a state can prescribe, as a rule of civil conduct, that whites and blacks shall not travel as passengers in the same railroad coach, why may it not so regulate the use of the streets of its cities and towns as to compel white citizens to keep to one side of a street, and black citizens to keep on the other?

*Id.* at 558.

41. See Ruth Colker, *Bi: Race, Sexual Orientation, Gender, and Disability*, 56 OHIO ST. L. REV. 1, 6 (1995) (explaining that *Plessy* was a "radical challenge to the construction of racial categories").

42. See *id.* at 5 (describing how attorney Albion Tourgee sought a "[n]egro whose complexion was white or nearly white" with "mixed Caucasian and African blood, in the proportion of one-eighth African and seven-eighths Caucasian." *Id.* at 6-7).

43. See Pearlman, *supra* note 8, at 843. A significant problem arises when law attempts to classify biological phenomena, however. Medicine, for example, "cannot give Yes or No answers . . . [p]eople are not either tall or short, they are taller or shorter or about average." *Id.* (citation omitted). Hence, the conflict between law and biological phenomena.

44. See generally Pearlman, *supra* note 8, at 844-46 (explaining the law's fascination with sex and gender categories and the challenge transsexuals pose to those constructs); see also BORNSTEIN, *supra* note 7, at 3-4 (describing the sociological need to identify with recognizable sex and gender categories).

45. See, e.g., ANNIE WOODHOUSE, *FANTASTIC WOMEN: SEX, GENDER AND TRANSVESTISM* 4-5 (1989) (noting that we categorize others in our minds because labels prevent confusion).

46. See Pearlman, *supra* note 8, at 845-46 (explaining how classification on the basis of gender is a means of minimizing classification anxiety). Unfortunately, "[c]ulturally marked categories (of male and female) are made up of antiquated gender identities." *Id.* at 846.

categories did not always exist in law.<sup>47</sup> During the Renaissance, when men commonly became eunuchs, for example, laws determined sex assignment through gender displays like clothing and behavior, rather than by genitals.<sup>48</sup> Not until the late eighteenth and early nineteenth century, when the "medical and legal community became enthralled with genital determination,"<sup>49</sup> did biological sex determination override cultural gender determination.<sup>50</sup> By the twentieth century, laws reinforcing biological sex determination based on genitalia were recognized as "'natural truths,' and the legitimization of sex categorization was born."<sup>51</sup>

One manifestation of sex categorization under law is apparent when courts impose rigid genital classifications as prerequisites to marriage. By controlling and manipulating the definition of marriage,<sup>52</sup> courts determine who may and may not marry based on an unspoken but pervasive rationale which is, in effect, a one-penis-per-union rule. Homosexuals cannot marry because lesbian couples do not have the requisite penis, gay couples have too many.<sup>53</sup> Trans-

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47. For an insightful look at how law has created sex-based dichotomies and how legal dogma has corrupted the body of woman, see Judith E. Grbich, *The Body in Legal Theory*, in *AT THE BOUNDARIES OF LAW: FEMINISM AND LEGAL THEORY* 65 (Martha Fineman & Nancy Thomadsen eds., 1991). From a poststructuralist perspective, for example, philosopher Jacques Derrida suggests it is a unique function of western thought to polarize categories like good vs. evil, right vs. wrong, and male vs. female. *Id.* Some feminist legal theorists have taken Derrida's concept a step further, seeking to identify not only why one polar category is privileged over another, as in males over females, but also to identify how the privileges arose in the first place, through patriarchal legal systems. *Id.* at 65-67.

48. See Pearlman, *supra* note 8, at 850 (noting that categorization based on genitals was considered impossible due to the belief that "one's genitals might change over [the course of] one's life time," especially if men became eunuchs) *Id.* quoting Druann Pagliassotti, *On the Discursive Construction of Sex and Gender*, 20 *Comm. Res.* 472, 474-75 (1993) (citation omitted). See also BORNSTEIN, *supra* note 7, at 48 (describing the concept of sex and gender continuums practiced in Shamanic cultures).

49. See Pearlman, *supra* note 8, at 850.

50. Pearlman, *supra* note 8, at 850. The categories were straightforward: "[p]enis equals boy, vagina equals girl. Presence of (or absence of) the genital represented one's true sex." *Id.*

51. Pearlman, *supra* note 8, at 850.

52. See Note, *supra* note 9, at 1980 (arguing that the law plays an integral role in constructing sexual identities). The author observes that "[i]t is only by sleight of hand that the Court makes the divide between the cluster of heterosexual props — family, marriage, procreation — on the one hand and gays and lesbians on the other seem obvious." *Id.* The trick is in addressing family, marriage, and procreation as if they are natural institutions that existed prior to state intervention. Thus the law's construction of these categories is hidden. *Id.* at 1980-81. Upon closer look, however, we can see that socially constructed laws are "the very source of the distinctions upon which [*Bowers v. Hardwick*, 478 U.S. 186 (1986) (ruling that the right to homosexual sex is not a fundamental right)] was decided." *Id.*

53. See BORNSTEIN, *supra* note 7, at 22 (explaining how, in most cultures, gender assignment begins at birth). Doctors look at newly born infants and either say, "It has a penis, it's a boy," or "It doesn't have a penis, it's a girl." *Id.* "It has little or nothing to do with vaginas. It's all penises or no penises: gender assignment is both phallocentric and genital. Other cultures are not or have not been so rigid." *Id.*

sexuals may alter their anatomy to fit the rule, but courts have consistently and arbitrarily denied their physical qualifications.<sup>54</sup> The following discussion will look at how a few courts have viewed, indeed erased, transsexual existence.

### *A. Name Changes and Birth Certificates*

A long line of New York cases in the late 1960s and early 1970s indicates that courts were willing to allow transsexuals to change their names from traditionally male titles to traditionally female titles.<sup>55</sup> In most states today individuals can legally change their names without judicial scrutiny,<sup>56</sup> and receiving a new name on a birth certificate poses no great hurdle.<sup>57</sup>

What can be difficult, however, is changing the sexual classifica-

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54. Pearlman identifies the significance behind conflating medical and legal determinations of sex. The medical profession constructs the transsexual's new genitalia, or "true sex." Then the legal community directs and restricts the ways transsexuals can live with their reassigned sex. "In essence, the medical community determines the status of biology, while the legal community determines the status of one's body (how to live assigned to a particular sex)." Pearlman, *supra* note 8, at 851.

55. See, e.g., *Anonymous v. Mellon*, 398 N.Y.S.2d 99 (Sup. Ct. 1977) (finding that the Bureau of Vital Records was required to change a transsexual's name on a birth certificate, but not his or her sex); *Hartin v. Director of Bureau of Records*, 347 N.Y.S.2d 515 (Sup. Ct. 1973) (concluding that the Department of Health must change a transsexual's name on the birth certificate); *In re Anonymous*, 314 N.Y.S.2d 668 (Civ. Ct. 1970) (allowing a male to female transsexual to change her name from a male name to a female name); *In the Matter of Anonymous*, 293 N.Y.S. 2d 834 (Civ. Ct. 1968) (granting a male to female transsexual's request to change her name to a traditionally female name and ordering the name change to be attached to the birth certificate); *Anonymous v. Weiner*, 270 N.Y.S.2d 319 (Sup. Ct. 1966) (denying a transsexual's application to have her sex changed on her birth certificate but not reaching the question of whether the male name could be changed to a female name).

56. The personal significance attached to a name, however, can be significant. In her autobiography, Patty Duke recalled her feelings after the Rosses, her new caretakers, changed her name: "[W]hen the Rosses said, 'Anna Marie's dead, your Patty now,' it was as if she really did die . . . That may seem like a lot of fuss over a bunch of letters strung together, but your name is an important symbol." PATTY DUKE & KENNETH TURAN, *CALL ME ANNA: THE AUTOBIOGRAPHY OF PATTY DUKE* 28 (1987) (quoted in Suellyn Scarnecchia, *Who Is Jessica's Mother? Defining Motherhood Through Reality*, 3 AM. U.J. GENDER & L. 1, 6 (1994)).

57. Most states require no administrative or official procedures to complete a name change. In these states, a name is whatever one chooses, as long as that name is not used for fraudulent purposes. See, e.g., ARK. CODE ANN. § 9-2-101 (1987 & Supp. 1995) (commenting that the statute providing for legal procedures to change one's name is only "supplemental to the common-law rule that one may ordinarily change his [sic] name at will, without any legal proceedings, merely by adopting another name, that the right is not limited by the ordinary rules of minority and that the section only affords another method of doing so"); IND. CODE ANN. § 34-4-6-1 (1995) (providing simply that "the circuit courts in the several counties of this state may change the names of natural persons on application by petition"); NEB. REV. STAT. § 71-640 (1996) (allowing a name change only once for a person over seven years old, such that further name changes may be made upon written request for a court order).

tion on a birth certificate.<sup>58</sup> At first blush, this acknowledgment may seem superfluous, but for a transsexual who wants to marry, it can make all the difference. In most cases, two individuals applying for a marriage license must show birth certificates for identification and to prove that they are of "opposite sexes."<sup>59</sup> In *Anonymous v. Weiner*,<sup>60</sup> a New York court refused to issue an order to amend a transsexual's birth certificate to reflect her sex following genital reconstruction surgery.<sup>61</sup> The court reasoned that "an individual born one sex cannot be changed" by surgically altering the sex organs.<sup>62</sup> The court accepted the New York Academy of Medicine's arguments against amending her birth certificate for the following reasons: 1) post-operative transsexuals retain their pre-operative chromosomal status; 2) transsexuals are psychologically ill and should not be allowed to use legal documents to conceal their condition; and 3) the public interest in protecting against fraud outweighs transsexuals' private need for gender identity cohesion.<sup>63</sup> Ultimately, the court refused to recognize her change of sex, relying on the Committee on Public Health of the New York Academy of Medicine's determination that she remained "chromosomally" male, even if she is "ostensibly" fe-

58. Only 16 states and the District of Columbia currently allow birth certificates to be amended with proof of sex reassignment surgery: Arizona, ARIZ. REV. STAT. ANN. § 36-326(A)(4) (1993); Arkansas, ARK. CODE ANN. § 20-18-406(f) (Michie 1991); California, CAL. HEALTH & SAFETY CODE § 10475 (West 1991); District of Columbia, D.C. CODE ANN. § 6-217(d) (1989); Georgia, GA. CODE ANN. § 31-10-23(e) (1991); Hawaii, HAWAII REV. STAT. § 338-17.7(a)(4)(B) (Supp. 1994); Louisiana, LA. REV. STAT. ANN. § 40:62(A) (West 1993); Massachusetts, MASS. GEN. LAWS ANN. ch. 46 § 13 (West Supp. 1994); Michigan, MICH. COMP. LAWS ANN. § 333.2831(c) (West 1992); Mississippi, MISS. CODE ANN. § 41-57-21 (1993); New Mexico, N.M. STAT. ANN. § 24-14-25(D) (1994); North Carolina, N.C. GEN. STAT. § 130A-118(b)(4) (1992); Oregon, OR. REV. STAT. § 432.290(5) (1993); Utah, UTAH CODE ANN. § 26-2-11 (1989 & Supp. 1995); and Virginia, VA. CODE ANN. § 32.1-269(E) (1992). New York is representative of states holding that a new sex after surgery should not be recorded on a birth certificate because to do so would fraudulently conceal one's identity. See *Hartin*, 347 N.Y.S.2d at 518 (declaring that the "public interest for protection against fraud" outweighs the transsexual's desire to be known as a different sex than the one he or she had at birth).

59. See, e.g., CAL. FAM. CODE ANN. § 300 (West 1994) (stating that "marriage is a personal relation arising out of a civil contract between a man and a woman . . ."); FLA. STAT. ANN. § 741.01 (West 1996) (providing that "two individuals of the same sex may not validly apply for a marriage license" (Op. Atty. Gen., 076-31, Feb. 6, 1976)); GA. CODE ANN. 19-3-30(b)(1) (1996) (mandating that "no marriage license shall be issued to persons of the same sex").

Among the rejected same-sex challenges to marriage statutes are: *DeSanto v. Barnsley*, 476 A.2d 952 (Pa. Super. Ct. 1984); *Dean v. District of Columbia*, 653 A.2d 307 (D.C. Ct. App. 1995); *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. Ct. App. 1973). In Indiana, a circuit judge refused to issue a marriage license to two gay prisoners and fined them \$2,800 simply for making the request, and complained, "[t]heir claims about Indiana law and constitutional rights are wacky and sanctionably so." Arthur Leonard, *Judge Denies Marriage License to Gay Male Prisoners*, 1988 LESBIAN/GAY L. NOTES 63.

60. 270 N.Y.S.2d 319 (Sup. Ct. 1966).

61. *Id.* at 324.

62. *Id.* at 321 (citation omitted).

63. *Id.*

male.<sup>64</sup>

On the other hand, in *In re Anonymous*,<sup>65</sup> the court allowed a transsexual to alter her birth certificate on a different, but narrow premise.<sup>66</sup> The court rejected a chromosomal test as determinative of the sex of the petitioner, stating that "were it not for the fact that the petitioner's background was known to the court, the court would have found it impossible to distinguish this person from any other female."<sup>67</sup> Although the court held that after surgery the petitioner was both anatomically and psychologically female,<sup>68</sup> it qualified the decision, stating that "[a]bsent surgical intervention, there is no question that his social sex must conform with his anatomical sex, his mental attitude notwithstanding."<sup>69</sup> In other words, the law interprets transsexual reality,<sup>70</sup> and therefore, all sexuality, to mean that sex determines gender, but gender does not determine sex. Transsexuality challenges this patriarchal resistance to recognizing that gender does not automatically follow sex. The legal system, in turn, ignores or erases transsexual realities in order to eliminate sex-based classification anxiety.<sup>71</sup>

Legal, patriarchal resistance to transsexuals' reality does not end with birth certificates. Suppose an individual has sex reassignment surgery, as did the individual in the case of *In re Anonymous*, and is permitted to amend her birth certificate. If that individual chooses to get married, can she do so legally?

### B. Marriage

Once a transsexual obtains a marriage license, usually with a valid birth certificate, the act of getting married is generally not difficult.

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64. *Anonymous v. Weiner*, 270 N.Y.S.2d at 322; cf. *Anonymous v. Mellon*, 398 N.Y.S.2d 99, 102 (Sup. Ct. 1977) (denying a transsexual's request that the designated sex, male, on her birth certificate be changed to female, despite noting that the "legal nature of sex" cannot be determined by chromosomes alone).

65. 293 N.Y.S.2d 834, 835 (Civ. Ct. 1968).

66. *Id.* at 838.

67. *Id.*

68. *Id.* at 837.

69. *Id.*

70. See *supra* note 14 (explaining the meaning behind "transsexual reality").

71. Pearlman, *supra* note 8, at 848. Pearlman argues that if:

[t]he assumption is that there are two and only two genders because gender follows from 'sex,' then a process of transgression or sex reassignment breaks down the binary categorization inherent in the sex/gender system and thus raises the level of categorization anxiety. To reduce the anxiety, society pressures masculine females and feminine males to match their biological sex with their gender identity representation through sex based behaviors and forced internalized gender recognition ... . So, if you are a man, you must perform as a man — thus masculine.

Even when litigators and judges interfere with weddings involving a transsexual partner, the marriage may still go forward. In a recent Texas case, a judge allowed a marriage between "two people with a vagina, because one of them insisted he was a he, albeit with a very small penis."<sup>72</sup> Notably, though, attorneys suggested one of the two partners should take on a female persona and claim to have a hypertrophic clitoris, ectopic ovaries and vaginal agenesis, to appear more like a heterosexual couple.<sup>73</sup> The combined effect of the judge's and the attorneys' interpretation of this relationship thus enforces the one-penis-per-union rule while simultaneously denying the true sexual identities of the individuals.<sup>74</sup> The decision turned on the existence of a penis and significantly overlooked the gender identities of the transsexual partners.

In *M.T. v. J.T.*,<sup>75</sup> the court began by announcing as natural and fundamental, the premise that "lawful marriage requires performance of ceremonial marriage of two persons of the opposite sex, a male and female."<sup>76</sup> Rejecting the idea that sex at birth is the single most important factor in determining whether one is male or female,<sup>77</sup> the court held that a marriage between a man and a male to female transsexual was valid only in the sense that "if the anatomical features of a transsexual are made to conform to the person's gender identity . . . then identity by sex must be governed by the congruence of these standards."<sup>78</sup> Again, in law, sex determines gender, but gender does not determine sex.<sup>79</sup> Moreover, commentators agree that

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*Id.* at 847 (footnotes omitted). See Note, *supra* note 9, at 1977 (explaining that "gender does not follow inevitably merely from being a man or woman").

72. ROTHBLATT, *supra* note 12, at 80. Rothblatt compares this case to that of Marie/Marin in France in 1601. A judge sentenced Marie to die for committing acts of lesbianism with another woman, until a doctor saved her life by testifying that he had examined her and described her clitoris as a very small penis. *Id.*

73. These terms refer to an enlarged clitoris, misplaced ovaries, and an unopened vagina.

74. This male-defined phallogocentric logic underscores the fact that "[p]enetration is the most significant cultural feature of the penis." Pearlman, *supra* note 8, at 849 n.59. In many respects, the Marie/Marin case is remarkable, given that "[a]n inadequately sized penis is unable to penetrate and thus engage in heterosexual intercourse. This inability is at the heart of an anxiety filled gender classification." *Id.*

75. 355 A.2d 204 (N.J. Super. 1976).

76. *Id.*

77. *M.T.* was the first united states case to reject the *Corbett* test based primarily on chromosomal analysis. *Id.* at 208.

78. *Id.* at 209.

79. For example, if one's anatomical appearance, genitalia and/or sex, is a tangible indication of one's self-identified gender, the court will recognize that gender. If, however, the individual does not possess anatomy congruent with that gender identity, the court will consider the individual's genitalia, not gender identity, in categorizing one as male or female. For the class-based implications inherent in this reasoning, see Part V.B.

this decision was not necessarily the positive legal recognition it appeared to be,<sup>80</sup> as the following sections will reveal.

### C. Divorce

In general, the greatest scrutiny of marriages involving transsexuals occurs when the couple decides to separate, rather than when they decide to unite.<sup>81</sup> M.T.'s case involved a divorce in which the ex-husband tried to avoid alimony and support payments by arguing that his ex-wife, a post-operative male to female transsexual was formerly a man, so the marriage itself was void.<sup>82</sup> The court ruled in the ex-wife's favor, but based its decision on a rigid bipolar framework.<sup>83</sup> It held the marriage to be valid because the transsexual partner had a vagina; thus the couple could have sexual intercourse.<sup>84</sup> Placing the wife in such a rigid sex and gender role is not a positive decision and "in no way does the court's decision undermine the polarized conception of gender that underlies our marriage laws."<sup>85</sup>

The remaining, far less "positive" decisions refuse to even grant divorces in transsexual marriages.<sup>86</sup> For instance, in *Frances B. v. Mark B.*,<sup>87</sup> a wife sought to annul her marriage to a post-operative female to male transsexual on the grounds that they were both women and thus physically incapable of entering into marriage.<sup>88</sup> The court held that the couple could not be divorced because their marriage was

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80. See, e.g., Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CALIF. L. REV. 3, 131-35 (1995); ROTHBLATT, *supra* note 12, at 63-4.

81. See *M.T. v. J.T.*, 355 A.2d at 204 (N.J. Super. 1976).

82. *Id.* at 209.

83. *Id.* at 210-211.

84. See *supra* note 74 (reporting that penetration is the single most important cultural function of the penis). Here, the court stated that an important factor in the decision was that M.T. had undergone successful surgery (to construct a vagina) prior to the marriage which then enabled the couple to have intercourse. Therefore, because M.T. was capable of "performing sexually as a wife" she could be "classified as a woman for the purposes of marriage." *M.T.*, 355 A.2d at 205-06.

85. Colker, *supra* note 41, at 49.

86. Courts have not treated transsexual marriages and families the same in every case. See, e.g., *Karin T. v. Michael T.*, 484 N.Y.S.2d 780 (Fam. Ct. 1985) (ordering a female to male transsexual, Michael T., married to Karin T., to pay child support for a child born to the couple through artificial insemination); *Christian v. Randall*, 516 P.2d 132 (Colo. Ct. App. 1973) (granting custody to a female to male transsexual mother who married a woman); cf. *In re Ladrach*, 513 N.E.2d 828 (Ohio P. Ct. 1987) (refusing to grant a marriage license to a post-operative male to female transsexual and a man); *Anonymous v. Anonymous*, 325 N.Y.S.2d 499 (Sup. Ct. 1971) (declaring null and void the marriage of a pre-operative male to female transsexual to a man).

87. 355 N.Y.S.2d 712 (1974).

88. *Id.* at 713. The decision noted that the wife argued that her husband did "not have male sexual organs, (did) not possess a normal penis, and in fact (did) not have a penis." *Id.*

never valid.<sup>89</sup> Because the husband had no congenital male sex organs,<sup>90</sup> the marriage itself never existed.<sup>91</sup> The record is unclear as to whether the husband had not undergone sex reassignment surgery, or if the attempted reconstruction was unsuccessful. Nonetheless, the court reasoned that because he "does not possess a normal penis, and in fact does not have a penis," he can not function sexually as a male in the marriage, therefore the marriage does not exist under law.<sup>92</sup> Clearly the couple was missing the one penis that would have validated their marriage — without it, their marriage and their relationship were legally impossible.

The underlying theme is that in order to have a legally recognizable union, a couple must have a *legitimate* penis and the ability to have heterosexual intercourse with that penis.<sup>93</sup> Yet, the courts do not stop at these two factors. Procreation draws an arbitrary, heteropatriarchal distinction between couples who can marry and those who cannot.

#### D. Procreation

I have discussed how courts define sex by reference to external genitalia. Some courts limit their inquiry to genitalia at birth while others consider changes in genitalia. These arbitrary distinctions are especially obvious when courts assert that marriage exists only for heterosexual sex and procreation.

##### 1. Sexual Intercourse

When courts attempt to apply existing laws to transsexual marriages, the analysis tends to turn on, predictably, factual impossibilities: copulation and procreation. Even in *M.T.*, one need only pe-

89. *Id.* at 717.

90. I use the term "congenital" to refer to an individual's sex at birth.

91. *Id.* See Valdes, *supra* note 80, at 134 n.365 (asserting that "the overall prominence of the husband's penis in the analysis illustrates again how sex as a legal concept depends inevitably and inexorably on external genitalia").

92. *Frances B.*, 355 N.Y.S.2d at 717. In dicta the court scoffed, "the record does not show that the entrapped male successfully escaped to enable defendant to perform male functions in a marriage. Attempted sex reassignment . . . has not achieved that result." *Id.* Under this absurd rationale (the *only* "male functions" in a marriage are penile penetration of a partner's vagina), even if the husband could strap on a dildo when plastic surgery failed to properly construct an inflatable penis, the court would not consider either apparatus acceptable. A female to male transsexual cannot possibly consummate a marriage in the sense required by this court, and thus can never marry under the one-penis-per-union rule.

93. That is, no strap-on dildos or surgically constructed organs qualify. See Marcelle Cook-Daniels, *Crossing Over: A Lesbian Family's Story*, in *IN THE FAMILY*, Oct. 1995, at 9 (commenting on her post-operative identity, Cook-Daniels notes, "I think of myself as a 'transsexual' male. I modify the word 'male' because I'm after-market, not factory equipped."). See also *supra* note 53 (asserting that gender assignment is based on genitals and male phallocentricity).



ruse a few lines of the court's dicta to discover that the court also believes that the individual's capacity, both physically and psychologically, to engage in sexual intercourse must be scrutinized.<sup>94</sup> Again, a transsexual relationship is recognizable by law only in heteropatriarchal terms.

Under the physical element of the court's qualifier, the one-penis-per-union rule effectively limits transsexuals' marital recognition to relationships involving a congenital male and a male to female transsexual. After all, female to male transsexuals may not have successful surgery to attach a penis; it is much easier to invert a penis in order to replicate a vagina.<sup>95</sup> A congenital female and a post-operative male to female transsexual couple would fail the intercourse requirement as well, since both would have vaginas. Without a penis, intercourse in its traditional, heteropatriarchal conception is impossible.<sup>96</sup> As a result, classification based on male anatomy remains the status quo and classification by female anatomy is overlooked and erased. That is, phallogentric patriarchal domination is neatly maintained.

As for the court's psychological element in the sexual intercourse requirement, one is left to her imagination.

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

95. For a detailed description of both surgical processes, see BORNSTEIN, *supra* note 7, at 16. The penis, for female to male transsexuals, is, according to Bornstein, a rolled up skin graft which is virtually nonfunctional, even for urinary purposes. With technological breakthroughs, however, these surgeries are yielding increasingly functional results. *Id.*

96. For an analysis of the absurdity of applying one definition of "sex" to all sexual orientations, see MARILYN FRYE, *WILLFUL VIRGIN* 134 (1992). Frye reviews a study suggesting that lesbians "have sex" less often than gay male couples and heterosexual couples and asserts that specific words do not exist to articulate women's intimate experiences. She explores the patriarchal origins of words like "sex," "sexual," and "sexuality" which women adopted for themselves to counter the "stifling woman-hating Victorian denial that women even have bodily awareness, arousal, excitement, orgasms and so on." *Id.* at 116. Frye concludes that "having sex" is a phallogentric concept pertaining to "heterosexual intercourse, in fact, primarily to heterosexual intercourse, that is, male-dominant-female-subordinate-copulation-whose-completion-and-purpose-is-the-male's-ejaculation." *Id.* at 113. The primary limitation in attempting to articulate our experiences through male-defined terms is that:

Our [lesbian] lives, the character of our embodiment, cannot be mapped back on to that semantic center. When we try to synthesize and articulate it by the rules of that mapping, we end up trying to mold our loving and passionate carnal intercourse into explosive 8-minute events. But that is the timing and the ontology of an alienated and patriarchal [male] penis, not of the lesbian body. When the only thing that counts as "doing it" are those passages of our interactions which most closely approximate a paradigm that arose from the meanings of the rising and falling penis, no wonder we discover ourselves to "do it" rather less often than do pairs with one or more penises present.

*Id.* at 113-14.

## 2. *Transsexual Procreation*

In *Frances B.*, the court held that a union involving a congenital female and a post-operative female to male transsexual was not a valid marriage.<sup>97</sup> In addition to its preoccupation with the role of male genitalia in marriage, the court reasoned that "the marriage relationship exists with the result and for the purpose of begetting offspring."<sup>98</sup> Therefore, because the "husband" did not have the "necessary apparatus" to be male, theirs could not be a valid marriage.<sup>99</sup> From this reasoning, one can conclude that if a male to female transsexual were to marry a male, the marriage would likewise be invalid because he would not have the "necessary apparatus" to be female and bear offspring.<sup>100</sup> His relationship as a post-operative transsexual is rendered a legal impossibility when defined in terms of an ability to procreate.

With the above legal interpretations in mind, I return to Bornstein's situation.<sup>101</sup> Recall that Kate Bornstein, a male to female transsexual is in a relationship with David Harrison, a female to male transsexual. She could probably change her birth certificate, as

97. 355 N.Y.S.2d at 717.

98. *Id.* This reasoning may seem illogical, as it should, given that heterosexuals who are physically unable to procreate can nonetheless marry.

99. *Id.* A look at the selective enforcement of gender-neutral anti-sodomy statutes, however, suggests that facially neutral proscriptions are not necessarily applied equally to heterosexuals and homosexuals. See, e.g., *Moseley v. Esposito*, No. 89-6897-1 (Ga. Super. Ct. Sept. 6, 1989) (insisting that heterosexuals have every right to engage in sodomy within the institution of marriage); Nan D. Hunter, *Marriage, Law, and Gender: A Feminist Inquiry*, 1 LAW & SEXUALITY 9, 10 n.2 (1991) (commenting that "a fascinating legal anomaly would result if a state relied on *Hardwick* [declaring homosexuals have no constitutional right to engage in sodomy] to prosecute a married lesbian or gay couple").

100. See Valdes, *supra* note 80, at 134 n.365. The role of the vagina in marriage is a significant issue in and of itself in transsexual unions. If penetration is considered the most important cultural function of the penis (and males, by default), then "for the female . . . the only concern for the capacity of the vagina is its ability to be penetrated by a penis." Pearlman, *supra* note 8, at 849 n.59. This sentiment is modified, however, in Judge Ormrod's reasoning in the landmark *Corbett* decision, positing that because penile penetration of an artificial vagina is more like anal intercourse than sexual intercourse, marriage between a man and a male to female transsexual cannot be consummated and thus cannot exist. *Corbett* (or *se Ashley*) at 107.

Consummation, the act of legitimating a marriage, is more a religious edict than a legal prescription. In Catholicism, for example, a marriage is only considered "legal" after it is "consummated by sexual intercourse." See JIM HILL & RAND CHEADLE, *THE BIBLE TELLS ME SO* 88 (1996). That we frequently presume consummation is a civil requirement for sealing the marriage contract is indicative of the role religion continues to play in contemporary treatment of this institution. That is not to say, however, that consummation is not legally prescribed. It is often codified in marriage statutes. See, e.g., CAL. FAM. CODE § 302 (West 1995) (stating that "an unmarried male or female under the age of 18 years is capable of consenting to and consummating marriage" if written consent from the minor's parents and a court order are obtained).

101. Although I base this analysis on accounts in Bornstein's memoir, I do not mean to suggest that Bornstein wants to marry (or not marry) Harrison. Her memoir does not discuss this issue. Looking at their relationship in this context is my own endeavor.

could Harrison. They could probably get married with little, if any, legal intervention. If, however, either individual seeks a divorce, or if their marriage is scrutinized in court, for say, an adoption petition, their union probably would not be considered valid. Harrison does not have a congenital penis. Bornstein reconfigured hers. Perhaps a judge could be convinced of the same Marie/Marin type situation<sup>102</sup> as in the Texas case. The point is, however, as Martine Rothblatt asserts, such "verbal gymnastics" should not be necessary.<sup>103</sup> Most transsexuals cannot confine or define their experiences and relationships in heteropatriarchal, binary terms. Semantics can do violence. Yet, the law requires transsexuals to force themselves into prescribed semantic paradigms which, as the next Part explores, may nonetheless exclude them.

#### IV. GENITALS AND GENDERS AND FAMILIES - OH MY!<sup>104</sup>

They drove us out, made us feel ashamed of how we looked ...  
The plants closed. Something we never could have imagined.  
That's when I began passing as a man. Strange to be exiled from  
your own sex to borders that will never be home. You were ban-  
ished too, to another land with your own sex, and yet forcibly apart  
from the women you loved ...

- Leslie Feinberg, *Stone Butch Blues*<sup>105</sup>

Oh now attitude, why even bother?  
I can't change your mind;  
You can't change my color.  
Free your mind and the rest will follow.

- En Vogue, *Free Your Mind*<sup>106</sup>

Categories can be comfortable in terms of group identity, or they can be used to exclude and oppress, depending on who has drawn the lines and for what purpose. Being (100%) white, declared the Supreme Court in *Plessy*, was a proper prerequisite to separate, in-

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102. See *supra* note 72 (explaining the 1601 French case of two lesbians who married each other).

103. ROTHBLATT, *supra* note 12, at 80.

104. This phrase is adapted from a popular line in the *Wizard of Oz*, in which Dorothy, hand-in-hand with her misfit friends, walks warily through a forest, chanting "lions and tigers and bears - oh my!" *The Wizard of Oz*, MGM(1939).

105. LESLIE FEINBERG, *STONE BUTCH BLUES* 11 (1993).

106. EN VOGUE, *Free Your Mind*, on *FUNKY DIVAS* (Eastwest Records 1992).

deed preferred, treatment based on race.<sup>107</sup> Anyone classified as black under these white supremacist laws would be treated differently. At the heart of *Plessy*'s case was a challenge to the arbitrariness of racial assignment. As one attorney argued, "there are great numbers of citizens in whom the preponderance of the blood of one race or another, is impossible of ascertainment, except by careful scrutiny of the pedigree."<sup>108</sup> In fact, seventeen different genes combine and interact on a continuum to create skin tone or pigmentation.<sup>109</sup> Yet, the Court in *Plessy* heralded arbitrary distinctions drawn to impose separate treatment with respect to race.

Similar to law's binary construction of race, our legal system views the sexuality of individuals in terms of rigid bipolar and arbitrary classification schemes based on genitals, rather than on a gender continuum.<sup>110</sup> Incongruity between sex and gender poses "a challenge not only to assigning categories, but to the corresponding desire to regulate and limit 'confusion.'"<sup>111</sup> Hermaphrodites, for example, commonly undergo surgery in infancy to "correct" their "problem" and assign their genital sex as either male or female, but not both.<sup>112</sup> On the other hand, when transsexuals decide, in adulthood, to undergo an operation to alter their genital sex, we strive to classify them as either male or female based on their genitals. The legal system, as we have seen, rigidly assigns a sex, not a gender, to transsexuals on the basis of their genitals either before or after their

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107. 163 U.S. 537 (1896).

108. Colker, *supra* note 41, at 7. In terms of race and sex based categories, Judy Scales Trent relates that "people feel uncomfortable when [she tries] to explain to them that [she is] a 'white black woman,' because categories 'make the world appear understandable and safe.'" *Id.* at 14 (citing Judy Scales-Trent, *Commonalities: On Being Black and White, Different and the Same*, 2 YALE J. L. & FEMINISM 305, 305 (1990)).

109. See generally Mei Guo & James A. Birchler, *Trans-acting Dosage Effects on the Expression of Model Gene Systems in Maize Aneuploids*, SCIENCE, Dec. 23, 1994, at 1999. Along these lines, civil rights activist Mary Church Terrell rejected use of the word "Negro." She asserted that "[t]he word is a misnomer from every point of view. It does not represent a country or anything else except one single, solitary color . . . We are the only human beings in the world with 57 variety of complexions who are classed together as a single racial unit." THE BLACK WOMAN'S GUMBO YA-YA 98 (Terri L. Jewell, ed. 1993) [hereinafter GUMBO YA-YA] (quoting Mary Church Terrell, who founded the National Association of Colored Women in 1896).

110. See, e.g., ROTHBLATT, *supra* note 12, at ix (noting that she recalls only one person of color from her childhood, which made it easy for her community to draw distinctions based on skin tone: "there were two races, black and white." Moreover, "[s]ince everyone was also divided into boys and girls, husbands and wives, it also seemed obvious that there were two sexes, male and female." *Id.*)

111. Pearlman, *supra* note 8, at 845 (citation omitted).

112. Pearlman notes that "[s]urgery is not performed 'because it is threatening to the infant's life,' but because it is threatening to the infant's culture." Pearlman, *supra* note 8, at 850 (quoting Suzanne J. Kessler, *The Medical Construction of Gender: Case Management of Intersexed Infants*, 16 SIGNS 3, 25 (1990) (defining intersexed infants as "babies born with genitals that are neither clearly male nor clearly female")).

reassignment surgery — whichever classification is least threatening to the patriarchy.<sup>113</sup>

I explored the legal interpretations of transsexual marriages to illustrate how transsexuality threatens patriarchy in terms of traditional notions of family. Our perceptions of family are frequently tied to sexual relations, for example, spouses, lovers, same-sex partners. Sexuality, then, is central to our understanding of family, a concept Martha Fineman calls the "sexual family."<sup>114</sup> That we view families across sexual lines rather than intergenerational lines, such as the mother-child dyad, is no accident; it is perpetuated by and serves the patriarchy. Fineman explains,

It is the ideological power of patriarchy that explains why an individual can resist or reject its structures by, for example, refusing to participate in a nuclear family but still find herself defined and ultimately controlled by the ideology underlying and supporting the structure.<sup>115</sup>

In patriarchy it is difficult to examine alternative family structures, like defining the mother-child dyad as the core family unit, because we view men's most significant role in the family as a sexual affiliation with women.<sup>116</sup> We often overlook male biological roles within the family as, for example, sons, brothers, and uncles.<sup>117</sup> Women and men alike may resist alternative family roles because "if patriarchy is a *shared* construct, it affects us all. Its core images of intimacy and sexuality define the discourses produced by both the proponent of the status quo and its critic."<sup>118</sup> Nevertheless, we need to rethink the concept of "family" and how we define the roles within that concept.

Because the sexual construction of family is a tool of the patriarchy, it exists without question. That is, the patriarchal family is an "assumed institution," socially defined and constructed to require seemingly "complementary roles, husband/head of household, wife/helpmate and child."<sup>119</sup> From these roles we conclude that the most significant tie in the family is borne of sexual affiliation, a le-

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113. Transsexuality "is threatening because it gives a human dimension to the unrecognized ground between the rules of a binary structure." Pearlman, *supra* note 8, at 845.

114. MARTHA FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* (1995).

115. *Id.* at 23.

116. *See id.* at 5 (refuting the claim that choosing a mother-child dyad as the core family unit is "sexist" and suggesting we look at intimacy between women and men as a vertical, intergenerational tie, rather than merely a horizontal one).

117. *Id.*

118. *Id.* at 24 (emphasis in original).

119. FINEMAN, *supra* note 114, at 24.

gally sanctioned marital bond.<sup>120</sup> Thus, our assumption that sexual affiliation forms the basis of the family "reinforces patriarchy in that it defines the male presence as essential and dominant within the family."<sup>121</sup>

The underlying assumption of the "sexual family," therefore, supports the rigid sexual distinctions propounded by courts faced with transsexual marriages. The patriarchal construct of family requires presence of a male.<sup>122</sup> A family without a male threatens the overall scheme of male domination because control within the household is perhaps the most elemental level of male supremacy.<sup>123</sup> As a result, the patriarchal legal system constructs rigid gender-genital categories and distinctions to maintain the sexual family by controlling who may marry. This goal is achieved in two ways: the one-penis-per-union rule and recognition of genitals over gender.

### *A. Marriage and the Many Ways We Cannot Be*

An underlying theme in the cases above is that courts are not willing to accept different definitions of the sexual family. Given the legal interpretations of transsexual marriages, the sexual family is a

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120. Underlying these roles is the assumption that men hold a dominant position over women in the family. The ideal, biblically-defined marriage mandates submission of women to men in marriage. See, e.g., *Ephesians* 5:22-26. "Wives submit yourselves unto your husbands, as unto the Lord. For the husband is the head of the wife." *Id.* at 5:22-23. As for secular traditions in marriage, the male-as-head-of-household standard also persists. Even though most states have sex-neutral statutes regarding domicile, surnames and head of household designations, "old practices concerning domicile and names and family decision-making continue to exist . . . Custom still dictates that women change their names at marriage and that children born in wedlock be given the surnames of their fathers." *SEX DISCRIMINATION AND THE LAW: HISTORY, PRACTICE, AND THEORY* 1186 (Barbara Allen Babcock et al eds., 2d ed. 1996) [hereinafter *SEX DISCRIMINATION AND THE LAW*].

121. *FINEMAN*, *supra* note 114, at 23.

122. Included in this patriarchal construct is racism. Many communities of color do not adhere to the traditional, white, middle class model of a nuclear family. Instead, grandparents, aunts, uncles and other relatives may comprise a "nuclear" family not recognized under law. See Taitz, *supra* note 25, at 56; C. STACK, *ALL OUR KIN: STRATEGIES FOR SURVIVAL IN A BLACK COMMUNITY* 45-61 (1974). See generally VALERIE POLAKOW, *LIVES ON THE EDGE: SINGLE MOTHERS AND THEIR CHILDREN IN THE OTHER AMERICA* (1993).

123. Scholars debate why sex role inequality persists in marriage even though family law is now gender-neutral, sex-discrimination in the labor market is decreasing, and most married women work and earn wages outside the home. Most marriages today are not egalitarian. See generally STEPHANIE COONTZ, *THE WAY WE NEVER WERE: AMERICAN FAMILIES AND THE NOSTALGIA TRAP* 122-48 (1995). One suggested response to this phenomenon is to accept "the continuation of male dominance and sex-based roles in marriage [as an] ... inevitable consequence of permitting people to make their own choices." *SEX DISCRIMINATION AND THE LAW*, *supra* note 120, at 1188.

For an insightful analysis of the origins of male domination in the household, see BOB MCCUBBIN, *THE ROOTS OF LESBIAN AND GAY OPPRESSION* 17-22 (1993) (explaining how sexual slavery lead to subjugation of women and the advent of the "male-dominated monogamous family").

concept of polarity. While most transsexuals perceive themselves as existing on a continuum of sexuality, not specifically "male" nor specifically "female," courts are unwilling to look beyond a person's genitals to determine sexual affiliation.<sup>124</sup> The fluidity of a sexual continuum threatens patriarchy because it challenges the assumed, rigid need for a male presence in marriage. Hence, the one-penis-per-union rule.

While vigilantly protecting the boundaries of marriage, judges and legislators tell us with *whom* we can have sex and marry.<sup>125</sup> For example, the court in *M.T.* drew distinct gender poles to justify recognition of a transsexual marriage.<sup>126</sup> If, between two individuals, there exists just one penis and one vagina, constructed or original, and those two individuals can then have sex as would occur between a man and a woman, the law will recognize their ability to be married. The concept of the sexual family, therefore, is not threatened because the presence of a man (penis), not the transsexuality of the woman, is the basis for recognition.

Alternatively, the legal system tells us with *whom* we can *not* have sex or marry. In *vonHoffburg v. Alexander*,<sup>127</sup> for example, the Fifth Circuit defined Marie vonHoffburg as a lesbian after the military refused to acknowledge the post-operative genital re/construction of her husband, even though the couple married after the surgery.<sup>128</sup> The court noted that "although Kristian vonHoffburg is a psychological female to male transsexual, Kristian is a biological female."<sup>129</sup> As a result, the army discharged Marie, despite her own self-identity as heterosexual, for being a lesbian. A lesbian married to a man?<sup>130</sup> The penalties for violating the one-penis-per-union rule can be rigid

124. According to Martine Rothblatt, "Manhood and womanhood can be life-style choices open to anyone, regardless of genitala. It is law and custom, not biology, that makes birth order, birth parents, skin tone, or genitals relevant to one's ability to choose a culture, perform a job, or adopt a life-style." ROTHBLATT, *supra* note 12, at 3.

125. For example, as recently as 1967, a Virginia statute prohibited a white citizen from marrying a non-white citizen. *Loving v. Virginia*, 388 U.S. 1 (1967). The Supreme Court, however, unanimously struck down the law, stating that such a statute had no legitimate purpose and in effect attempted to promote white supremacy. *Id.* at 396.

126. See *supra* note 78 and accompanying text.

127. 615 F.2d 633 (5th Cir. 1980).

128. *Id.*

129. *Id.* at 636.

130. With this query, I turn again to the relationship between Bornstein, a lesbian-identified male to female transsexual, and Harrison, a female to male transsexual (Bornstein's memoir does not indicate Harrison's sexual orientation). On this issue, Bornstein remarks, "Can you imagine? I wake up one morning, a nice lesbian like me, I wake up one morning and I'm living with a a man! [So] . . . with a man as my lover, what was I?" BORNSTEIN, *supra* note 7, at 237. One is left to wonder whether her self-identification would coincide with how the law would classify her.

and cruel.

Ultimately, *how* we have sex may impact our potential to be legally married. Sodomy and other socio-legally constructed crimes against nature aside, the situation of hermaphrodites is particularly relevant. Although *In re Marriage of C. and D.*<sup>131</sup> is an Australian case, the court's reasoning parallels that of the United States' courts discussed above. In *C. and D.*, the respondent had not been diagnosed as intersexed until he was twenty-one.<sup>132</sup> He continued to live as a male and married a woman shortly thereafter.<sup>133</sup> Eleven years later, his wife requested a nullification of their marriage, which the Family Court of Australia granted on two grounds.<sup>134</sup> First, the marriage was not consensual because the wife was mistaken as to her husband's identity at the time of their marriage.<sup>135</sup> Apparently, it took the wife eleven years to discover her husband had a penis and a vagina.<sup>136</sup> Second, the court defined marriage as a union between a man and a woman; since the respondent was anatomically both, the marriage was invalid.<sup>137</sup> Although outside the standard one-penis-per-union rule, this reasoning serves its purpose. If the court allowed hermaphrodites to marry, the genital boundaries that define marriage and the legitimate sexual family would become blurred. There can be no genital continuum with hermaphrodites, which could involve three or four (genital) organs in one union, because just as with transsexuals, there can be no recognition of a sexual continuum. Patriarchy mandates the "control of intersexual bodies because they blur and bridge the great divide . . . they have unruly bodies."<sup>138</sup>

### *B. Matter Over Mind?: When Identity Takes a Backseat to Anatomy*

The second underlying theme in the cases above supports the notion that nontraditional relationships, those outside the nuclear fam-

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131. 35 F.L.R. 340 (Austl. 1979).

132. *Id.* The term "intersexed" commonly refers to infants who have genitalia of two sexes, whereas "hermaphrodite" usually refers to an adult having genitals of two sexes. I use both terms interchangeably without attaching special significance to the age of an individual having multiple genitals.

133. *Id.*

134. *Id.* at 344. In dicta the court found it noteworthy that the respondent had not been able to properly consummate the marriage. *Id.* at 341.

135. *Id.* at 345.

136. The wife argued that she had never had sexual intercourse with her husband. *Id.* at 342.

137. The judge opined that the wife "did not in fact marry a male but a combination of both male and female and notwithstanding that the husband exhibited as a male, he was not." *Id.* at 345.

138. Colker, *supra* note 41, at 51-52 (citation omitted).



ily, shall be legally defined in terms of sex rather than gender. With the exception of *M.T.*, a male to female transsexual who walks, talks and looks like a woman (even under her clothes), and lives as a woman, is classified only as "ostensibly" female.<sup>139</sup> Regardless of how transsexuals perceive themselves and their own gender, the law fails to consider individualized gender identities. *M.T.*'s only saving grace was that her husband had a functional penis.<sup>140</sup>

Martine Rothblatt offers two commonly cited (non)answers as to why courts insist on placing such a high value on sexual identity while devaluing gender identity in transsexual relationships: religious orthodoxy condemned cogenital relationships as sinful, and religious leaders convinced legislators that co-genital relationships would lead to the end of the species.<sup>141</sup>

The first reason is simply inaccurate, and at best, outdated. Several religious organizations and leaders in the United States have formally, publicly argued *against* proscribing co-genital relationships, the issue of morality notwithstanding. For example, the Unitarian Universalist Association argues "that 'private consensual behavior between persons over the age of consent shall be the business of those persons and not subject to legal regulations.'"<sup>142</sup> The General Assemblies of the Presbyterian Church (USA) assert that "religious convictions held by individuals should not be imposed by law on the secular society."<sup>143</sup> Even within the Catholic Church, a bastion of homosexual intolerance, at least one group of priests have declared "opposition to all civil laws which make consensual homosexual acts between adults a crime and thus urge [ ] their repeal."<sup>144</sup> Furthermore, several Protestant denominations in the U.S., including many Quaker congregations and the Unitarian Universalist Church, recognize same-sex unions.<sup>145</sup> Therefore, with respect to transsexuality,

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139. *Anonymous v. Weiner*, 270 N.Y.S.2d at 322.

140. *See supra* note 84 and accompanying text.

141. ROTHBLATT, *supra* note 12, at 64.

142. *SEXUAL ORIENTATION AND THE LAW* 95 (William B. Rubenstein ed., 2d ed. 1997) (citing Brief on Behalf of *Amici Curiae* American Friends Service Committee, et al., at 15-25, *State v. Baxley*, 656 So.2d 973 (La. 1995)). Other religious organizations voicing similar opinions include the Episcopal Diocese of Michigan, the Union of American Hebrew Congregations, the Lutheran Church in America, the Reformed Church in America, the Disciples of Christ, and the American Jewish Congress. *Id.* at 95-99. Notably, however, each of these organizations want to remove *secular* proscriptions on homosexuality, but simultaneously advocate *moral* condemnation of cogenital relationships. *See id.*

143. *Id.* at 95 (quoting Minutes of the General Assembly (1970)).

144. *Id.* at 97 (quoting the National Federation of Priests Councils).

145. *LESBIANS, GAY MEN, AND THE LAW* 418 (William Rubenstein ed., 1993). Rubenstein further suggests that strong evidence exists to show that "the Catholic Church consecrated same-sex marriages from the fifth through at least the thirteenth century." *Id. But cf.*

one commentator has urged that "the simplistic biblical dichotomy between the sexes may now, in the light of modern insights, have to give way to a bipolar model of human sexuality."<sup>146</sup>

The second reason, the tired, overstated case for procreation as a bar to nontraditional marriages, should be put to rest altogether. Like transsexuals, some lesbian and gay camps have long sought state approval and recognition of their relationships in legal marriage.<sup>147</sup> These attempts thus far have proven futile for reasons akin to those propounded in the transsexual marriage and divorce cases.<sup>148</sup> A common justification for refusing to legally recognize these relationships is that "marriage exists as a protected legal institution primarily because of societal values associated with propagation of the human race, and it is apparent that no same-sex couple offers the possibility of the birth of children by their union."<sup>149</sup> Although medical technology, and even naturally occurring ectopic pregnancies, inform us that a vagina and uterus are not necessary to carry a fetus to term, in a female or a male,<sup>150</sup> courts refuse to sanction same-sex marriages, suggesting that partners with similar reproductive tracts are disqualified from marriage. Yet, courts do not bar heterosexual couples from marriage if they cannot physically procre-

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MCCUBBIN, *supra* note 123, at 30 (suggesting that the Medieval Church, in cooperation with the feudal ruling class, "raised the persecution of homosexuals to a hysterical [sic] pitch that has set the tone for Western attitudes and practice ever since").

146. Henry Finlay, *Legal Recognition of Transsexuals in Australia*, 12 J. CONTEMP. H.L. & POL'Y 503, 517 (1996).

147. For the touchstone articles in the same-sex marriage debate among lesbian and gay activists, see Paula Ettelbrick, *Since When Is Marriage a Path to Liberation?*, OUT/LOOK NAT'L GAY & LESBIAN Q., Fall 1989, at 20; and Thomas B. Stoddard, *Why Gay People Should Have the Right to Marry*, OUT/LOOK GAY & LESBIAN Q., Fall 1989, at 10. See also Symposium, *Debating the Fight for Same-Sex Marriage*, GAY COMMUNITY NEWS, Winter-Spring 1996, at 4 (including Cathy Cohen, *The Price of Inclusion in the Marriage Club*, at 27; Letitia Gomez, *Marriage Latino Style*, at 5; Nancy D. Polikoff, *Marriage as a Choice? Since When?*, at 26).

148. See, e.g., *Anonymous v. Anonymous*, 67 Misc. 2d 982, 984, 352 N.Y.2d 499, 500 (Sup. Ct. 1971) (holding that marriage is and always has been a contract between a man and a woman); *Singer v. Hara*, 11 Wash. App. 247, 253-55, 522 P.2d 1187, 1191-92 (1974) (finding that same-sex marriages are not included within the proper definition of marriage).

149. See *Singer v. Hara*, 522 P.2d 1195 (1974)).

150. Ectopic pregnancies, usually fatal when the embryo attaches to the fallopian tubes, can and have resulted in live, healthy births. In these cases, rather than the egg moving from the ovary into the fallopian tube, it may float into the abdominal cavity. Sperm can travel the length of the female reproductive tract, exit the fallopian tubes, and fertilize the egg. If fertilized, the resulting zygote can implant in the outer wall of the uterus or attach to the small intestine, absorbing nutrients from the mother's blood. In a couple of months, the fetus will have formed its own placenta, and is born via cesarean section. This procedure has been performed successfully in primates, but the medical field is simply not exposing the procedure to the general public. The potential for anyone, male, homosexual, or transsexual, to attach an *in vitro* fertilized egg to the small intestine and bear offspring is thus a reality. See Laurel Galana, *Radical Reproduction: X Without Y*, in THE LESBIAN READER 122 (Amazon Press ed. 1989).

ate, nor is this inability grounds for divorce.<sup>151</sup> Arguably, if underpopulation were a compelling governmental concern, the state would deny marriage licenses to heterosexuals who cannot procreate as readily as they deny licenses to lesbian and gay couples. In fact, if procreation were the only justification for such denial, states "would allow sterile or menopausal lesbians and sterile [gay] men to enter same-sex marriages."<sup>152</sup>

Religious resistance and arguments about procreation are flawed from a legal perspective. Neither position adequately explains why one single definition of family, or even gender, is correct.<sup>153</sup> The bottom line is that patriarchy cannot afford to recognize gender as a fluid concept, capable of change, and ever-changing. The seemingly complementary roles of husband/mother/child that exist, unquestioned within the sexual family, persist because each role holds its distinct place in the hierarchical structure of the family.<sup>154</sup> We categorize accordingly. The father has a penis, the mother a vagina. Clear, concise and easy. To accept that gender, or one's own gender identity, may not conform with her or his genitals threatens these rigid boundaries.

Limiting legal inquiry to one's genitals is arbitrary, since we know that transsexuals can alter their genitals. Such an inquiry is also easily manipulated by judges using anatomy as tool to measure transsexuals against their partners. That is, beyond measuring one individual's genital structure, a couple with the combined anatomical capacity to have heterosexual intercourse can be ascertained in court and have their behavior sanctioned. Such a distinction is wholly irrelevant to each individual's gender identity. If sex determines gender, why doesn't gender determine sex? The capacity to have heterosexual intercourse determines who can marry. Gender identity, in turn, one's perceived or rejected role within the sexual family, may pose a legal barrier to marriage.

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151. See Richards, *Constitutional Legitimacy and Constitutional Privacy*, 61 NYU L. REV. 800, 835 (1986) (rejecting the contention that reproduction is central to marriage).

152. See Andrew H. Friedman, *Same-Sex Marriage and the Right to Privacy: Abandoning Scriptural, Canonical, and Natural Law Based Definitions of Marriage*, 35 HOW. L.J. 173 (1992) (questioning why states do not have similar procreation-only laws governing heterosexual marriages).

153. Taboos against same-sex relationships are a socially constructed phenomenon. In ancient Greece, for example, homosexual and heterosexual relationships were recognized equally under law. See MCCUBBIN, *supra* note 123, at 21-24. In fact, prior to the sexual subjugation of women, group marriages were common. *Id.*

154. See Wilkinson & White, *Constitutional Procreation for Personal Lifestyles*, 62 CORNELL L. REV. 563, 572 (1979) (finding that recognition of homosexual marriages would undermine the stability of the nuclear family which "has been fortified by a conception of marriage as an exclusively heterosexual union").

# V. EXPLORATIONS TOWARD A RESOLUTION: MARRIAGE AND PRISONS COMPARED

some guy designed  
 these shoes i use to walk around  
 some big man's business  
 turns a profit every time  
 i lay my money down  
 some guy designed this room  
 i'm standing in  
 another one built it  
 with his own tools  
 who says i like right angles  
 these are not my laws  
 these are not my rules

- Ani DiFranco, *i'm no heroine*<sup>155</sup>

Vain trifles as they seem, clothes have, they say, more important  
 offices than merely to keep us warm. They change our view of the  
 world and the world's view of us.

- Virginia Woolf, *Orlando*<sup>156</sup>

There are no hard and fast solutions to deconstructing sexual  
 apartheid. Understanding the ideology behind the sexual family,  
 however, in connection with how the socio-legal system confines all  
 people to rigid bipolar sex and gender roles is a beginning.

## A. *The Marriage Trap*

Fineman suggests that we dismantle the existing concept of the  
 sexual family which feeds patriarchy, in exchange for recognizing  
 other, intergenerational bonds.<sup>157</sup> The bond we traditionally per-  
 ceive as between mother and child should not necessarily be con-  
 fined to rigid gender definitions. A man may fulfill the same roles  
 ascribed to the wife/helpmate in the sexual family when he partici-  
 pates in duties traditionally associated with motherhood, as in caring  
 for a child or a disabled relative. If we begin to recognize, and even  
 encourage disruption of the norm, the rigid gender assignments we

155. ANI DIFRANCO, *i'm no heroine*, on *IMPERFECTLY* (Righteous Babe Records 1992).

156. VIRGINIA WOOLF, *ORLANDO* 187 (1928).

157. See FINEMAN, *supra* note 114, at 5.

hold for each role, husband/wife/child, become fluid and continuous.

Traditional family roles are dependent upon strict bipolar models of male and female.<sup>158</sup> Just as patriarchy promulgates polar opposites in marriage, the husband/wife dyad, the legal system recognizes only males and females and refuses to see transsexuals, indeed all people, as existing on a continuum of gender identity. The system punishes those who do not fit neatly within bipolar categories. For example, hermaphrodites are forced to have "corrective" surgery in infancy to eliminate their intersexuality,<sup>159</sup> and transsexuals are forced into a legal nonexistence when they have surgery as adults to conform their sexual genitalia with their perceived gender identity.

Marriage, as a family construct, should not be based on sex, though the concept of "sex" to which I refer is slightly different from that which Fineman addresses.<sup>160</sup> I agree that marriage, as a conceptual scheme, should not occupy the fundamental basis for what we call "family." But in discussing marriage, sex and gender should not even be an issue. To go one step further, we could question the whole concept of couples. Why can't three or five or ten people get married?<sup>161</sup> Marriage exists to maintain male domination over women - a system of ownership.<sup>162</sup> More than two spouses would blur

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158. See generally Mark Strasser, *Family, Definitions, and the Constitution: On the Antimiscegenation Analogy*, 25 SUFFOLK U. L. REV. 981, 1003 (1991) (asserting that the traditional "nuclear family" arrangement is no longer the only model of family life in the united states).

159. See, e.g., BORNSTEIN, *supra* note 7, at 57. Bornstein asks, "What if you had been born a hermaphrodite, with some combination of both genitals?" *Id.* Western medicine dictates that "[a] surgeon would have 'fixed' you - without your consent, and possibly without the consent or even the knowledge of your parents, depending on your race and economic status." *Id.*

160. For the most part, Fineman looks at sex in terms of sexual affiliations, whereas I have concentrated largely on sex in terms of genitalia.

161. See *supra* note 123 (noting that sexual subordination of women gave rise to the male-dominated model of monogamous marriage and family that exists still today). Perhaps non-monogamy is not far from mainstream view. In Boulder, Colorado, for example, a group called "Loving More" actively practices "polyamory," which they define as multiple sexual relationships. Bill Husted, *James Earl Jones Trumpets Buell Extravaganza*, DENVER POST, Feb. 18, 1997, at A2. In fact, the group publishes a magazine promoting "polyamory" and boasts 10,000 subscribers. *Id.* One member suggested, "Odds are, your monogamous relationship won't last, so why not acknowledge that up front?" *Id.* These "four-or-more-somes" meet over the Web and hold marriage ceremonies with cakes holding up to six figurines. *Id.*

162. See MCCUBBIN, *supra* note 123, at 17-22. In a warning, Black lesbian feminist poet Audre Lorde captured both the perversity of white patriarchal tradition and the repercussions of black men adopting those ideals:

It is not the destiny of Black america to repeat white america's mistakes. But we will, if we mistake the trappings of success in a sick society for the signs of a meaningful life. If Black men continue to define "femininity" instead of their own desires, and to do it in archaic European terms, they restrict our access to each other's energies. Freedom and future for Blacks does not mean absorbing the white male disease of sexism.

AUDRE LORDE, *SISTER OUTSIDER* 63 (1984).

the husband-wife, dominant-subordinate bipolar roles that make marriage so valuable to men.<sup>163</sup> Even the thought of two or more wives per husband is dangerous because wives might realize they can satisfy each other, apart from their husband.<sup>164</sup> The one-penis-per-union standard reinforces this bipolar model.

Insofar as finding a legal paradigm befitting transsexual marriages is concerned, the issue appears to be more about recognition than right. In other words, transsexuals with a valid birth certificate generally marry without incident. In most cases, judges only step in to deny transsexual identity when the marriage is challenged after-the-fact.<sup>165</sup> As the cases show, even when transsexuals attempt to coordinate their anatomical sex with their gender identity they will not be recognized in a legal marriage, primarily because crossing genders, crossing roles, violates the bipolar model of sex - male or female.<sup>166</sup>

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163. The Mormon Church was the last established religion in the United States known to actively practice polygamy, usually one man having several wives. The Church itself abolished this practice, which non-Mormons named the "Mormonistic ulcer," in 1890. HILL & CHEADLE *supra* note 100, at 88.

164. Significantly, although the practice of bigamy and polygamy is federally prohibited, each may be practiced under the rubric of freedom of religion, as long as all concurrent marriages are with members of the same religion. Brian Hosford, *Conveying Respect of Society*, THE IRISH TIMES, Nov. 20, 1995, at 21.

Polygamy, the practice of one spouse (usually a man) having many other spouses (wives), is in fact documented in United States history, and is still practiced by men in parts of this country. For example, one man had seven different wives across several states in 1996. Rob Howe, Cathy Free, Lynda Wright, Lorna Grisby & Ellise Pierce, *Princess Brides: John Weaver Said All the Right Things, But When the Law Stepped in, His Many Wives and Loves Realized He Was Mr. Wrong*, PEOPLE MAGAZINE, July 8, 1996, at 34. See *Bigamy Not Protected*, Judge Says, FLORIDA TODAY, May 30, 1996, at 6B (reporting a state circuit judge's ruling against a man who had two wives. The judge held that "bigamy is pernicious to the best interests of society and to the best interests of the institution of marriage." *Id.*)

Whether the practice of polygamy is culturally or ethnically enforced has also been a topic of debate. See, e.g., James W. Clarke, *Black-on-Black Violence*, SOCIETY, July 17, 1996, at 46 (suggesting that because white law enforcers applied white-constructed proscriptions differently to black citizens in the early twentieth century, some social mores differ across racial lines today). In the 1930s in Mississippi, for example, if black tenant farmers worked hard enough, landowners would exempt them from certain laws "that whites considered unimportant because violating them had little impact on the white community." *Id.* Thus, proscriptions against polygamy, bigamy, adultery and assaultive behavior were not legally punished, as long as the behavior occurred within the black community. *Id.* As a result, racial differences may exist today with respect to the types of behaviors we define as "wrong." See generally Asuncion Lavrin, *Lives of the Bigamists: Marriage, Family, and Community in Colonial Mexico*, 28 J. LATIN AM. STUD. 510 (1996) (exploring the historical origins, acceptance, and treatment of bigamy in colonial Latin America).

165. See *supra* Part III B.-D.; Anonymous v. Mellon, 398 N.Y.S. 2d 99 (Sup. Ct. 1977) (declaring a marriage involving a transsexual null and void); see also In re London, 513 N.E.2d 828 (Ohio Prob. Ct. 1987) (refusing to grant a marriage license to a postoperative male to female transsexual and her male partner).

166. See Harper & Clifton, *Heterosexuality: A Prerequisite to Marriage in Texas?*, 14 S. TEX. L.J. 220, 247 (1972-73) (arguing that what makes marriage "special" is that it can only exist between heterosexuals).

Legally speaking, these boundaries cannot be relaxed by surgical alteration. Of course, if gay and lesbian marriages become legally available, these anatomical, gender, and sex categories will no longer be an issue. Generally, recognition of same-sex marriages may, in some ways, benefit transsexuals who want to marry because this external pressure to define oneself within a specific sex will be eliminated. The flip side, however, is that such recognition may further blur our view of how legal standards erase transsexual identity.

When I say transsexual identity is erased or impossible, I refer to judicial refusal to acknowledge, much less permit, these relationships. Beyond that refusal, however, is a more perverse erasure - a rejection of transsexual gender identity. Under our conventional understanding of sexual orientation, the relationship between M.T. and J.T., for example, would have been classified as homosexual prior to M.T.'s sex reassignment surgery, even though J.T. identified as heterosexual.<sup>167</sup> After the surgery, the court deemed the same on-going relationship as heterosexual, not because they identified as heterosexual, (M.T. still identified as homosexual),<sup>168</sup> but because M.T.'s operation altered the genital configuration of the couple from co-genital to cross-genital. The decision recognized their heterosexual sexual capacity, *not* their gender identities. If the *M.T.* court, other courts, and the legal system in general accepted one's own *chosen* and *asserted* gender identity, rather than looking down the pants of every couple seeking recognition of their relationship,<sup>169</sup> we would be one step closer to making transsexual existence possible under law.<sup>170</sup>

### B. Lessons from the Prison Dilemma

I have argued that the legal system should recognize the concept of a gender continuum in matters concerning transsexual relationships. The problem with gender categorization in the marriage and divorce cases above is that courts are looking at the ability of partners to have heterosexual intercourse.<sup>171</sup> The factor those courts should

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167. 355 A.2d at 208.

168. *Id.*

169. In fact, this analysis should not be limited to couples, but should consider nonmonogamy and include threesomes, foursomes, or however many individuals share in a given relationship as defined by those individuals. That analysis is, however, beyond the scope of this paper.

170. See *supra* Part I (explaining why transsexuals, with respect to their relationships with others, are legally impossible beings).

171. Their analysis does not, of course, apply to traditionally recognized male and female heterosexual couples. See *supra* note 149 and accompanying text (questioning the practice of allowing marriages between heterosexuals who cannot procreate, but barring marriage between co-genital partners for precisely that reason).

have instead considered, and better still, acknowledged, is the gender identity of each party.<sup>172</sup> Arguably, though, dissolving the categories we assign on the basis of genitalia, as opposed to a chosen gender identity, may be easier to discard when the issue is sanctioning intimate relationships. Indeed, as I have noted elsewhere, gender categorization will be moot in this context if same-sex marriages become legally available in the United States.<sup>173</sup>

In other contexts, however, as in assigning transsexuals convicted of crimes to sex-segregated prisons, the incentive to blur bipolar gender categories is perhaps less salient. Consider these scenarios: a guard corners a male to female transsexual in a bathroom of an all-male prison, forcibly undresses her and sexually assaults her;<sup>174</sup> an inmate brutally beats and rapes a transsexual prisoner shortly after officials release her into the general prison population;<sup>175</sup> a transsexual prisoner is forced to strip in a crowd of inmates, guards, and other officials shouting derogatory comments about her physical appearance.<sup>176</sup> In this section I will briefly look beyond the one-penis-per-union analysis to explore the prison dilemma and consider whether rigid gender categories have merit in other contexts, and if so, how.<sup>177</sup>

The idea that the state may have a valid reason<sup>178</sup> to assign a sex or gender label to an individual is poignantly raised in the 1994

172. In other words, courts measured transsexuals in comparison with the partners they chose, rather than in consideration of the gender with which they identify.

173. Again, I am not advocating that the queer rights movement seek legalization of same-sex marriages, but rather acknowledging that it may happen.

174. *Murray v. United States Bureau of Prisons*, 106 F.3d 401, 405 (6th Cir. 1997). On another occasion, prison officials placed Murray in solitary confinement because an inmate assaulted her. *Id.* at 403. Once in the prison cafeteria, two guards cornered Murray, harassed her about her appearance, and conducted a pat-down search during which one guard purposely fondled her breasts. *Id.*

175. *Farmer v. Brennan*, 114 S. Ct. 1970 (1994).

176. *Meriwether v. Faulkner*, 821 F.2d 408 (7th Cir. 1987).

177. For analysis of legally-imposed gender assignments in the labor context, see *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984) (holding that Title VII's sex-based employment discrimination protections do not apply to transsexuals, where an airline hired Kenneth Ulane as a pilot in 1968, but fired her as Karen Ulane, shortly after her sex reassignment surgery in 1980).

178. From a Constitutional perspective, the level of scrutiny applied to sex-based classifications has long been intermediate scrutiny, where the state can show a substantial government interest in maintaining the distinction. *Craig v. Boren*, 429 U.S. 190, 193 (1976) (setting forth the standard that "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives"). After *United States v. Commonwealth of Virginia*, however, the Court may be on its way to raising sex-based classifications to strict scrutiny, requiring a compelling governmental interest. 96 F.3d 114 (1996) (stating that sex-based classifications should be subject to "heightened scrutiny"). An equal protection analysis in the following prison cases, though, is beyond the scope of this paper.



Supreme Court decision *Farmer v. Brennan*.<sup>179</sup> The case involved Dee Farmer, a male to female "pre-operative"<sup>180</sup> transsexual convicted of credit card fraud in 1986, when she was eighteen years old.<sup>181</sup> Speaking for the Court, Justice Souter described Farmer's "feminine" appearance, noticeably avoiding gender specific pronouns, as follows:

For several years before being convicted . . . petitioner wore women's clothing, (as petitioner did at the 1986 trial), underwent estrogen therapy, received silicone breast implants, and submitted to unsuccessful 'blackmarket' testicle removal surgery. Petitioner's precise appearance in prison is unclear from the record before us, but petitioner claims to have continued hormonal treatment while incarcerated by using drugs smuggled into prison, and apparently wears clothing in a feminine manner, as by displaying a shirt 'off one shoulder.'<sup>182</sup>

Farmer had been segregated from other inmates for her own "safety concerns" in at least one prison.<sup>183</sup> Nonetheless, in 1989, prison officials transferred Farmer from a federal correctional facility to an all-male federal penitentiary which "hous[ed] more troublesome prisoners."<sup>184</sup> Ultimately, within two weeks of her transfer, an inmate brutally beat and raped Farmer in her cell.<sup>185</sup> Farmer filed a complaint stating that "prison officials placed her in the penitentiary population knowing that, as a transsexual, she inevitably would be targeted for sexual attack at an institution with a history of violence

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179. 114 S. Ct. 1970 (1994).

180. As noted earlier, the term "pre-operative" is usually a misnomer, given that many transsexuals may undergo a number of anatomically altering operations from facial surgery to mastectomies or breast implantations prior to, if ever, having genital re/construction. For consistency with legal usage, I use the term pre-operative in this context to refer to individuals who are pre-genital-re/construction.

181. 114 S. Ct. at 1975. Farmer is now serving a twenty-year federal sentence. *Id.* at 1986 (Blackmun, J., concurring).

182. *Id.* at 1975 (citations omitted). Briefs filed in support of Farmer noted the prison officials' admission that because of Farmer's "youth and feminine appearance" she is "likely to experience a great deal of sexual pressure in prison." *Id.* at 1984. See generally *Murray*, 106 F.3d at 402 (condoning prison officials' decisions to repeatedly place Murray in solitary confinement for not wearing a brassiere).

183. *Farmer*, 114 S. Ct. at 1975.

184. *Id.* The record is unclear, but apparently officials transferred Farmer in part because she caused disciplinary problems. *Id.*

185. *Id.* at 1975. In remarking on Farmer's "brutal" attack, Justice Blackmun noted, "[t]he horrors experienced by many young inmates, particularly those who, like petitioner, are convicted of nonviolent offenses, border on the unimaginable." *Id.* at 1987. "Although formally sentenced to a term of incarceration, many inmates discover that their punishment, even for nonviolent offenses like credit-card fraud or tax evasion, denigrates into a reign of terror unmitigated by the protection supposedly afforded by prison officials." *Id.* at 1987 (Blackmun, J., concurring). According to Justice Thomas, "[r]egrettably, '[s]ome level of brutality and sexual aggression among [prisoners] is inevitable no matter what the guards do . . . unless all prisoners are locked in their cells 24 hours a day and sedated.'" *Id.* at 1990 (Thomas, J., concurring).

and inmate assaults,"<sup>186</sup> in violation of her Constitutional protection against cruel and unusual punishment.<sup>187</sup> The Court held that Farmer's placement did not violate the Eighth Amendment, because that protection applies only to cruel and unusual "punishment," not "conditions" of imprisonment.<sup>188</sup>

Although the Court entertained the idea that Farmer, as a transsexual with "feminine characteristics," did not belong in an all-male prison in the first place, the decision ultimately held that prison officials had not acted with reckless disregard for her safety by exposing her to the general prison population.<sup>189</sup> *Farmer* does not specifically mandate, however, that all transsexuals can be placed in prisons regardless of their gender.<sup>190</sup> The Court acknowledged the present standard used to assign transsexuals to single sex prisons: "It is the practice of the federal prison authorities to incarcerate persons who have completed sexual reassignment with prisoners of the transsexual's new gender, but to incarcerate persons who have not completed it with prisoners of the transsexual's original gender."<sup>191</sup>

Farmer's tragic, but not uncommon, situation and the Supreme Court's indifferent response,<sup>192</sup> calls into question the role of sex-based, genital distinctions in the prison context.<sup>193</sup> For the moment, I will assume that sex-segregated prisons are necessary, and therefore the state will, at times, need to assign a sex or gender to individuals.<sup>194</sup> Although some commentators argue that rapes are inevitable

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186. *Id.* at 1975. Compare *Dothard v. Rawlinson*, 433 U.S. 321, 324 (1977) (Marshall, J., dissenting) (admonishing the majority for permitting exclusion of female correctional officers from working at an all-male prison on the basis that women are innately sexual objects. The decision relies on the "depraved conduct of inmates" to discriminate against and "punish women because their very presence might provoke sexual assaults." *Id.*).

187. U.S. CONST. amend. VIII.

188. 114 S. Ct. at 1979. The Court further stated that prison officials will be held liable for denying humane conditions under the Eighth Amendment only if they "know that inmates face a substantial risk of serious harm and disregard that risk by failing to take reasonable measures to abate it." *Id.* at 1984. The Court remanded the case for determination as to whether the district court gave too much deference to allegations that Farmer had not voiced objections to the transfer. *Id.* at 1985.

189. 114 S. Ct. at 1976.

190. See *id.* at 1975 (acknowledging different standards applied to transsexual prisoners).

191. *Id.* at 1975 (citing *Farmer v. Haas*, 990 F.2d 319, 320 (1993)).

192. *Id.* at 1970. See, e.g., *Murray*, 106 F.3d at 401 (rejecting a transsexual's claims that on several different occasions inmates and officials verbally harassed and physically assaulted her).

193. Most prisons, federal and state, are segregated on the basis of sex, while some jails house both men and women, but in separate sections. See SEX DISCRIMINATION AND THE LAW *supra* note 120, at 286.

194. See *infra* notes 280-88 and accompanying text (posing the debate over whether sex-segregation is useful or necessary in prisons).

in prisons,<sup>195</sup> no amount of administrative efficiency justifies placing a transsexual in an environment to face almost certain assault. The standard applied in *Farmer* is inadequate.<sup>196</sup> A new standard for assigning sex or gender to prisoners should be adopted.

At least three possible criteria could be applied in categorizing inmates for assignment to single-sex prisons: chromosomes; genitalia, congenital or constructed; and gender identity.

### 1. Assignment by Chromosomes

Using chromosomal analysis to determine who goes where, in essence, is worse than the standard already in place.<sup>197</sup> Through chromosome-based assignments, a male to female transsexual who has undergone genital reassignment, for example, would go to an all-male prison. She would no doubt be in constant jeopardy of rape, assaults and humiliation.<sup>198</sup> Even *Farmer*, who had not had genital re/construction was singled out, assaulted and raped. This standard is simply not plausible and is not currently applied at the federal prison level.<sup>199</sup>

### 2. Assignment by Genitalia

The second alternative, using genitalia as a criteria for assignment, is the standard currently used. This standard distinguishes between congenital and constructed genitalia, but, as *Farmer* illustrates, this criteria opens some transsexuals to misplacement and inmate attacks.<sup>200</sup> To reiterate, the standard provides for sending "post-operative" transsexuals to single-sex facilities consonant with their gender identity. Transsexuals who have not had genital re/construction, on the other hand, are assigned to a facility conso-

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195. See *supra* note 185; ROTHBLATT, *supra* note 12, at 62 (arguing that "[c]lassifying people by sex so that they can be incarcerated accordingly has done nothing to prevent jailhouse rape").

196. "What every population subgroup needs is to be treated as persons, not as demographics." ROTHBLATT, *supra* note 12, at 86.

197. Use of chromosomal analysis has been denied in the context of birth certificate changes. See *In re Anonymous*, 293 N.Y.S. 2d 834 (Civ. Ct. 1968) (rejecting a chromosomal test, stating that "were it not for the fact that the petitioner's background was known to the court, the court would have found it impossible to distinguish this person from any other female." *Id.* at 838.). See also *supra* notes 65-71 (discussing the underlying assumptions in the *Anonymous* court's analysis).

198. See, e.g., *Meriwether v. Faulkner*, 821 F.2d 408 (7th Cir. 1987) (holding that a transsexual had a valid cause of action under the Eighth Amendment where prison officials, *inter alia*, failed to protect her from sexual assaults and other acts of violence and forced her to strip in front of a guard and other inmates).

199. For an explanation of standards applied at other prison levels, see *supra* note 190.

200. While I recognize inmate assaults also occur for reasons unrelated to sex, in this analysis I am proposing ways to eliminate a specific risk factor.

nant with their congenital sex, regardless of how far along they may be in altering their anatomy.<sup>201</sup> In addition, the standard is inadequate because it invites a problematic slippery slope and raises significant issues regarding class privilege, as I will discuss below.<sup>202</sup>

After being assigned under the current standard, Farmer sued prison officials in a separate case for denying her hormonal and psychiatric treatment.<sup>203</sup> Upon recounting the federal prison standard for assigning transsexuals to single-sex prisons,<sup>204</sup> the Circuit judge described how Farmer had been prescribed continuing estrogen therapy at the age of fourteen, had breast implants, but still had a penis.<sup>205</sup> The judge explained,

the usual next step would have been an operation to remove the male sexual organs and create, from penile tissue, a simulacrum of a vagina. However, for reasons that are unclear Farmer did not have the operation - at least not one performed by a surgeon. Farmer did have what the briefs call a 'black market' operation to remove her testicles, but, odd as it may seem, the operation was unsuccessful. Yet, while retaining the male sex organs, Farmer lived as a woman for five years before being imprisoned.<sup>206</sup>

Farmer had been taking estrogen, which, among other things, softens skin texture and causes breast growth.<sup>207</sup> She had had breast implants. She had attempted to remove her testicles. Her penis remained intact, presumably so that surgeons could invert it to resemble a vagina.<sup>208</sup> Suppose Farmer's back alley surgery had been successful, and she had been arrested one day before surgery to invert her penis. She may have had all intentions of having the type of surgery required under the current prison assignment standard, but would have missed her opportunity to follow through at the last

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201. See, e.g., *Murray*, 106 F.3d at 401 (holding that even though Murray had been castrated and had breasts, she still had a penis, which was a correct basis for assignment to an all-male prison); *Farmer*, 114 S. Ct. 1970 (1994) (finding presence of an external penis as a proper basis for assignment to an all-male prison); *Meriwether*, 821 F.2d 408 (7th Cir. 1987) (having an external penis was a sufficient basis upon which to assign a transsexual to an all-male prison).

202. A host of other issues also affect this standard, like racism, homophobia, and sexism, which are equally significant, but beyond the scope of this discussion.

203. *Farmer v. Haas*, 990 F.2d 319 (7th Cir. 1993).

204. *Id.* at 320.

205. *Id.*

206. *Id.*

207. BORNSTEIN, *supra* note 7, at 18-19. Some transsexuals also experience genital reduction, water retention and mood swings. *Id.* at 19.

208. See generally BORNSTEIN, *supra* note 7, at 15-19 (explaining the surgical processes involved in male to female sex reassignment).

moment.<sup>209</sup> Perhaps what is worse, officials denied her access to estrogen therapy in the all-male prison.<sup>210</sup> Farmer is sentenced not only to thirty years of incarceration, but to thirty years in a body that does not fit - all because she had a penis, and despite being "ostensibly" female.<sup>211</sup>

The current standard of placing pre-operative transsexuals in all-male prisons is indeed cruel and unusual punishment, because medical providers in such facilities have denied transsexuals unique care<sup>212</sup> and therapy.<sup>213</sup>

In *Meriwether v. Faulkner*,<sup>214</sup> prison authorities placed Lavarita Meriwether, a pre-operative<sup>215</sup> male to female transsexual, in an all-male prison.<sup>216</sup> The medical director at the facility told her that for as long as she was in that facility, "she would never receive the medication [estrogen] and that he would make sure of this."<sup>217</sup> Meriwether did not receive the estrogen treatments she had been receiving for the previous nine years<sup>218</sup> and consequently developed severe withdrawal symptoms.<sup>219</sup> Also, prison physicians refused to treat complications she experienced related to her silicone breast im-

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209. Sex reassignment is time-consuming. According to Bornstein, genital surgery is just one step in a long process of sex reassignment. The process begins with two years of psychological therapy, during which the individual may begin hormonal treatments. Two therapists must agree that genital surgery is acceptable for a particular individual, even before that person may begin to look for a cooperative surgeon. BORNSTEIN, *supra* note 7, at 15-19.

210. Although the Supreme Court decision states that Farmer had been able to continue her estrogen treatments, she did so only through smuggling the hormone into prison. Her source was not guaranteed and officials did not provide the treatment to her. *Farmer*, 114 S. Ct. at 1972.

211. See, e.g., *In re Anonymous*, 293 N.Y.S.2d 834, 835 (Civ. Ct. 1968) (finding that a transsexual would not be classified as the sex of her chosen gender, absent "surgical intervention").

212. See, e.g., *Meriwether*, 821 F.2d at 410; *Murray*, 1997 WL 34677 at \*2 (holding that hair and skin products necessary for a male to female transsexual prisoner to maintain a feminine appearance may be withheld as part of the "routine discomfort [which] is part of the penalty that criminal offenders pay").

213. See *Farmer*, 114 S. Ct. at 1975 (stating that Farmer had to smuggle estrogen into prison); *Meriwether*, 821 F.2d at 410 (reporting that Meriwether had been denied all previous chemical and psychiatric treatment once her incarceration began).

214. 821 F.2d at 410. In 1982, a federal district court sentenced Lavarita Meriwether, a male to female transsexual, to 35 years for committing a murder. *Id.*

215. The court designated Meriwether as "pre-operative" even though she had had several operations to augment her facial structures, hips, and breasts. *Id.* at 410.

216. The court described Meriwether as a person who "has feminine mannerisms, wears makeup and feminine clothing and undergarments when permitted, considers herself to be a female, and in fact has been living as a female since the age of fourteen." *Id.* at 410.

217. *Id.* at 410 (citation omitted).

218. *Meriwether*, 821 F.2d at 410. From the first day of her incarceration, prison physicians denied Meriwether all medical treatment, "chemical, psychiatric, or otherwise." *Id.*

219. *Id.* The court does not specify what type of symptoms she suffered.

plants.<sup>220</sup>

Similarly, Michelle Murray, a male to female transsexual, challenged prison officials' refusal to provide her with adequate hormonal therapy in *Murray v. United States Bureau of Prisons*.<sup>221</sup> According to the court, the "policy of the Bureau of Prisons is to provide a transsexual prisoner with the level of female hormones necessary to ensure that she neither progresses nor regresses in the development of feminine attributes."<sup>222</sup> Because transsexuality is a "recognized medical disorder," the court held that transsexuals generally need "some sort of treatment" such that to completely withhold any treatment would violate the Eighth Amendment.<sup>223</sup> In Murray's case, prison officials had been giving her a lower dosage of hormones than she had been receiving prior to incarceration.<sup>224</sup> In rejecting Murray's claim, the court emphasized that although Murray had a right to some level of medical treatment, she did not have a right to any particular treatment, like estrogen therapy, and with respect to transsexual inmates, courts "should defer to the informed judgment of prison officials as to the appropriate form of medical treatment."<sup>225</sup> The court essentially ignored Murray's need for hormonal treatment and placed her and other transsexual inmates at the potentially unqualified,<sup>226</sup> merciless hands of prison officials like the one who purposefully prevented Meriwether from receiving hormones in prison.

In addition to hormone therapy, Murray and Meriwether had surgically altered their bodies.<sup>227</sup> The *Meriwether* court explains in detail

220. *Id.*

221. 106 F.3d 401 (1997).

222. *Id.* at 403.

223. *Id.* (stating that "deliberate indifference to medical needs" would be a valid claim under the Eighth Amendment).

224. *Id.* Even though Murray had brought this discrepancy in dosages to prison physicians' attention on several occasions at several different prisons, officials consistently refused to correct her dosages. *Id.*

225. *Murray*, 106 F.3d at 404 (quoting *Meriwether v. Faulkner*, 821 F.2d 408, 413 (7th Cir. 1987); see also *Brown v. Zavaras*, 63 F.3d 967, 970 (10th Cir. 1995) (holding that a male to female transsexual had a right to medical treatment, but not necessarily estrogen therapy); *White v. Farrier*, 849 F.2d 322, 327 (8th Cir. 1988) (stating that a transsexual prisoner's right to medical treatment does not include hormone therapy).

226. Specialized therapists diagnose and work with these individuals who have, as it is medically defined, "gender dysphoria." Hormone therapy is prescribed in conjunction with psychological therapy - a mode of insight and treatment not likely to be available to transsexuals through the general practitioners found in state and federal prisons. See BORNSTEIN, *supra* note 7, at 14-15 (describing the types of therapy transsexuals usually receive).

227. *Murray*, 106 F.3d at 401 (noting that she was castrated and had breast implants); *Meriwether*, 821 F.2d at 410 (stating that Meriwether's hormone treatments had chemically castrated her).

how Meriwether had "undergone surgical augmentation of her facial structure, breasts, and hips so as to alter her body shape to resemble that of a biological female."<sup>228</sup> Despite having multiple operations to further her sex reassignment, however, officials placed her in an all-male prison.<sup>229</sup> Likewise, in Murray's case, the Sixth Circuit held that despite her hormone therapy, breast implants and castration, Murray "remain[ed] anatomically male" and thus the Federal Bureau of Prisons properly assigned her to an all-male prison.<sup>230</sup> Neither had had genital surgery to invert their penises.<sup>231</sup> In essence, the only surgery that matters under the current standard is manipulation of a penis.<sup>232</sup> Unfortunately, as *Farmer*, *Meriwether*, and *Murray* show, no matter how much an individual looks like a biological female, she will be assigned according to the presence or absence of an external penis.<sup>233</sup>

Finally, these cases beg the question, what is "genitalia," or the basis upon which federal prisons determine who has "completed sexual reassignment"?<sup>234</sup> If the standard refers to presence or absence of "external genital organs,"<sup>235</sup> *Farmer*, *Meriwether* and *Murray* could be assigned, as they were, to all-male prisons because neither had removed her external penis before the moment of assignment.<sup>236</sup> A female to male transsexual, on the other hand, would have to surgically remove his vulva<sup>237</sup> to be rid of female genitalia. Not all female to male transsexuals choose to undergo this procedure.<sup>238</sup> Moreover, based solely on external genitalia, many women who have been cir-

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228. *Id.*

229. *Id.*

230. *Murray*, 106 F.3d at 401.

231. *Id.*; *Meriwether*, 821 F.2d at 410.

232. That is, a female to male transsexual must have a "simulacrum" of an attached penis, a male to female transsexual must have a "simulacrum" of a vagina.

233. An electronic database search yielded no prison cases involving a female to male transsexual. Presumably, under the current anatomy-based standard, a "pre-operative" female to male transsexual, i.e., without an external, attached penis, would be assigned to a prison based on his congenital sex.

234. See *supra* note 191 and accompanying text (stating the standard for sex and prison assignments).

235. WEBSTER'S COLLEGIATE DICTIONARY 486 (10th ed. 1994) (claiming this definition as the primary usage of the term) [hereinafter WEBSTER'S].

236. See *id.* at 858 (defining "penis" as "a male organ of copulation").

237. "The external parts of the female genital organs." *Id.* at 1326.

238. Likewise, not all male to female transsexuals undergo genital reconstruction. Bornstein refers to these people as "non-operatives" because they choose not to reconfigure their anatomy to fit their gender, despite social mandates to do so. BORNSTEIN, *supra* note 7, at 119. See Taitz, *supra* note 25, at 56 (stating that most transsexuals do not undergo complete reassignment surgery due to financial restrictions as well as physical or psychological constraints).

cumcised<sup>239</sup> but identify as women, would qualify under the present standard, to be assigned to an all-male prison. If "genitalia" refers generally to "the organs of the reproductive system,"<sup>240</sup> a male to female transsexual like Farmer, whose testicle removal was unsuccessful, and Meriwether, whose testicles were chemically reduced but physically apparent, would be sent to an all-male prison, regardless of whether they had reconstructed other organs. Moreover, with respect to both male and female transsexuals, what constitutes "reproductive" organs?<sup>241</sup> Alternatively, "genitalia" could refer simply to "a sexual organ."<sup>242</sup> In that sense, Farmer, Meriwether, and Murray, having enlarged breasts and "ostensibly female" attributes, as well as male sexual organs, could have been assigned to either sex/prison. A female to male transsexual could remove her breasts, get a penile prosthesis, and still have a vulva.<sup>243</sup> She, too, could be arbitrarily assigned to a specific prison.

The only way to avoid this trap, this rejection of one's chosen and performed gender,<sup>244</sup> is to undergo complete surgical sex reassignment as early as possible.<sup>245</sup> The surgery, however, is costly, time-consuming, and can only be performed with approval of a psychotherapist who has evaluated the individual's choice over one to two years.<sup>246</sup> The cost of the surgery itself, including one to two weeks in the hospital and the surgeon's fees amounted to approximately eight thousand dollars in 1985.<sup>247</sup> When inflation and lost wages are factored into that amount, the costs are significant. Also, this surgery is

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239. See generally Layli Miller Bashir, *Female Genital Mutilation in the United States: An Examination of Criminal and Asylum Law*, 4 AM. U. J. GENDER & L. 415, 420-21 (1996) (describing various degrees of female circumcision, or "genital mutilation," two of which involve removal of the vulva).

240. WEBSTER'S, *supra* note 235, at 486.

241. See Part III.D.2. (explaining the impossibility of procreation for most transsexuals).

242. WEBSTER'S, *supra* note 235, at 485-86 (defining "genital" as "of, relating to, or being a sexual organ"). The term "sexual" is defined as "of, related to, or associated with sex or the sexes," including differentiation. *Id.* at 1074.

243. Likewise, if female to male transsexuals could have a prosthetic device or a surgically constructed, though not fully functional penis, they would not be assigned to a male prison, the prison of their surgically reassigned sex - even after surgery. If female to male transsexuals opt for incarceration with inmates of their same gender identity, these individuals would be denied that recognition, based on their lack of a functional penis.

244. BORNSTEIN, *supra* note 7, at 119.

245. See BORNSTEIN, *supra* note 7, at 217 (expanding the definition of transsexuals to include not only pre-operative and postoperative persons, but also "nonoperative" transsexuals).

246. Pearlman, *supra* note 8, at 842 (citing *Doe v. Boeing Co.*, 846 P.2d 531, 533 (Wash. 1993)); BORNSTEIN, *supra* note 7, at 15-16. A second psychotherapist's opinion is necessary before a surgeon may perform a genital reassignment. *Id.*

247. BORNSTEIN, *supra* note 7, at 18 (noting that in 1985, she spent nine days in the hospital at a rate of four thousand dollars for hospital care and four thousand dollars for her surgeon).



not available in all hospitals, so many transsexuals also incur travel expenses.<sup>248</sup> Finally, sex reassignment surgery is not currently covered by most governmental health insurance policies,<sup>249</sup> therefore, "[d]ue to financial requirements, the fulfillment of the surgical dream is subject to cultural and class constraints; cosmetic and genital conversion surgery is available primarily to the middle and upper classes."<sup>250</sup> Consequently, low income transsexuals will suffer most when genitalia is used as the basis for categorization, as in prison assignments.<sup>251</sup>

### 3. Assignment by Gender Identity

The third possible standard is based on gender identity. This standard is not only consistent with my analysis in the marriage and divorce cases, but also with the individual's chosen and performed gender identity. Under this standard, the law would focus on an individual's gender performance, rather than on the stage of surgical reassignment a transsexual has attained. I introduce the concept of "gender performance" to underscore, particularly in this context, that "[w]e perform our identities, which include gender, and we perform our relationships, which include sex. Transgender is simply identity more consciously performed on the infrequently used playing field of gender."<sup>252</sup> Using this third standard, if a person lives *as a woman* and commits a crime *as a woman*, she will go to prison *as a woman*.<sup>253</sup>

I recognize the potential for a slippery slope in applying this criteria. That is, the possibility that all-female prisons will be overrun by

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248. See BORNSTEIN, *supra* note 7, at 18 (recalling that she had to fly to Colorado for her surgery).

249. See *Rush v. Parham*, 625 F.2d 1150 (5th Cir. 1980) (refusing to mandate health care coverage of sex reassignment surgery); but see *Doe v. Minnesota Department of Public Welfare*, 257 N.W. 2d 816 (Minn. 1977) (holding that under the Medicaid Program, total exclusion of medical assistance for sex reassignment surgery violated federal regulations). Although the court refused to hold that sex reassignment surgery should automatically be covered under the plan, it also suggested that the medical need for each applicant should not be determined "on a case by case basis." *Id.* at 820.

250. BORNSTEIN, *supra* note 7, at 119.

251. According to Bornstein, "[t]ranssexuals, especially middle-class pre-operative transsexuals, are heavily invested in maintaining their status as 'diseased' people. The demedicalization of transsexuality would further limit surgery in this culture, as it would remove the label of 'illness' and so prohibit insurance companies from footing the bill." BORNSTEIN, *supra* note 7, at 119.

252. BORNSTEIN, *supra* note 7, at 124.

253. Unfortunately, this standard also requires the unsavory task of performing a single, polarized gender, exhibiting either traditionally defined masculine or feminine characteristics. The model of a gender continuum, while socially positive, has not found acceptance under law. Thus, the standard I propose is structured to fit within the law as it is today.

thousands of Maxwell Klingers,<sup>254</sup> or Jack the Rippers<sup>255</sup> in lipstick, or transvestites,<sup>256</sup> who will enter women's prisons and rape inmates to an extent more frequent than what already occurs.<sup>257</sup>

The standard can work, however, if a basic background check is done on individuals asserting transsexual status.<sup>258</sup> For example, indications that a person is transsexual and actively performs the gender of her or his chosen identity, can be ascertained from three primary criteria: presentation of gender-specific ostensible characteristics,<sup>259</sup> psychological evaluations,<sup>260</sup> and overall gender performance.<sup>261</sup> Insofar as I argue the law should allow for a gender continuum, I must also acknowledge that the law breeds and feeds on categories and standards.<sup>262</sup> With that fact in mind, and until the law accepts a gender continuum, I propose the following criteria.

*Ostensible Characteristics.* Ostensible factors to consider would be

254. Maxwell Klinger, a main character on the television sitcom, "M.A.S.H.," was best known for dressing in traditionally female, civilian attire in an effort to be dishonorably discharged from military service.

255. Jack the Ripper is the prototypical serial rapist and crazed murderer. See MURDER BY DECREE (Highlight Theatrical Production 1979) (portraying the life and crimes of this notorious psychopath).

256. Transvestites are, generally speaking, male heterosexuals who dress in traditionally feminine attire for sexual arousal, rather than for social comfort, and are content living as the sex into which they were born/acclimated. Transvestite females are rarely identified because wearing traditionally masculine attire, like pants and work boots, is generally acceptable for women. The definition is, I suppose, in the mind of the cross-clothed. See, e.g., Taitz, *supra* note 25, at 54 (listing a variety of people with characteristics related to transvestitism); AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 530 (4th ed. 1994) [hereinafter DSM-IV] (suggesting cross-dressing occurs only among males, usually heterosexual males seeking sexual stimulation from wearing traditionally female attire).

257. See Lisa Krim, *A Reasonable Woman's Version of Cruel and Unusual Punishment: Cross-Gender, Clothed-Body Searches of Women Prisoners*, 6 UCLA WOMEN'S L.J. 85, 107 n.110 (1995) (citing widespread instances of sexual abuse in all-female prisons perpetrated by male prison guards, not female inmates). In 1986, nearly two hundred women reported that male prison guards had raped them in a Georgia all-female prison over a thirteen year period. *Id.* (citation omitted). Female prisoners in Hawaii and Indiana have come forward with similar stories. *Id.* (citations omitted).

258. Although this standard is aimed at recognizing transsexuals prior to prison assignment, proper medical and psychological attention should be paid to persons exploring their transsexuality after entering prison. If an individual acts on his or her transsexuality for a time period and in a manner that would qualify under this standard, that person should then be assigned to a prison consonant with his or her gender identity.

259. See generally Pearlman, *supra* note 8, at 849-854.

260. See generally Pearlman, *supra* note 8, at 855 n.97.

261. See generally Pearlman, *supra* note 8, at 850. Moreover, it is improbable that congenital males would pretend to be transsexual prior to committing a crime, with the hope that, if caught, they will serve their sentence in a female prison; if they had committed themselves to that much research, they would also know that women's prisons are deficient in nearly every possible program as compared to all-male prisons. See SEX DISCRIMINATION AND THE LAW, *supra* note 120, at 286.

262. See *supra* notes 43-47 and accompanying text (explaining the social and legal desire to create categories and standards).

found primarily in physical appearance. One's projected image includes, for example, gender-normative styles and choice of clothing. Of course, this factor is difficult to assess without getting caught in rigidly defining feminine and masculine styles and how men and women are expected to dress.<sup>263</sup> Physical characteristics to look at might include non-genital surgeries on various body parts like hips, face, breasts (implants or mastectomies), and others.<sup>264</sup> An important consideration, though, is the cost of surgery, which is not necessarily accessible to lower income transsexuals. Using these types of indicators creates a category of particularly oppressive, prescribed gender traits, by specifying what appearance one must project in order to qualify as male or female under law. Consequently, this category should be given less weight than the following two criteria.

*Psychological Evaluations.* This criteria may be determined largely from the same criteria the American Psychiatric Association uses to identify individuals with transsexual status.<sup>265</sup> Courts, prison officials, and other parties should defer to the expertise of a psychotherapist's evaluations based on these relevant factors:

- a. A strong and persistent cross-gender identification (not merely a desire for any perceived cultural advantages of being the other sex) . . . In adolescents and adults, the disturbance is manifested by symptoms such as a stated desire to be the other sex, frequent passing as the other sex, desire to live and be treated as the other sex, or the conviction that he or she has the typical feelings and reactions of the other sex.
- b. Persistent discomfort with his or her sex or sense of inappropriateness in the gender role of that sex . . . In adolescents and adults the disturbance is manifested by symptoms such as preoccupation with getting rid of primary and secondary sex characteristics (e.g., requests for hormones, surgery, or other procedures to physically alter sexual characteristics to simulate the other sex) or belief that he or she was born in the wrong sex.
- c. The disturbance is not concurrent with a physical intersex con-

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263. See, e.g., Note, *supra* note 9, at 1987-90 (exploring how drag queens, lesbians, and gays disrupt heterosexual gender norms in many ways, including through their choices of clothing. "[G]ays and lesbians ... pick and choose aspects of masculinity and femininity and recombine them for erotic effect. Each of these combinations disrupts the heterosexual matrix . . . In the same way that the drag queen disconnects anatomical sex from gender, the lipstick lesbian disconnects gender from sexuality." *Id.* at 1988). I offer this factor - that transsexuals should confine themselves to a rigidly dictated style of clothing which is consistent with their chosen gender - with sincere reservations, given that it reinforces rigid gender roles.

264. Other physical traits could include a shaved down adam's apple in male to female transsexuals and increased facial hair (due to hormone ingestion) in female to male transsexuals. See DSM-IV, *supra* note 256, at 535.

265. These criteria are listed in DSM-IV, *supra* note 256, at 532-38.

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d. The disturbance causes clinically significant distress or impairment in social, occupational, or other important areas of functioning.<sup>266</sup>

The psychological criteria used in determining when an individual is transsexual are extensive.<sup>267</sup> These criteria distinguish "simple nonconformity to stereotypical sex role behavior," transvestic activities, and other behaviors from the gender identity assertions made by transsexuals.<sup>268</sup> While many transsexuals are evaluated by a psychotherapist prior to beginning hormone therapy and surgical alterations, some may not have been. An independent psychological evaluation could be conducted with an individual asserting transsexual status who has not previously sought psychological counseling.

*Gender Performance.* Psychotherapists require transsexuals to take a "life test" during which transsexuals dress, live and work in the socially prescribed role of their chosen gender for at least a year.<sup>269</sup> If, for example, a congenital female cannot function socially or occupationally as a man, doctors will discourage her from pursuing a different gender identity.<sup>270</sup> If an individual performs his or her chosen gender to the satisfaction of therapists, that individual will be identified as transsexual and will be considered for genital reassignment surgery.<sup>271</sup> By the same token, whether an individual has been functioning socially and economically in the role of his or her chosen gender should be taken into account when assigning transsexuals to single-sex prisons.<sup>272</sup> Using the "life test" as a model for this criteria does not mean an individual must prove she or he has been living in the role of her chosen gender identity for a specified, supervised pe-

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266. *Id.* at 537-38. In law, the word "disturbance" could be removed from these guidelines in exchange for a more accurate descriptor, like "nonconformity."

267. *Id.* at 532-37.

268. DSM-IV, *supra* note 256, at 536-37. Transvestism is merely cross-dressing for sexual excitement. The DSM-IV labels transsexuals as having "gender identity disorder" - a label I choose not to use here because it implies transsexuality is a disease or illness. In reality, transsexuality is a healthy, asserted nonconformity to socially constructed sex and gender roles. *But see supra* note 251 (suggesting that low-income transsexuals have a particular stake in maintaining the medical status of transsexuality for insurance purposes).

269. BORNSTEIN, *supra* note 7, at 15; Pearlman, *supra* note 8, at 842.

270. BORNSTEIN, *supra* note 7, at 15.

271. BORNSTEIN, *supra* note 7, at 15.

272. Unfortunately, requiring transsexuals to prove they have lived according to the normative, socially-constructed gender role ascribed to their chosen gender identity fails to challenge rigid, polarized definitions of male/female and masculine/feminine. *See* Pearlman, *supra* note 8, at 842 (noting "[t]he requirement that a transsexual must undergo this process to realign sex to conform with gender, reinforces the binary construction of sex and gender"). Moreover, those aspects of the "life test" which require individuals to be employed in their chosen gender role are "fraught with various forms of employment discrimination." *Id.*

riod of time. Instead, the "life test" should serve as a model for evaluating how an asserted transsexual lived his or her life prior to conviction for a crime. The length of time an individual has performed her or his chosen gender should be considered in addition to, not in place of, *how* an individual performs gender.

With these criteria in mind, I return to the prison cases discussed above. In *Farmer* and *Meriwether*, the petitioners had openly identified with a gender inconsistent with their sex at birth for five and nine years respectively.<sup>273</sup> They had both undergone physician-supervised hormone therapy and various degrees of physical alteration.<sup>274</sup> Using the criteria I have proposed, Farmer and Meriwether would have been assigned to a prison for females, and may have avoided the assaults and abuse they endured in the all-male prisons. Also, if reliable criteria are established and applied, the likelihood of a "pre-operative" male to female transsexual raping female prisoners is presumably the same as for any other female inmate.<sup>275</sup>

With respect to female to male transsexuals, the situation is an arguable exception. Can we still say that if a person lives as a male, commits a crime as a male, he will go to prison as a male? In *Farmer*, Justice Ginsburg criticized the argument that Farmer, as a transsexual, should not have been sent to an all-male prison, and asked, "What about a young man of a slight build?"<sup>276</sup> If we assume that many female to male transsexuals may be of "slight build,"<sup>277</sup> compared to other male inmates, it may be tempting, in an effort to avoid additional risk of assaults, to exclude female to male transsexuals from placement in all-male prisons. Moreover, genital reconstruction is more obvious in female to male transsexuals<sup>278</sup> which would place them at greater risk of being identified and assaulted by other inmates, especially if access to androgens/hormones is restricted.

Excluding female to male transsexuals from the same gendered prison assignments male to female transsexuals would experience is inconsistent, however, with the goal of recognizing gender identity

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273. *Farmer*, 990 F.2d at 320; *Meriwether*, 821 F.2d at 410. I have omitted *Murray* from this analysis, merely because the court did not provide as much background about her transsexuality.

274. *Farmer*, 990 F.2d at 320; *Meriwether*, 821 F.2d at 410.

275. See BORNSTEIN, *supra* note 7, at 191 (suggesting that gender identity answers the question of "who I am," whereas sexual preference answers who "I want to be romantically or sexually involved with").

276. See ROTHBLATT, *supra* note 12, at 62.

277. This assumption is, of course, a gross generalization intended only for the purpose of analysis.

278. See BORNSTEIN, *supra* note 7, at 217.

in law. As with female-identified transsexuals, male-identified transsexuals would be assigned to a prison according to gender identity, rather than anatomy.<sup>279</sup>

A different alternative to current sex-based prison assignments has been proposed by Martine Rothblatt and other commentators.<sup>280</sup> The alternative is to increase the current number of co-correctional or "multi-sexed"<sup>281</sup> facilities, which house both men and women. This proposal offers a solution to the unequal treatment and minimal financial resources allocated to all-women's prisons,<sup>282</sup> as well as incentive to create a rehabilitative environment closely resembling the real world.<sup>283</sup> As part of this plan, Rosemary Herbert envisions that

[t]he mixing of men and women in the same cells would not be a feature of such a remedy, since the legitimate privacy and security interests would require separate cells for men and women. The structure of the prison and the degree of unrestricted movement permitted in the relevant housing unit would dictate whether men and women should be separated by room, hall, or by cell block ... Low security prisons could be patterned after the federal co-correctional institutions, but medium and maximum security prisons would require greater security measures and a more controlled environment.<sup>284</sup>

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279. Given that nearly 98% of all rapes occurring outside prisons are perpetrated by males on females, the concept of putting a female to male transsexual in an all-male prison, particularly a transsexual who has not undergone genital reconstruction, may seem misguided. An alternative to this assignment might be found in arguing rationales used in Title VII employment discrimination cases. In *Dothard v. Rawlinson*, for example, the Supreme Court held that because sex offenders are spread throughout prison dormitories, all-male prisons are not safe for female guards, and thus, the state may legally discriminate against women by not hiring them for these positions. 433 U.S. 321 (1977). On the flip side, Justice Marshall dissented, and stated that "this rationale regrettably perpetuates one of the most insidious of all the old myths about women - that women, wittingly or not, are seductive sexual objects." *Id.* at 330 (Marshall, J., dissenting) (noting also that women are made to pay the price for the threat of "depraved conduct by prison inmates." *Id.*).

280. See ROTHBLATT, *supra* note 12, at 62; SEX DISCRIMINATION AND THE LAW, *supra* note 120, at 286.

281. ROTHBLATT, *supra* note 12, at 62.

282. See SEX DISCRIMINATION AND THE LAW, *supra* note 120, at 286-89 (citing several cases filed by female inmates asserting conditions unequal to those in male prisons). See, e.g., *McCoy v. Nevada Dept. of Prisons*, 776 F. Supp. 521 (D. Nev. 1991) (holding that female inmates had a cause of action in a claim asserting inequalities in vocational, occupational, and educational training programs, medical screening, law library, opportunities to earn good-time credit, and building conditions and maintenance).

283. See ROTHBLATT, *supra* note 12, at 62. See also SEX DISCRIMINATION AND THE LAW, *supra* note 120, at 287 (indicating that co-correctional facilities will further the correctional goal of reintegration into the community).

284. Rosemary Herbert, *Women's Prisons: An Equal Protection Evaluation*, 94 YALE L.J. 1182 (1985) (quoted in SEX DISCRIMINATION AND THE LAW, *supra* note 120, at 287).

With respect to potential childbirth problems inherent in such a proposal, proponents of multi-sexed institutions suggest that all inmates be injected with temporary contraceptives which can be removed upon release from prison.<sup>285</sup> Others suggest sexual contact between inmates is inevitable, but that "coerced sexual relations should be strictly and effectively prohibited in integrated institutions, as they should now be in single-sex prisons."<sup>286</sup>

The problem with this proposal is, however, that male sex offenders alone comprise a significant proportion of prison populations, whereas the overall population of female inmates is relatively small.<sup>287</sup> Not only will coerced sexual relations continue if prisons are multi-sexed, but "[t]he small number of incarcerated women limits the extent to which desegregation is currently feasible. Unless integration is to be token, or to produce cruel and unusual conditions, *some all-male prisons are inevitable*."<sup>288</sup> Hence, desegregation may improve the unequal treatment of women in single-sex facilities, but it will not reduce sexual assaults.

For as long as single-sex prisons are necessary, assignment of transsexuals to the prison of their gender identity remains a necessary consideration. The most salient resolution in the prison assignment debate is analogous to that in the marriage and divorce arena: categorization, when absolutely necessary, should follow gender identity, not biological sex.

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285. See e.g., ROTHBLATT, *supra* note 12, at 62-63 (explaining that hormonal injections are available for males and females so that "[i]mplanting all inmates, regardless of genitalia, would significantly reduce the chances of an accidental pregnancy"). *Id.* at 63.

286. Herbert, *supra* note 284, at 289 (commenting further that any attempts to impose celibacy on inmates will prove futile). Also, despite higher vigilance, rape still occurs in high security prisons.

287. Twenty-five to thirty percent of all incarcerated males are "actually sex offenders, regardless of the crime for which they were incarcerated." Cindy Moy, *Female Inmates Not Similarly Situated With Men, Says Eighth Circuit*, 1996 WL 667233, Nov. 20, 1996. When comparing the overall male and female prison populations in Missouri, for example, "the female prison population is significantly smaller (725 females compared to 13,000 males)." *Id.* These figures are even less proportionate when race is taken into account. "Historically, smaller numbers of Black women have been imprisoned than either white or Black men, however, significantly greater proportions of incarcerated women were Black." Dorothy E. Roberts, *Motherhood and Crime*, 79 IOWA L. REV. 95, 106 (1993). The discrepancy between white and black female inmates can be attributed, at least in part, to judges' reluctance to incarcerate white women, as opposed to black women. *Id.*

288. Herbert, *supra* note 284, at 289 (emphasis added). Herbert further claims that "[b]y proposing a desegregation remedy, [I do] not suggest that women must simply adapt themselves to the existing structure of men's prisons. Desegregation should prompt a reappraisal of the goals and practices of our penal systems and the role of women in those systems"). *Id.* at 290.

## VI. INCEPTION: WHERE DO WE GO FROM HERE?

Similarity is not the same thing as identity.

- Ibo Proverb<sup>289</sup>

Whatever portable plurality she found, she organized into neat lines, according to their size, shape, or gradations of color. Just as she would never align a pine needle with the leaf of a cottonwood tree, she would never put the jars of tomatoes next to the green beans. During all of her four years of going to school, she was enchanted by numbers and depressed by words. She missed - without knowing what she missed - paints and crayons.

- Toni Morrison, *The Bluest Eye*<sup>290</sup>

We need to look beyond the rigid sex and gender categories law has fashioned for us, to oppress us, in order to re/construct a legal system that embraces what's missing - the many ways individuals identify. That is, the way we *do gender*. Through the marriage cases and the prison assignment dilemma, I examined how law inadequately deals with this issue. The law classifies individuals on the basis of genitalia and completely overlooks chosen gender identities, which are out of the control of laws and patriarchy. An important part of challenging the status quo of patriarchal binary constructs is stepping out of our own worlds to see and appreciate the rich textures, colors, and complexities of other people. We need to reevaluate sex categories and value gender continuums.

While I believe we need to deconstruct the rigid bipolar models of sex that form the basis of the legal understanding of "family" and attempt to depolarize our concept of gender as male or female, I am not suggesting a *limitless* continuum model. I find comfort in being categorized as a lesbian, for example, insofar as the boundaries of that category signal, at the very least, a resistance to heteropatriarchy. Also, group membership can enable individuals to find energy in others who are similarly situated or share similar experiences. Voluntary and asserted identity with a chosen group can be healthy. The key is in understanding who is excluded when and where each new line is drawn.

Obviously, differences of sexuality, gender, and race exist among us. These are not, however, differences in *identity* until we make

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289. GUMBO YA-YA, *supra* note 109, at 104.

290. TONI MORRISON, *THE BLUEST EYE* 89 (1970).



them so. Moreover, it is the desire to count oneself 'superior' to another, or to count oneself 'normal,' that converts such differences into those specified identities in opposition to which we define ourselves.<sup>291</sup>

I invite proponents as well as opponents of the gender identity model to consider how and why we draw group distinctions. If lines are drawn differently in private social groups as opposed to public group classifications, we should explore why that occurs.<sup>292</sup>

Our goal should not be to create a *blank* continuum, either, which fails to recognize and appreciate difference as well as sameness. Everything has its opposite always already defined within it. Just as *Plessy* dealt with the arbitrariness of racial assignment, we need to look at how we, and courts, arbitrarily deal with transsexuality, genital classifications, and marriage. Marriage exists only because some people remain, by choice or law, unmarried. Husbands are defined inapposite to wives. The concept of male exists only in relation to the concept of female. Heterosexuality exists only in opposition to homosexuality. Somewhere between these poles, however, is transsexuality, at once male, female, neither and both.<sup>293</sup> The solution to recognizing transsexual identities and transsexual marriages, both socially and legally, is in relaxing the bipolar distinctions that serve the patriarchal sexual family - to integrate a system that recognizes sameness and difference while accepting fluid identities rather than enforcing rigid sexual boundaries.

With respect to co-genital marriages in general, it is unclear whether queers will win any heterosexual privileges not currently available through domestic partnership laws.<sup>294</sup> On one hand, we may break down some of the ludicrous patriarchal facets inherent in marriage laws by gaining queer rights to marry. That is, if co-genital partners can marry, we destroy the one-penis-per-union rule and courts will stop using our genitals as a basis to restrict access to some heterosexual privileges. On the other hand, legal recognition of co-

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291. Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737 (1989), in *SEXUAL ORIENTATION AND THE LAW*, *supra* note 142, at 271 (emphasis in original).

292. See, e.g., *Roberts v. United States Jaycees*, 468 U.S. 609, 615 (holding that "[p]rotecting [private] relationships from unwarranted state interference . . . safeguards the ability independently to define one's identity that is central to any concept of liberty"). Accordingly, the Court cites *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978); *Smith v. Organization of Foster Families*, 431 U.S. 816, 844 (1977); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969). *Id.* See generally *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 115 S.Ct. 2338 (1995) (ruling that a statute mandating admission of a "parade contingent expressing a message not of the private organizers' own choosing violates the First Amendment").

293. Bisexuality likewise exists along this continuum.

294. See *supra* note 147 (listing articles debating the value of same-sex marriages and domestic partnership laws).

genital marriages will legitimize same-sex couples who follow the rules and marry, while a host of other sexual nonconformists will remain excluded from those privileges. Nonmonogamous partners, polygamous groups, and political nonconformists who refuse to beg the state to sanction their intimacy should not be ignored and ostracized by the queer community. Moreover, if we stop challenging the gender and sex prescriptions currently intact in the legal concept of marriage, we will at best gain entry into an institution that imposes unwelcome, oppressive gender roles on us. For example, are we willing to ask a lesbian partner to take on a male persona, or to do verbal gymnastics, in order to get paternity leave when her partner has a child?

The erasure and mistreatment of transsexuals under law compels us to reconsider bipolar categories. "The frontier of liberty may have expanded far beyond where it began, but for those without rights, it always seems on the horizon, just beyond their reach."<sup>295</sup> Wherever law exists, categories will exist. Our task is to constantly challenge and redefine those categories as progress demands.

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295. Steve Silberman, *We're Here, We're Queer, and We've Got E-Mail*, WIRED, Nov. 1994, at 76.