

SYMPOSIUM

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**TRANSGENDER LAW:  
CHALLENGING THE BOUNDARIES OF LAW AND GENDER**

Touro College, Jacob D. Fuchsberg Law Center  
February 20, 2009

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## **INTRODUCTION**

**DEAN RAFUL:** Ladies and gentlemen, good morning and welcome. My name is Larry Raful. I have the honor and privilege of serving as the fourth dean of the Touro College, Jacob D. Fuchsberg Law Center. I want to welcome you.

First of all, I want to start by thanking Meredith Miller, who has done a great job of putting this program together. On behalf of all of us, thank you. I want to thank those who have come to speak today. I want to thank our students on the *Journal of Race, Gender and Ethnicity*, and I want to thank Barbara Hakimi, our wonderful CLE coordinator, who has done a lot of work to make this possible.

I remember when Professor Miller came to talk to me about the topic. I was amazed and pleased that the topics that she showed me promoted promise and hope, because when I first heard her talk about transgender legal issues, I thought we were going to have another program about discrimination. It is lovely that we are starting to move past that, and we are talking about people who have issues with buying homes, and starting corporations, and having wills and trusts, and having children. Maybe there is some hope and promise in spending a day talking about these people as people, as human beings; people with dignity, people who have lives and people who have legal issues. I thought that was a lovely thing. I remember when she first came to me, I was really pleased by the topics that she said she wanted to cover. I think it is a lovely way to think about moving ahead. With this new administration and maybe some hope for things getting better, I am really pleased that Touro Law School is going to be part of that.

The role of the dean is very important. The dean tells you where the rest rooms are. For those of you who have not been here, they are straight down the hall on your right past the classrooms. There is a cafeteria right below us if you need some snacks, and the lunch break is downstairs, so right down the stairs. We also have a lovely bookstore next to the cafeteria, which you can buy your own Touro paraphernalia, if you are so moved. I know there are a number of people here who are new to this building, and alumni who are new to this building. Maybe we can figure out a time to do a little tour. We will see if we can do that. Thank you for coming. Meredith, thank you so much. I appreciate what you have done, and it is just a lovely way to spend a day talking about something that is so hopeful. I guess I'm going to introduce my colleague James Durham, who is the moderator of the first session. Thank you very much for coming and have a lovely Friday.

## **SESSION ONE: GENDER AND ACCESS TO JUSTICE**

**MR. DURHAM:** Good morning and welcome to the transgender law symposium. I am honored to be here, and to be the moderator for the first panel session. The first session is called *Gender and Access to Justice*. It is going to have three portions. Our first speaker is Victoria Neilson, Esq., who will be speaking on "Immigration Law and the Transgender Client." The second portion will be "Eight, Hate or Too Late? Did

California Transsexuals Survive the Proposition Eight Vote.” That will be presented by Katrina Rose, Esq. And the third session is “Transgender Issues in Criminal Law; Finding a Place for Transgender Individuals in Prisons” by Benish Shah, Esq. Before we get started with the first panelist, I would like to give you a little bit of background information about each one of them.

Victoria Neilson is the Legal Director of Immigration Equality, a national organization fighting for immigration rights for the lesbian, gay bisexual, transgender (“LGBT”), and HIV-positive community. Ms. Neilson runs Immigration Equality’s pro bono asylum project and provides technical assistance and mentoring on LGBT and HIV immigration issues to attorneys around the country. She is the primary author of the LGBT/HIV Asylum Manual, a comprehensive guide for attorneys, and she has published extensively on legal issues facing LGBT and HIV positive immigrants and refugees. Ms. Neilson received her law degree from the City University of New York (CUNY) School of Law and her bachelor’s degree from Harvard University. Ms. Neilson is co-chair of the New York City Bar Association’s Committee on AIDS and an active member of the American Immigration Lawyers Association. She is the former Litigation Director at the HIV Law Project in New York.

Katrina is a graduate of Texas A&M University (B.E.D, Environmental Design, 1987) and South Texas College of Law (J.D. 1998). She clerked for Judge James E. Broberg of the Third Judicial District in Albert Lea, Minnesota and is licensed to practice law in Texas and Minnesota. She is currently a doctoral candidate in History at the University of Iowa, where she teaches courses on transgender legal history in both the History and Sexuality Studies Departments. Her scholarly work focuses on transgender legal history, particularly the interrelationships between the emergence of transsexual birth certificate statutes and more recent LGBT legal developments. Her two recent articles are, *Is the Renaissance Still Alive in Michigan? Or Just Extrinsic? Transsexuals’ Rights After National Pride at Work*<sup>1</sup> and another article, *Where the Rubber Left the Road: The Use and Misuse of History in Quest for Federal Employment Non-Discrimination Act*, will appear in the Temple Political and Civil Rights Law Review.

Benish Shah is a litigation associate at Strook, Strook & Lavan, helping lead the anti-trafficking initiative at the firm. She is also the founder of the South Asian American Law Journal, which is currently in its first phase. Recently, Benish was invited to present her paper on the Hudood Ordinances of Pakistan at the University of Baltimore School of Law’s Second Annual Feminist Legal Theory Conference, Applied Feminism. Benish is also the recipient of Emory University’s 2008 Humanitarian Award for service to the community based upon her pro bono legal work. Further, Benish is the founder and Editor-in-Chief of NEEM Magazine, which focuses on issues related to South Asian-American woman. Currently, Benish lives in New York City and is continuing research on criminal justice issues related to children and minorities.

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<sup>1</sup> 35 OHIO N.U. L. REV. 7 (2009).

We have quite the panel for our first session on *Gender and Access to Justice*. I would like to first introduce Victoria Neilson.

**MS. NEILSON:** Hi. I am very happy to be here today. As you just heard, I'm the legal director at Immigration Equality, so for any of you who are practicing lawyers, you should just know that if you work with the transgender community and you have an immigration question, Immigration Equality provides technical assistance to lawyers. What I'm going to be talking about today appears in the book, *Immigration Law and the Transgender Client*.<sup>2</sup> We are very excited. We co-authored this book with the Transgender Law Center based out in California. It is the first LGBT-themed book published by the American Immigration Lawyers Association, which is a mainstream immigration bar association with 11,000 members. You can find the book in web version on our web site at [www.immigrationequality.org](http://www.immigrationequality.org),<sup>3</sup> or the book is for sale on the American Immigration Lawyers Association<sup>4</sup> web site.

I thought I would start by sort of talking to you about a current client we have, changing her name and some of the facts for confidentiality reasons, because she really presents several of the issues that we deal with frequently in transgender immigration cases. This person, who I will call Ursula, is a male to female (“MTF”) transgender woman from Brazil. She lived in Florida and contacted us last fall because she married an American citizen in Florida. He filed for a green card on her behalf and that application was denied. I am going to talk a little bit more about why that was. First, I want to talk generally about the state of the law.

Her husband was a disabled war veteran actually, and when we found out they had married in Florida where, as many of you know, the law is very bad on marriages where one spouse is transgender, we said okay; just go to another state where the law is better and marry there. We know things are okay in North Carolina, go there. She said, okay, great, but we can't go right now because my husband is a disabled war vet. As soon as he is feeling better, we will go to another state. Actually before she met her husband, she had filed an application for political asylum based on being a transgender woman in Brazil.

Even though a lot of people when they hear Brazil, they think of Carnival and people dancing in the streets, in fact, in the Western Hemisphere, Brazil has the highest murder rate of LGBT people. There is still a great deal of social cleansing that goes on there in spite of the fact that the government has passed laws that seem to protect LGBT rights. She filed this claim. The claim was denied at the first level due to some bureaucratic foul-up. The case sort of took forever to get to Immigration Court. During that interim period, she met her United States citizen husband and they married, and she had her green card application denied.

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<sup>2</sup> VICTORIA NEILSON & KRISTINA WETZ, *IMMIGRATION LAW AND THE TRANSGENDER CLIENT* (2008).

<sup>3</sup> NEILSON, *supra* note 2, available at <http://www.immigrationequality.org/template3.php?pageid=1135>.

<sup>4</sup> <http://www.aila.org/>

Recently, her asylum case did get referred to Immigration Court. There is a deportation proceeding pending against her because the asylum application at the first level was denied. Before she and her husband had the opportunity to go to a more transgender-friendly state to get a marriage license that would be recognized by Immigration, her husband unfortunately passed away. So now she has no possibility of getting a green card based on her husband. The only hope that she has left is that her asylum case is successful.

We run a pro bono program. We do some direct representation, and we also work with some law firms. We are lucky to have placed this case with a really topnotch law firm that has an office in Florida. They will be representing her on her asylum application.

I am starting with a real person because these issues are very real. This person is now dealing with the fact that she lost her husband after the state said you have no relationship that is recognized. And now she is back to fighting to prove that her life would be in danger if she went to Brazil, in order to not be deported.

I am going to back up now to talk about the general legal issues and then return briefly to Ursula's specific facts again. So, why was Ursula's marriage not recognized? Immigration law is entirely federal but, as many of you know, there is no federal level family law. Family law is a state-based hodgepodge.

As a general rule, immigration law looks to the laws of the state to decide whether or not specific family relationships exist. This was the route that Citizenship and Immigration Service ("CIS") took for many years up until the early 2000's, meaning that for a situation where one spouse was transgender, the CIS would recognize the marriage as long as it was recognized in the state where it was entered into.

Suddenly, in the early 2000's, we started seeing all marriage cases where one of the spouses was transgender being denied sort of across the board by the CIS. Immigration Equality along with some other organizations wrote to CIS and said, "What's up? You should be looking to the law of the state."

In one of the cases, an Oregon case where a marriage-based petition was denied, the district director seemingly accidentally sent the lawyer a memo, which seemed like it was meant to be an internal memo at the Department of Homeland Security which said, "Here are our options to deal with transgender issues and immigration. The two primary issues are identity documents and marriage cases."<sup>5</sup>

By identity documents, I refer to green cards and naturalization certificates. What gender is Immigration putting on those documents: the birth gender or the gender now based on the person's transition?

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<sup>5</sup> Ridge Memo (Jan. 21, 2004) (on file with author).

Basically, what this internal memo<sup>6</sup> said was we have three options; we can just say it is birth sex for all purposes and leave it at that. The problem with that is then the identity documents that we issue are not going to match the way that people look, which could present some kind of security risk.

A second option would be to use a person's corrected gender for identity documents, but still refuse to recognize their marriage. We realize that it would be internally inconsistent, but we are not sure we want to deal with the controversy of recognizing a marriage where the person is transgender.

The third option is to recognize the correct gender for all purposes so that both identification documents match the way the person looks, and the marriage is recognized if the person has completed their transition, but they said that is too controversial.

The person who wrote the memo recommended option two, and Tom Ridge, himself, signed off on the memo option two, check. Shortly thereafter a memo for public consumption came out which essentially restated the standard, but actually took it a step further, and didn't just say for marriage cases we are looking at birth sex.

It said any person who claims to be transsexual will not have their marriage recognized, which made it sound like if you were born biologically male and you are now living as a female, not only could you not marry a male, but you couldn't marry a female either. It seemed to say if you are transgender, you can't have an immigration-based marriage case, which was obviously problematic.

Then in 2005, a shocking development happened. In immigration law the final level of administrative appeal is this body called the Board of Immigration Appeals ("BIA"), which had been a fairly balanced appellate body until Attorney General John Ashcroft took over. He basically turned a twenty-three member panel into an eleven member panel and mostly got rid of the more immigrant-friendly board members.

The BIA has largely rubber stamped Immigration Court decisions, and has been a pretty conservative body since that has happened. Somehow in 2005, the case of *Lovo-Lara*<sup>7</sup> came before the Board of Immigration Appeals. This was a case where the transgender person was the United States citizen. The person was born male and transitioned fully to be female and married a man from El Salvador.

The United States citizen was born in North Carolina, was able to have the birth certificate amended in North Carolina, and the couple married in North Carolina. They filed a marriage-based petition. It was denied. The case was appealed to the BIA. The BIA said this is an opposite-sex marriage, so therefore, it should be recognized under

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<sup>6</sup> Yates' Transgender Marriage Memo (Apr. 2004),  
<http://www.immigrationequality.org/uploadedfiles/Yates%20april%2004%20trans%20marriage.pdf>

<sup>7</sup> In re Lovo-Lara, 23 I. & N. Dec. 746 (B.I.A. 2005).

immigration law. What we do with this case, as with any other case, there is no federal family law. The district director talked about the Defense of Marriage Act in its denial, but the Defense of Marriage Act does not apply here because the Defense of Marriage Act says a marriage must be a union between one man and one woman. It cannot be a same-sex marriage, so it is inapplicable.

The BIA said well, for this case it is the same as for any other kind of marriage case. Was the marriage valid in the state where it was entered into? So it looked to the law of North Carolina. North Carolina doesn't have a specific law about transgender marriages. Since it does have a law permitting people to amend their birth certificate, the BIA extrapolated that they recognized the petitioner in this case as female and, therefore, the opposite-sex marriage was valid under North Carolina law.

It is a two-step inquiry. First, has the person lawfully changed their gender in a way that's recognized by the government? Second, in the state in which the couple resides, is there any public policy reason against recognizing the marriage? So in that case, both answers came out in favor of the couple. The marriage was recognized and the applicant was able to get his green card. But that is the only precedential case in this area. If you are interested in this area of law, you should read about it because I think it is one of the few federal agency decisions that is favorable to a transgender issue, period, in any context.

Since then there have also been a couple of non-precedential BIA decisions, meaning they don't have to be followed in other situations, but they are still persuasive. There are a couple of points in those which are interesting. One of them is the case of *Oren*<sup>8</sup> from 2006, where the transgender person was a United States citizen. In this case the person was female to male, and he married a woman from Israel.

Again, the case was initially denied. They appealed to the BIA. What is significant about *Oren* is it is clear from reading the decision that he did not have bottom surgery. You know, as I imagine you will hear from some of the other panels, that often the ultimate indicator of whether somebody has fully transitioned or not is whether they've had genital reassignment surgery.

In this case with a mastectomy and some other medical interventions *Oren* was able to get medical documentation that said that his transition was complete. That was good enough in the state of Michigan where he was born to have his birth certificate amended, and basically the BIA said that Michigan recognizes him as a man, so it is not our place to get into that sort of state area of law. If he is recognized as a man, it's an opposite-sex marriage and it works for us.

Another case where again the BIA seemed to be even expanding things a little further; in 2007, another unpublished case, the case of *Ahmad*<sup>9</sup> involved a United States

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<sup>8</sup> In re *Oren*, No. A79-761-848, 2006 WL 448282 (B.I.A. Jan. 25, 2006).

<sup>9</sup> In re *Ahmad*, No. A96-609-556, 2007 WL 3301748 (B.I.A. Sept. 26, 2007).



citizen who married a male to female woman from Singapore. This is where these things get complicated. If the transgender person is not the American citizen, but rather is a person from another country, it can be very difficult or impossible for them to get an amended birth certificate.

One problem that people face is if folks are here without legal status, because of some very harsh immigration laws, often if someone leaves the United States after they've accrued unlawful presence here, they are forbidden to come back. As a practical matter sometimes people can't leave to try to go through the process of getting their documents amended because they would be prohibited from coming back. In this case, a law in Singapore said that birth certificates are not amended unless there is some sort of typographical error at the time the birth certificate was issued.

It was impossible legally for her to get an amended birth certificate, but she was able to get a passport issued to her in the female gender. In this case the BIA said the important thing is that her government recognizes her now as female. The fact that they have a poor birth certificate law shouldn't affect our vision of her as a female. And this is an opposite-sex marriage and, therefore, this marriage should be approved. This couple was married in New York.

Like I said, kind of good news from the BIA. Still the law does not protect everybody because, as I'm sure you will hear more about, state laws vary greatly. And depending on what state you are in, you may or may not be able to get your birth certificate amended and you may or may not be able to get married.

Returning to my first example of Ursula, unfortunately they married in Florida. And in Florida the Supreme Court had the *Kantaras v. Kantaras*<sup>10</sup> decision, which generally said that whatever gender you are born, for all purposes that is it. If both parties were born male, we are never going to recognize that marriage. Because they were from Florida, and there is this very clear and horrible case law decision there, their petition was denied. Actually, Ursula had a private attorney<sup>11</sup> that appealed that decision, but I really don't think she has too much chance of winning because the public policy in Florida is so clear. So, shifting gears from the area of marriage, what Ursula is left with and many transgender individuals are left with is -- can she prevail on her claim for political asylum?

To give a very brief overview, people can win political asylum in the United States if they have a well-founded fear of persecution in their home country based on race, religion, nationality, membership in a particular social group or political opinion. Membership in a particular social group is a sort of kitchen sink category, which has encompassed creative areas of asylum, which can include genital mutilation, domestic violence-based claims and LGBT-based claims.

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<sup>10</sup> *Kantaras v. Kantaras*, 884 So.2d 155 (Fla. Dist. Ct. App. 2004), *review denied*, 898 So.2d 80 (Fla. 2005).

<sup>11</sup> Immigration Equality did not arrange for Ursula's private representation in this case.

In 1994, the BIA declared that a case of a man from Cuba was a precedent, meaning that sexual orientation could be grounds for political asylum.<sup>12</sup> That is the only BIA case ever in an LGBT asylum issue.

There have been a lot of circuit cases on LGBT issues. The four cases which have dealt with transgender applicants are all out of the Ninth Circuit. Three out of four of them involve Mexican applicants. They all involve male to female applicants. The first case in this area from 2000 was the *Hernandez-Montiel*<sup>13</sup> case, involving a male to female woman from Mexico. In that case a particular social group was framed in what seemed to me to be an awkward way. They didn't identify the applicant as a transgender woman. They identified her as a "gay man with female sexual identity," which, sort of looking through the case, and rereading it a number of times, basically what happened whenever a case was denied at the lower level was that the immigration judge recognized that sexual orientation could be part of a particular social group.

But the judge went on to decide the reason that Hernandez-Montiel was targeted by the police and beaten up, and actually even raped was not because she was a gay man, but rather because this person was dressing as a woman. To be a member of a particular social group you have to show that you have an immutable characteristic that is protected, such as your religion or ethnicity.

The judge said yes, maybe sexual orientation is an immutable characteristic, but dressing as a woman is a volitional act, and she got beaten up for dressing as a woman. If she didn't dress as a woman, she wouldn't have gotten beaten up. The BIA affirmed this, and interestingly concluded that the tenor of the respondent's claim was that he was mistreated because of the way he dressed (as a male prostitute) and not because he is a homosexual. So, the BIA then took it a step further and decided if this person, who identifies as a gay man dresses in female clothing, he is actually dressing as a male prostitute, even though there were no allegations anywhere in the facts that this person had ever engaged in prostitution.

Fortunately the case went to the Ninth Circuit and the Ninth Circuit said the issue here is not whether or not putting on female clothing is a volitional act, this is an innate part of Hernandez-Montiel's identity. He identifies as female and, therefore, he is a member of a particular social group and that enjoys a protected status.

There were two similar cases in the Ninth Circuit using this sort of strange "gay female sexual identity" particular social group. And then finally in 2007, in the case of *Morales*<sup>14</sup> another male to female Mexican case in the Ninth Circuit, finally recognized the particular social group as male to female transsexuals. That is on more firmer ground,

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<sup>12</sup> In re Toboso-Alfonso, 20 I. & N. Dec. 819 (B.I.A. 1990), designated precedent 1895 Op. Att'y Gen. 94 (1994).

<sup>13</sup> *Hernandez-Montiel v. INS*, 225 F.3d 1084 (9th Cir. 2000).

<sup>14</sup> *Morales v. Gonzalez*, 478 F.3d 972 (9th Cir. 2007).

to go with a particular social group where you don't have to do this strange tying of a person's gender identity to their sexual orientation because many transgender people don't in any way identify as gay men.

I would like to say a few words about transgender cases. In our experience we have had a great deal of success in transgender asylum cases, I think, unfortunately, largely because one of the aspects of an asylum claim is you have to prove the harm the person would suffer if they went back to their country.

As you do country condition research, in most countries, you will find that there are many more articles about discrimination and violence, and even murder of transgender people than the articles that you find about lesbian and gay people. I think in many instances also there is a question with lesbian-gay claims about how can you actually prove that someone is lesbian or gay if they don't look quote unquote lesbian or gay.

In most, but not all transgender cases, you will have some sort of medical evidence to show that the person is in some stage of transition, which can be very helpful in proving that they are actually transgender.

To return to the case of Ursula, she is now in removal proceeding in Florida. She did her asylum case pro se. She lost in front of the asylum officer. She went without an attorney. She said the asylum officer said to her, "You are a beautiful woman. What problems would you have if you had to go back to Brazil?" She is in the situation where he didn't find that she would be persecuted because he thinks that she passes so well as a woman, that people wouldn't know she was transgender and, therefore, she would not suffer harm. This is kind of the flip side of what we often see with lesbian or gay cases where the issue is, how can you really prove that you are this identity that you claim to be?

She was not represented, unfortunately, and the obvious answers were, "people knew me as Juan when I left Brazil, and now I'm coming back as Ursula. My identity documents in Brazil say Juan. So people will find out." She won't be able to access the kind of health care that she needs, and because her identity documents identify her as a male, if she wants to marry, she may have problems.

We are hopeful with her case, now that she has really good representation. With the country conditions being as bad as they are in Brazil, we hope that she will be able to prevail in her case and put her life back together.

**MR. DURHAM:** Because we only have three panelists for this session instead of four, I think we can be a little more relaxed in our taking of questions. Maybe about five minutes of questions for you before we move to the next panelist.

**AUDIENCE MEMBER:** In your international survey, where does the United States stand in relation to England or Canada or France with regard to transgender immigration, I mean the strictness or openness?

**MS. NEILSON:** In terms of marriage-based claims?

**AUDIENCE MEMBER:** Yes.

**MS. NEILSON:** I think that the difference between us and Canada and the United Kingdom is that Canada has same-sex marriage, and the United Kingdom has a domestic partnership law, where if you can show you have been in a long-term relationship for two years with the partner, you can sponsor the partner.

In some ways whether or not the relationship is viewed as same-sex or opposite-sex, is not as significant in those countries, because same-sex relationships have similar rights as opposite-sex relationships. In Canada they have identical rights. In the United Kingdom you have a slightly higher level of proof that you need to establish. I honestly do not know what the state of the law is in the United Kingdom in terms of marriage recognition where one of the spouses is transgender. If it is viewed as same-sex at least folks would have some rights.

**AUDIENCE MEMBER:** Did she have the possibility of going to Canada if it doesn't work out for her legally here?

**MS. NEILSON:** The question if people didn't hear is, would Ursula have that possibility of going to Canada? Yes and no. Basically, there was a terrible law that the United States implemented, I think about three years ago, called the Safe Third Country Agreement,<sup>15</sup> which says that for asylum purposes between the United States and Canada, because our systems are similar, whichever country of the two a person sets foot in first is the country where they have to seek asylum.

Before that law was passed, it used to be if someone lost asylum in the United States, they could race up to the border and they could have a second bite of the apple. That was significant. One thing I didn't mention with asylum cases in the United States is that, you have to file within one year of entering the United States. Ursula did, but a lot of people miss that deadline. It is still possible to win asylum, but it is a lot more difficult. In Canada they don't have the one-year inspection. In the past, in some instances, people would lose on in the United States on that ground but still be able to put their case forth in Canada. I mean the short answer is no, she would not be able to go to Canada for that case.

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<sup>15</sup>THE AGREEMENT BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF CANADA FOR COOPERATION IN THE EXAMINATION OF REFUGEE STATUS CLAIMS FROM NATIONALS OF THIRD COUNTRIES OF DECEMBER 2002, *available at* [www.uscis.gov/files/article/appendix-c.pdf](http://www.uscis.gov/files/article/appendix-c.pdf)

The longer answer is Canada does, unlike the United States, have something called a point system where people can go and self-petition. You are assigned points for various qualities that maybe the government wants in immigrants, like being relatively young, well-educated, being fluent in English and/or French, and having some ties to Canada. Depending on whether she would have enough points, it might be possible for her to self-petition under that system.

**AUDIENCE MEMBER:** This is a little unrelated. I was wondering if you were involved in or aware of the article about the transgender applicants for asylum, and if you had an opinion on how the media was portraying that patient process as being really easy and simple.

**MS. NEILSON:** The article that the questioner is referring to is this really awful article in the San Francisco Weekly, which I think is somewhat similar to the Village Voice. I did speak to the reporter, and I think I was quoted in the article. I think there were four attorneys quoted in the article. The premise of the writer was that transgender people have free pass to get asylum here, no matter what their criminal record is, and most of them are prostitutes. They get asylum and nobody cares. The article says that even after they get asylum they continue being prostitutes.

I talked to the reporter for a long time. She kept asking me if a lot of my clients are prostitutes. I responded that some of them are, but I certainly wouldn't say that most of them are. I sort of brushed it off and didn't have any idea that that was sort of the thesis of her article.

I wrote a letter to the editor, which every lawyer that was quoted in the article signed onto, and said you completely misquoted us and twisted what we said to meet your thesis, and this is not what any of us told you. In reality, we have had a very high success rate with transgender cases, and I think that is as it should be because in most parts of the world, including the United States, it is not safe to be transgender. In other parts of the world going back to one's country as an openly transgender person is likely to lead to violence and death. People should get status here. I know that there was uproar about the article in the San Francisco area, and we thought that the fewer people that read that, the better.

**AUDIENCE MEMBER:** I was curious when you said that North Carolina law was more favorable. I'm gathering from what you said that there is no specific court case in North Carolina. Is there any indication whether North Carolina courts would follow cases like *Kantaras* or the Kansas case?

**MS. NEILSON:** In doing the analysis of whether the marriage would be valid for immigration purposes, if you live in a state where there is a bad case on the books like *Kantaras* or the Kansas case, then you are out of luck to get your marriage recognized. Most cases, for better or worse, but for better in most cases, there is no case on point whether or not a transgender marriage is valid, recognized or not.

The reason I think the North Carolina case was successful is that there was a specific statute that said a birth certificate could be amended to put someone's corrected gender on it. The BIA said, if North Carolina is recognizing the person as female, then we are going to defer to North Carolina. If they have already recognized her as female for the purposes of her birth certificate, then there doesn't seem to be any public policy reason in North Carolina not to recognize the marriage.

**AUDIENCE MEMBER:** Was that an opinion?

**MS. NEILSON:** Yes, it's an opinion. You can find it on our web site, its *Lovo-Lara*.<sup>16</sup> It is worth reading. It is very really strongly-worded and a good case.

**MR. DURHAM:** Thank you very much, Victoria. That was very informative.

The next presenter is Katrina Rose, and she will be talking about Proposition Eight in California and how that has affected the transsexual community. It's a pleasure to introduce Katrina Rose today because we are both former Houstonians. We were at South Texas College Law at the same time. Katrina was a law student and I was a reference librarian there. When I taught Sexual Orientation in the Law at South Texas, Katrina came as a guest lecturer. Once again, I have the pleasure of introducing Katrina Rose as a guest lecturer.

**MS. ROSE:** Thank you for letting me know about this symposium. It's nice to hear from you again. The best type of Houstonian to be is a former Houstonian. I spent thirty plus years there. I spent thirty plus years of summers with sixty days in a row of one hundred degrees. You *want* to be a former Houstonian.

I spent my time at South Texas College of Law transitioning not just from human to lawyer but from male to female. Around that time in law school, I guess probably colleges in general were transitioning from having rooms that did not have all of this technology to rooms that did. I graduated in 1998. There was probably only one room that had anything approaching this, and there weren't too many professors there that wanted to attempt to use any of it.

Right now, I teach an undergraduate level class on transgender history at the University of Iowa, sometimes in the Sexuality Studies Department and sometimes in the History Department. Because of the way I utilize technology, I couldn't teach the class without having projectors, or Internet access, because even though it is history, I often find myself dealing with current events. And sometimes by current, I mean *really, really, really* current.

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<sup>16</sup> 23 I. & N. Dec. 746 (B.I.A. 2005).

A little over two years ago, the Fall of 2006, I found myself dealing with something that was literally happening during the class. Just because of the way scheduling worked out, and in terms of the way the New Jersey Supreme Court hands down its opinions, the opinion of *Lewis v. Harris*<sup>17</sup> was released literally during my class session. I had no idea it was going to be released that day. When I did the syllabus that semester, we ended up talking about transgender in marriage cases that day. Of course one of the ones that probably anyone would talk about on that subject was the New Jersey case from 1976 *M.T. v. J.T.*,<sup>18</sup> probably still the leading *good* transsexual marriage opinion in the United States.

One of the things I was talking to my students about is (in the history classes it usually ends up being half LGBT and a half non-LGBT; sexuality studies are a little bit more on the LGBT side; some of the students come to the class with some familiarity about current issues regarding same-sex, transsexual stuff; they weren't too familiar about the dynamics between same-sex marriage and transsexual identity in marriage; they know things like that exist, but they don't -- and a lot of legal professionals don't -- understand really how they start butting heads) I had given my kids a preface about how things might go in *Lewis v. Harris* regarding trans-people, even though it wasn't a trans case. I had been looking at the briefs that had been filed in that case, and not surprisingly *MT v. JT* popped up in a number of briefs. More often, it popped up on the anti same-sex marriage side, because, of course, it upheld the idea that marriage is between a man and a woman.

It just so happened in 1976 three judges in the Appellate Division said, okay, you have a male to female transsexual and a man, that's a man and woman. We are not going to uphold the same-sex marriage. That's ridiculous. This is an opposite-sex marriage. We are cool with that.

I had started throwing out some hypotheticals about this (*Lewis v. Harris*) could end up going bad for transsexuals no matter how the case turns out for the same-sex couples. It could go really bad for the same-sex couples. It could be Tennessee and Texas<sup>19</sup> that says, we will be getting back to traditional family values; none of that queer stuff no matter what. We are wiping out that thing from 1976. We don't know what they were smoking back in 1976, or they could have said, marriage for everybody. We don't care what the sex is. And that stuff about transitioning from one sex to another? We don't know what they were smoking either. That doesn't matter; that didn't count; we don't know what that is.

As it turns out it didn't go either way. We know what happened in *Lewis v. Harris*. In New Jersey now there are civil unions, probably sometime soon marriage depending upon what the legislature does. And *MT v. JT* is still alive, luckily. Even though my talk is about California, we are going around from Texas to New Jersey, and now we are going to get to California.

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<sup>17</sup> 188 N.J. 415 (2006).

<sup>18</sup> 144 N.J. Super. 77 (1976).

<sup>19</sup> Littleton v. Prange, 9 S.W.3d 223 (Tex. Ct. App. 1999).

Much to my spouse's chagrin, I have a little too much time on my hands for looking at briefs in cases like *Lewis v. Harris* and the Proposition Eight briefs. If you haven't looked at some of the (Proposition Eight) briefs that are out there, I would advise taking a look at them. There's a lot on both sides. There are a lot of pro-GLBT folks and anti-GLBT folks, usually organizations like Focus on the Family and that kind of stuff. There are a couple of really wild ones on the anti side in the Proposition Eight challenge. There is one from the character named Michael McDermott apparently filing on behalf of himself and masculinity. I leave it to you to go find that brief. I believe I have a site for it in the materials in the booklet. He makes a lot of wild statements. One of them, I'm quoting it from him because versions of this you will see from people who you know are anti, and there are decent attorneys that know what they are doing. This is the clause. "The clarity of the language of Proposition Eight is matched by its unambiguous nature. There is no wiggle room in the text to prove by the Voters, who knew full well the meaning of what they enacted."<sup>20</sup> Did they? How do transsexuals fit in with what happened with Proposition Eight? How many people are aware that there was more than one version of an anti same-sex marriage amendment that was floated around out there? There were a couple of different ones that basically said marriage is between man and woman, just one little sentence. There was one monstrosity that was floated around that included a chromosomal definition of man and woman.<sup>21</sup> Not simply a chromosomal definition, but one that was pretty much wrong even by right-wing standards. It was just wacky. That one didn't get onto the ballot. The problem is if it had, I don't think that anybody would have paid attention to it. I mean, there are some people that would notice it floating around, but it probably would have passed just like the one that did pass passed. But the one that did pass didn't say anything about sex definition. That's a good thing. It's *not* a good thing that it passed, but it is there, and my suspicion is that the challenge to it in court isn't going to work.<sup>22</sup> I know the speech at the beginning talked about positiveness, but that comes from thirty years in Texas. I could be wrong.

But if I'm right, Proposition Eight is going to be there for at least a while. How *do* transsexuals fit in? What did people who voted on that thing mean when they wanted marriage to be between a man and a woman? Is it a man and a woman Texas style, which means chromosomes equal sex? Or, is it man and woman that is, presumably, the way California has meant it -- meaning it's a state like North Carolina that has a transsexual birth certificate statute. Actually, North Carolina beat California in that regard. California didn't pass its birth certificate statute until 1977. North Carolina passed its statute in 1975. It has been around a while. More importantly regarding the

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<sup>20</sup>Brief for Michael J. McDermott as Amici Curiae Supporting Proposition 8 at 5, *City and County of San Francisco v. Horton* (No. S168047), 2008 CA S. Ct. Briefs 68047.

<sup>21</sup>Proposed Cal. Initiative No. 07-0098, [http://ag.ca.gov/cms\\_attachments/initiatives/pdfs/i769\\_07-0098.pdf](http://ag.ca.gov/cms_attachments/initiatives/pdfs/i769_07-0098.pdf) (last visited Jan. 22, 2009).

<sup>22</sup>John Wright, *Kendell: 'We're going to lose,'* DALLAS VOICE, March 26, 2009, available at [http://www.dallasvoice.com/artman/publish/article\\_10980.php](http://www.dallasvoice.com/artman/publish/article_10980.php).



history of all of this stuff in California, the first time that California enacted a statute targeting same-sex marriage was also 1977.<sup>23</sup>

At the exact same time that it was dealing with the issue of recognizing change of sex, it was dealing with the issue of not letting gays get married. So you figure that the same people dealing with those two issues could distinguish between the two.<sup>24</sup> It is always a little bit of a touchy situation talking about this argument, because if someone isn't familiar with me or the issues, they might come away saying, oh, you are one of these transsexual separatists and you don't care about -- you're anti-gay. No, I'm just trying to let people realize that with these things, these anti same-sex marriage laws and now constitutional amendments, if they are there -- and they are there -- do your best to limit the damage.

It's just a matter of time before a transsexual marriage is in the courts in California under Proposition Eight, assuming that it is upheld by the California Supreme Court. A lot of people, well-meaning people -- sometimes people who generally do have a pretty good handle on transgender law -- will march into court and say, hey, this person changed sex; they had surgery, hormones, they should be recognized as the opposite sex, therefore, they should be allowed to change their birth certificate and get married. If the judge isn't familiar with this whole situation, they are going to ask why; why should this not be regarded as either it is going to be a same-sex-relationship or you are trying to get around it?

There is a reason that I kind of put my law stuff up on the shelf for a little while and started teaching history. I just started looking at a lot of the issues involving trans stuff, and I found myself looking really, really deep into where all of the trans stuff came from. The really, really bad case in Texas happened right after I moved away.<sup>25</sup> It was actually percolating in court while I was still there, but it didn't blow up until after I left. As it turns out Texas doesn't have a transsexual birth certificate statute, or anything really to hang your hat on regarding making that case turn out differently. But some states, I think it could still end up going bad even if there is some sort of statute, usually a transsexual person birth certificate statute that someone could hang your hat on. But, if you are not able to contextualize the time frame in which these things came into existence -- most came into existence a good while back, 1970s and 1980s, and not too many have been passed recently -- that might cause folks to think well, it is kind of the same gay stuff now.

It is kind of a retrenchment going back to traditional gender roles. Well, maybe, maybe not, but these laws are still on the books. There has yet to be an anti same-sex

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<sup>23</sup> 1975 N.C. LAWS CH. 556; 1977 CAL. LAWS CH. 1086 (transsexual birth certificate statute); 1977 Cal. Laws Ch. 339 (anti-same-sex marriage statute)

<sup>24</sup> I do not claim to be the first to have noticed this. See Catherine Kunkel Watson, *Transsexual Marriages: Are They Valid Under California Law?*, 16 SW. U. L. REV. 505, 524-25 (1986).

<sup>25</sup> I moved to Minnesota in July 1999. On October 27, 1999, *Littleton* was handed down. *Littleton*, 9 S.W.3d at 223.

marriage constitutional amendment or even a Defense of Marriage Act -- just a statute -- that says anything about limiting the rights of transsexuals within its statutory language. A lot of times like what happened in Kansas with the *Gardiner*<sup>26</sup> case, the judges are eager to kind of judicially add on anti-transsexual thought to it. But so far, there hasn't been any specific anti-same-sex marriage law or constitutional amendment that had something like a sex definition. A couple of them kind of percolated for a while, none of them ever went anywhere.

So right now, the argument has to be, and in my opinion is, sex definition and marriage definition are two different things. Maybe that's something that you just intuitively think. Well, who would think differently? Some people, particularly those sitting on the bench, might. They might say well, it is all traditional gender role stuff. It's all folded into one. It came close in Louisiana, which has one of the older statutes, 1968. There has been one case that technically didn't involve the validity of the marriage, itself. It was a custody situation that occurred after the marriage, itself, had been dealt with. It reached the Appellate Court in Louisiana. Despite the fact that it involved female to male, apparently they had done everything regarding meeting the statutory requirements for getting the birth certificate changed, and it all happened before the marriage, so there was no question at the time of the marriage, it was same-sex and the person transitioned. Everything was cool.<sup>27</sup>

One of the judges on the panel -- it was a two-to-one split -- one of the judges said, Louisiana has a law against same-sex marriage. This thing that lets this person change the birth certificate, that doesn't mean anything. That still doesn't change your sex.

Why?

I mean think about what it means when a state enacts one of these things. Sure, in the cases like California and North Carolina -- some of them where they deal only with this issue, it's usually just a one-page law -- and other states it came in when they would completely modify their entire Vital Statistics Act.

Either way, what's a state saying? Sure, it's specifically saying, we will let you change this particular documentation. But if you follow the thought process of that minority judge in that Louisiana case, what are you saying? You are saying we the state are enacting this framework to let you spend hard-earned money to file a court case or go before an administrative law judge, spend a lot of money, spend a lot of time to get a piece of paper that we know means nothing. That doesn't make any sense. You may not like transsexuals. You may not like changing sex. You may be post-transsexual, you may be anti every transsexual. Either way, what is the underlying meaning of the state enacting a piece of legislation allowing someone who has gone through surgery (or in the

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<sup>26</sup> *In re Gardiner*, 273 Kan. 191 (2002).

<sup>27</sup> *Pierre v. Pierre*, 898 So. 2d 419 (La. Ct. App. 2004).

case of Iowa's law surgery or some other procedure)<sup>28</sup> to change the sex designation on their birth certificate?

They are not saying, in those exact words, we are letting you change your sex. They are saying we are letting you change it on this document. But there is an underlying meaning and it's saying, hey, we recognize this. It's there. And the research I have been doing towards what I'm hoping will be my dissertation is really finding the evidence of this. If you look at a lot of these statutes, you will find the statutory language and there are not a lot of references to them. Usually the bad transsexual cases happen in states that don't have the statutes, so there's not a big connection. In the states that actually have them, there is not a whole lot of litigation, or at least reported litigation.<sup>29</sup>

Were the states *actually* enacting statutes that don't mean anything? I don't think so. I found a lot of deeply-buried archival materials -- some from Michigan, some from North Carolina -- that make it very clear; a lot of these came from doctors and gender-identity programs just writing letters to legislators saying we have these people that have gone through the program, they need to get some identity documentation. What can you do? We can go ahead and do *this*. It breezes through the legislature. At least it did back in 1975 back in North Carolina; somehow I don't think it would today. That is something to keep in mind.

Thirty years ago, forty years ago even, transsexuals, you know, in some ways were very controversial. But, the actual issue was seen as a medical issue, which is kind of a touchy issue in itself. But, at least that is how it was recognized, so it was recognized in some way. It is still memorialized in law. I think that has meaning even when the state does something really, really nasty like California did and pass an anti same-sex marriage constitutional amendment. Even as things stand, that definition of marriage is not the same as the definition of sex. They could have put a chromosomal definition in the Constitution, but they didn't.

I'm hoping that whenever that transsexual marriage case works its way into the courts in California, or in any of the other states that have both transsexual birth certificate statutes and anti same-sex marriage constitutional amendments, that the historical relevance -- the contextualization -- will at least be on somebody's mind. It won't just be all lumped together saying, this is all that queer stuff from today. We have to get back to the traditional morals. Well, twenty-five, thirty, forty years ago there was a difference. And however post-gay, post-transsexuals, post-gender you might want to be in terms of your queer or gender theory, these laws are still there. Don't forget about them. Don't rush past them into heavy duty gender theory. That is not saying I don't care about that stuff. If you prowl around on-line on some of the e-mail lists, you will see that

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<sup>28</sup> 1976 IOWA LAWS CH. 1111.

<sup>29</sup> Katrina C. Rose, *Is the Renaissance Still Alive in Michigan? Or Just Extrinsic? Transsexuals' Rights After National Pride at Work*, 35 OHIO N. U. L. REV. 107, 120-22 (2009).

I get probably equal barbs thrown at me from the gender theorists as well as the transsexual separatists.

The gender theorists because I actually care about the word "transsexual" -- that is how I identify -- from the transsexual separatists because I'm okay with transgender too. Transsexual separatists do not like the 'TG' word.

**MR. DURHAM:** Let's open it up to questions.

**AUDIENCE MEMBER:** All right, I'm not familiar with how the community operates, but I do know that sometimes transgender men marry transgender women. In other words, in that case it becomes a moot point because it is a man who became a woman marrying a woman who became a man.

**MS. ROSE:** It should.

**AUDIENCE MEMBER:** Well, because it is a moot point even on your chromosomes at that point.

**MS. ROSE:** It would, assuming that you are only dealing with your average sets of chromosomes. If you start getting into intersex stuff, but --

**AUDIENCE MEMBER:** Is that a common thing, or is it usually the transgender person marries a regular person?

**MS. ROSE:** I'm not sure I can speak to percentages. I know male-to-female and female-to-male couples. I know couples that are both male to female. I can't say I personally know any that female-to-male -- well, actually I know some. Myself, I'm male-to-female with a non-transsexual woman. I do point that out because again, in terms of the issue gender theorists versus transsexual separatists, I'm not simply going towards the transsexual separatist side. I understand that there are same-sex couples that are same-sex with a person post-transition. I understand that no matter which way the sex determination goes, under a Proposition Eight some transsexuals are going to be affected. What my concern is, in a state where things like *Gardiner* or *Littleton v. Prange* when it goes the way that it wipes out transsexual identity, it doesn't just wipe out heterosexual-transsexual marriages, it destroys the identities of single transsexuals too. I have been single enough during my life that that matters. Try to think of single people in this too. I get into arguments with single transsexuals about this. This affects you too. The *Gardiner* case involved a marriage, a probate case, marriage, but that wiped out the identities of single transsexuals in Kansas as well.<sup>30</sup> I can't speak to any percentages. I don't know if anybody else can or not.

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<sup>30</sup> Of course, those transsexuals living in Kansas but who were fortunate enough to be born elsewhere have recourse to the birth state for securing *some* documentation. See *Somers v. Superior Court*, 172 Cal. App. 4th 1407 (2009).

**AUDIENCE MEMBER:** I don't know the difference between the separatists and the theorists.

**MS. ROSE:** I am really just using real general terminology. My definition of transsexual separatist is someone who would probably fit in real well with the way things were in the 1970s. The goal was to transition, get your surgery; go and not have any connection with not only the gay community, but with other transsexuals. The idea was to completely assimilate. Some of these folks have really wacko attitudes. I understand where some are coming from, but some are almost really anti-gay attitudes and I definitely can't care about that. I'm talking about gender theorists are folks who almost completely shut out the word transsexual.<sup>31</sup> Transgender and transsexual have different meanings.

Sometimes transgender -- there are instances where transgender should not be used. In fact, and this is off a little bit, I will say one thing that really, really irks me is hearing the phrase LGBT marriage. The T in LGBT is transgender and not transsexual. Transgender is the big umbrella term. Not every person who is transgender has any connection to marriage. That is just -- you could be just a cross dresser or someone who is fully transitioned and might be in a marriage. So when you say LGBT marriage, you also get the B in there, and that opens a can of worms. I personally think if you say B, bisexual marriage, that starts opening up a can of worms for more than two people.

**AUDIENCE MEMBER:** Can you, for those of us who might not be that familiar with it, can you explain the difference between transgender and transsexual?

**MS. ROSE:** Okay. Transsexual is someone whose goal is to transition from male to female, female to male with or without surgery, although the separatists will tell you it has to be with surgery. Transsexual means transition from one to the other.

Transgender, the old definition of it meant basically a transsexual who doesn't have surgery. The usage of it now, unless you see someone refer back to the old version, it is an umbrella term, which means just gender variance of any sort.<sup>32</sup>

**AUDIENCE MEMBER:** The thing that puzzled me about thinking of marriage recognition and the birth certificate is, of course it's logical; but the thing that has occurred to me about it is that it potentially puts the transgender spouse or putative spouse in the position of if marriage recognition is based on whether you have been through this process and gotten a document change, then there is a question about what if you choose -- if you are eligible to have the document change, but choose not to so that you will be eligible to marry the person.

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<sup>31</sup> Law is becoming equally murky. For example, the *Somers* opinion, despite involving both a person who fits the definition of "transsexual" and the California transsexual birth certificate statute, contains multiple occurrences of "transgender" but none of "transsexual." *Id.*

<sup>32</sup> For the various terminology, *see generally* SUSAN STRYKER, *TRANSGENDER HISTORY* (2008).

That is to say that from the point of view of the hostile judiciary about gaming the system, if marriage recognition is based not just upon what your medical status is, but upon an elective administrative process, and that individual is -- based on your partner's sexual orientation, is to choose to go through the process or not, and to legally be whatever gender is necessary to have a recognized marriage in the relationship.

That sounds dandy to me, but it seems like it could be problematic in terms of saying well, we can't just rely on this birth certificate statute, so this may be just an inflated hypothetical that has never come up; or are there counterarguments to that as to why that shouldn't matter? Why the birth certificate shouldn't matter?

**AUDIENCE MEMBER:** Why the ability of individuals to choose to go through the process shouldn't matter as to whether recognition is based on the birth certificate statute?

**MS. ROSE:** Don't get me wrong, ideally that would be a wonderful situation. The reason I make these arguments in writing, when I write about this, is to make sure that there's at least some option out there. As of right now where I was born, Texas, it doesn't matter what I do. It doesn't matter how long I live. This is the cynicism in me. Texas is never going to overturn *Littleton v. Prange* via statute; it's not going to happen. My birth certificate is going to say what it said in 1964. But in states that do have these things, they at least represent some avenue for some people, people who have met whatever requirements there are of the statute in that state, to not be imprisoned by what is on the birth certificate.

You know, there is no ideal situation right now. I'm just saying please, please, please, don't forget that roughly half the states have by statute recognized, albeit implicitly, change of sex. As of right now, no state recognizes same-sex marriage by statute.<sup>33</sup> That is kind of a vicious argument I throw out when the subject turns to the transgender inclusion and the Employment Nondiscrimination Act. The anti-inclusion people say, oh, you people are too new, you're too weird. And I say, really? And I say, let's get to the recognition scoreboard!

**MR. DURHAM:** Thank you. Very interesting topics for discussion, very definitely. The next person is Benish Shah and she is going to speak on "Transgender Issues in Criminal Law: Finding a Place for Transgender Individuals in Prisons."

**MS. SHAH:** When I first started researching this topic, I was an intern at the District Attorney's Office in Atlanta, Georgia. The way I got actually into the topic was completely random, and most people who I tell laugh at me. I watched an episode of "SVU Law and Order," and the entire episode focused around a transgender male to female, who did not have surgery, but was taking hormones, was self-medicating. Of

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<sup>33</sup> After Ms. Rose's presentation, the Vermont legislature voted to allow same-sex marriages. *See Gay Rights Groups Celebrate Victories in Marriage Push*, N.Y. TIMES, Apr. 7, 2009, available at <http://www.nytimes.com/2009/04/08/us/08vermont.html>

course she goes to jail and it becomes an issue as to where to place her. She ends up going into a male prison because there is really no other place to put her, and she gets sexually assaulted and ends up in the hospital.

After watching this I was at the District Attorney's Office, and I marched myself over to one of the attorneys and I said to one of the attorneys, "You know, I want to talk about this issue. What do you guys do?" Their response was, "Are you considering gender surgery?" I was like, "Does that matter? I'm not entirely sure if that matters." They are like, "Well, you know, why would this come up? We have never seen someone in this case." I said "That's fine." I asked a couple of other attorneys, and they also told me that they never saw a transgender person on the other side of the table. I find that kind of hard to believe, but it goes back to the fact that there's actually no number to find. If you go in and you start researching how many transgender individuals are in jail, there is no number. And I asked an attorney I worked with -- I'm actually a corporate litigator -- I negotiate contracts all day. So I asked him because he is a former prosecutor. He looked at me the same way -- and this is New York -- and he said, "There are transgender people in the criminal justice system?"

The problem starts with the fact that there is no definition, legally speaking, of a transgender individual, which goes back to what you were saying. We all talk about sex, but there's a male and there's female. And international law talks about male and female, but you never actually define male and never actually define female, and within that transgender are completely lost. The funny thing is judges kind of still have the same attitude. In an 1872 case Justice Bradley said this about gender: "The natural and proper timidity and delicacy which belongs to the female sex evidently is unfit for many of the occupations of civil life. The paramount destiny and mission of women is to fulfill the noble and benign offices of wife and mother. That is the law of the Creator."<sup>34</sup>

In 2004, the Court said that the common meaning of male and female, as those terms are used statutorily, refers to immutable traits determined at birth. In another case it said that some things, you can't change them no matter how much you want to. There is not much of a difference between the definition of gender in the 1800s and what there is now. It usually refers to people in transgender situations, because judges freak out and they don't know how to deal with it, and they are like what can we find in prior case law. In *Farmer v. Brennan*,<sup>35</sup> in criminal law as transgenders, the judge decided to use a medical definition, which created a host of new ideas and a lot of problems and controversy, where he literally cited a medical journal and said that transgender people suffer a medical illness. It is a psychiatric disorder in which the person feels persistently uncomfortable with his or her anatomical case. There is no definition. You can't actually blame the judges or blame the prosecutors, because if you talk to someone in the transgender community, they also define themselves differently. Someone that is postoperative will say that I'm transgender, and the person who is a cross dresser is not.

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<sup>34</sup> *Bradwell v. Illinois*, 83 U.S. 130, 141 (1872).

<sup>35</sup> 511 U.S. 825 (1994).

The problem is when the person who is a cross dresser identifies as transgender and is arrested and is getting booked, they say you know what, I am a female. My driver's license says that I'm a male, but I am not. What ends up happening is they are abused. They are abused by the police officers. There are cases that have been reported in newspapers where officers will have them take their clothes off in front of everybody just to ridicule them. I mean, you are looking at parts of the United States that don't actually think that immigrants exist, so the idea that somebody could actually be transgender, I mean, you are asking for it.

This happened in Seattle. As reported there and pretty much what Seattle did is they actually went out there and took a step and said what you should do when somebody who is transgender is arrested. They came up with the wonderful and unique idea that it is genitalia-based. If you have a penis, you are a guy; if you have a vagina, you are a female, which completely ignores the whole idea that if you are a cross dresser, you probably have not had surgery. You may not want to have surgery. You may not be able to afford surgery, but you identify as a male or female which may be different from your sex. You are probably self-medicating, and you are still probably going to get abused in jail.

The same problem came up in Washington D.C. There's a lot of conferences, and then there is a huge controversy over the fact that the Washington D.C. Department of Corrections did the same thing. They thought they were being very benevolent also. They were like we are totally in with the transgender community. We are trying really hard, and that is all they could come up with, is the genitalia-based placement.

In New York, one of the things -- not just in New York -- but in other states as well, what they do is now they provide a way of safety, which is solitary confinement. I don't know, I mean a lot of people are kind of familiar with solitary confinement through TV shows and movies, but solitary confinement is generally reserved for people that have done something very wrong. They are very violent towards other prisoners and they -- it's a harsher form of punishment than is given to regular prisoners. What the court system has done, and this is now a protective solitary confinement, so if I'm a transgender individual and I personally want to feel safe because I'm male to female and I'm in a male prison, I can choose solitary confinement. So twenty-three hours of the day I will be by myself in a jail cell, where technically I will have access to what all the other inmates have access to, but usually you don't because there's just not enough resources in jail.

New York City has a case where it said solitary confinement is violative of the Eighth Amendment. A lot of activists came in and said you know what, we say solitary confinement here is perfectly okay. The way they got around it is saying you know what, we are not imposing solitary confinement on you, but we are giving you the option of solitary confinement to protect yourself. A lot of people will tell you it is not exactly a choice, when you are in a situation where you are probably going to get raped or beaten on a daily basis or go into solitary confinement. That doesn't really leave much of a choice. That's one option, solitary confinement.



The second option which New York also did away with is what you call category B prisons. Rikers used to have this. In 2005, it was shut down. You were allowed to self-identify as gay or transgender. They would put you in this unique facility, and you would be in a group with other transgender or gay individuals.

They shut this down in 2005 because they said that it had become a playground for sexual misconduct and deviants. In 2005 they said you know what, we are going to give you another option. It is now 2009, and there have been no other options created for these people.

There was a study done in which transgender people were polled and asked how many of you suffered discrimination or violence in the prison system or the criminal justice system. Fourteen percent of them said they suffered some sort of violence or discrimination in the prison system. Fourteen percent of the entire population that was surveyed; that is not fourteen percent of the population in prison, but fourteen percent of entire population. Theoretically, about one hundred percent of people who had any contact with the criminal justice system could be claiming that they suffered some sort of violence or discrimination in the criminal justice system. That's a pretty high number. The fact is that there hasn't been anything done about that. Courts and police officials and department of corrections haven't really done anything about it, except give you the option of solitary confinement or the option of genitalia-based placement.

Another idea that a lot of theorists talk about is the idea that you should be able to self-identify and pick the place where you want to be jailed. It's a nice theory, but the problem with that is, if you were male to female transgender individual, you are preoperative and you are put into a female facility, the females in that facility will begin to feel unsafe, and then they can file a suit saying their privacy rights have been violated. There is case law that says it does not violate your privacy rights. The fact is that there would be a serious uproar in society if you allowed that to happen. In one of the cases Richard Massbrow, a man convicted of severely beating and raping a woman, was put into a male facility and decided to castrate himself and then identify as female and be put into a female facility.

Now the question is, what draws the line between who is put into a female or male facility? There is no line. So, what my focus was on was trying to find some sort of solution that is more immediate, because there is a lot of theory to go through and a lot of arguments to talk about.

Those arguments are not going to get resolved tomorrow or in the next year or probably in the next five to ten years, because people are still trying to figure out how to define the transgender individual. During those five years or ten years, or that week, there are people that are being arrested and given prison sentences, and those people need some sort of protection.

When you are in that position, you don't actually care what the academics are arguing about. You don't actually care how it is defined. You are kind of worried about your safety. What I found was that it's kind of similar to victims of trafficking. I do a lot of victim trafficking work and work with people trafficking, who end up being prostitutes. A lot of transgender individuals who are arrested are forced into prostitution. Police officers, prosecutors, judges all have a certain attitude towards people who are prostituting, and that attitude is you know what, it doesn't matter; get him in and out because they are just going to go back and do whatever they were doing. It is not a positive attitude. It is not an attitude of trying to help that individual. That's kind of what you see here. The one thing we advocate in trafficking issues is trying to educate the people who are players in this field. When I said educate, I'm not saying have a mandatory training where you go once, as soon as you become a cop and that's it.

When I say mandatory training, I mean you should have training with people who know about the subject. It should be with people who are straight or transgender, a kind of mix of people. We are talking about a lot of very biased individuals who don't want to listen to you if you are a transgender. That's not fair and that's not right, but that's how it is.

Before you can change the entire system from the outside, you have to work with what you have. So you have to have the mandatory trainings, and after the trainings there should be a follow-up. Officers should have some sort of follow-up afterwards to see what they have been doing, have they been following these things, what do they remember. You should have somebody who shadows an officer or a prosecutor for a month, two months. There are a lot of organizations out there, who would be willing to do this. In fact, there are a lot of law firms who do pro bono work, who will do it because it helps with building contacts.

The second thing is you need to have written policies. A lot of the training doesn't always work because there's no actual reprimand that follows. If you have written policies on what to do when a transgender individual is arrested, what to do when they are booked, how do you ask them to identify themselves; all those things once they are written down, you have something to go back to and say look, this person did this wrong. I was put in the wrong cell. I was asked the wrong questions. And look, your own book says that what happened to me is the wrong thing. So, Washington D.C. and Seattle are on the right path where they are at least putting it in writing. And more states need to do that. And they also need to kind of make that public so people know that it's out there.

The third thing is reopening category B prisons. It's kind of controversial, and I don't think it is the best solution, but I do think that it is a more immediate solution that we can offer. Category B prisons, you can self-identify and people can self-identify as gay even if they are not, and they are sexual predators and they will go in and abuse everyone else. The way to deal with that right now is to have some sort of evaluation with a medical doctor. There is a huge controversy over this. I don't think that being transgender is a psychological issue, but there needs to be some way of gauging whether

someone is actually transgender or whether someone is a sexual predator. To deal with that argument that the department of corrections will give you, you can give that option of you know what, fine, if I identify as transgender, I will go and I will submit myself to some sort of evaluation. If they decide that yes, I fit this category, fine, because then you are giving the system something that says this is tangible, we can work with this.

Again, I'm going to go back to the fact that I don't think this is an ideal solution, but I think it is what we have right now to work with. At the end of the paper and at the end of the research, I realized that I was looking really hard to find a place for transgenders in the criminal system. Unfortunately, there just isn't one.

**MR. DURHAM:** Let's open the floor to questions.

**PROF. GLAZER:** Category B, do you mean gay men and transgender women or do you mean gay men, lesbian, bisexual people?

**MS. SHAH:** Yes, there needs to be -- they do need to be set up. I can understand that there is a danger to put everybody together, because their rights of privacy are also violated. But, you can have kind of like separate category B prisons.

**AUDIENCE MEMBER:** What do you suggest or maybe you don't have an opinion on it, would you suggest self-identified women lesbians, bisexual women and trans-women and then trans-men, gay men and bisexual men?

**MS. SHAH:** Yes.

**AUDIENCE MEMBER:** When does it become economically inefficient in terms of taxpayers footing the bill for these different classifications of prisons? Obviously, it seems like a lot of un-ideal situations; however, when posed with how much does it cost, that is totally another argument to take into account.

**MS. SHAH:** That is something I deal a lot with when it comes to prisoners' rights issues because taxpayers just don't want to pay because they have done something wrong. But in the end it is a human rights issue, it is an Eighth Amendment violation. If you are putting somebody in the prison system, the national law says that you cannot treat them in an inhumane manner.

If that means that the taxpayers need to shell out a little more money, then you know what, it's about human dignity.

**AUDIENCE MEMBER:** As far as taxation and cost, that is really not an issue for human rights activists. That is an issue for the criminal justice system. What is wrong with our prison system; why do we treat our transgender or transsexual inmates --

**AUDIENCE MEMBER:** I think if you did an analysis, you would see that gays and lesbians are abused in prisons as well. The issue is safety in the prisons, not safety for lesbians and gays. That is the issue; you don't have enough correctional officers or lockdowns. That is the issue. But, not to splinter this out, and have a separate prison for lesbians and a separate one for gays and a separate one for transgenders. That is ridiculous. The main issue is to simply have safety in the prisons.

**MS. SHAH:** I can understand what you are saying, but statistically people who are transgender are abused much more in prisons, because a lot of times it's because they are self-medicated and they are in the middle of transitioning. If you put a male, who has breasts into a male prison, they are more likely to be abused than if a guy looks like what a traditional guy would look like. I understand what you are saying; yes, there is a lot wrong with the prison system, and it is a prison safety issue, but what I am trying to address is again, those are much larger issues that are going to continue to happen. Right now, you have to come up with somewhat of an immediate answer to help people who are constantly being abused.

**AUDIENCE MEMBER:** I thought there may have been an element missing in the economics discussion that was brought up by this person here. One thing that I think in the paper that you are writing, you might want to look into, is the extent to which there are costs that would be expended unnecessarily if, for example, there has to be more policing in the event that there is going to be more abuse.

It is at least plausible, and I have not looked at the data, I imagine there is maybe some out there, because I think you can offer an answer to these folks that doesn't have to be rooted in the Eighth Amendment. I don't think you have to go there. If there is data that says it costs us a lot of money to have people to police all of this abuse that goes on even if we don't have these separate facilities. I would imagine that that person over there might be quelled a bit too. Then it is not about this sort of unnecessary proliferation of prisons, but it is something that might actually keep costs down, because it is at least possible that we are spending money to band-aid the problem.

**MS. SHAH:** Right. A lot of the problem is there is not a lot of data that is readily available. There is no form when you enter prison that says transgender.

**AUDIENCE MEMBER:** Right, of course not, but there is data about how much it costs to police prisons. For this purpose you actually don't need data.

**AUDIENCE MEMBER:** My question relates to this issue of segregation of gender. I'm wondering to what extent the idea that you cannot put a transgender prisoner who is a male to female transsexual into a women's prison is an issue that is clouded by a lack of understanding of identity. For example, the New York City homeless shelter system and other homeless shelter systems around the country, where you have a similar kind of gender-segregation has instituted policies where someone who is a male to female transsexual can go into the women's side of the shelter system, and that has been

successfully implemented. So, why can't we address that with regard to a prison environment?

**MS. SHAH:** I think it is being addressed. I think that a lot of people who talk about this issue won't tell you that these fears have no basis; that a male to female transgender will not go and attack a female because they do identify and see themselves as a female. The problem is that courts and judges don't adapt as quickly as the -- it is a very good point, but it will take some time.

**AUDIENCE MEMBER:** Do you think there is an analogy between prisons and homeless shelters?

**MS. SHAH:** I don't know if a judge would.

**AUDIENCE MEMBER:** Do you think there is one?

**MS. SHAH:** I can see there being one.

**MR. DURHAM:** In order to keep on the timetable, I should cut off questions for now. I'm sure the speakers will be open to questions after, during the break and during lunch to entertain any of your questions.

Ms. Benish, thank you. I wish we had more people like you who care about the issue. So, thank you very much for coming today.

I want to thank all of our panelists. It is very important and I'm hoping to hear more about it today. Thanks a lot.

## **SESSION TWO: GENDER AS LEGAL BOUNDARY**

**MR. KINKEAD:** I am Mik Kinkead. I'm a transition services coordinator for the Long Island LGBT Community Center. I'm really thrilled to be here. It is a really exciting conference. I'm really excited that Touro Law School put this together, and I'm excited to introduce the panelists in this next session because two of them are people I have worked with in the past, and I know them to be awesome people. And the third one I'm just excited to meet today.

The session is *Gender as Legal Boundary*. Our first speaker is going to be Shayna Sigman, who is an Associate Professor of Law at the Jacob D. Fuchsberg Law Center at Touro. She received her B.A. summa cum laude, in 1997 from Boston University and J.D. degree with high honors in 2000 from the University of Chicago Law School. Before joining Touro Law Center, Professor Sigman was a faculty member at the University of Minnesota School of Law, where she taught torts, remedies, sports law, law and economics, jurisprudence and creditor remedies/secured transactions.

Prior to teaching at UMN, she clerked for Chief Judge Richard A. Posner, United States Court of Appeals for the Seventh Circuit. Professor Sigman has written and lectured on a wide variety of subjects including the jurisprudence of Judge Kenesaw Mountain Landis, polygamy, Jewish law, violence in sports and more. Professor Sigman's current research focuses on the interaction between private ordering and legal regulation, particularly in the context of the family. In addition, she is the chair of the Jewish Law Section of the American Association of Law Schools for 2007-2008. When not engaged in teaching and scholarship, Professor Sigman, sports-nut extraordinaire, can usually be found playing or coaching ice hockey, training at the gym, or rooting for the New York Yankees.

The professor is going to be speaking about “From Sex-Testing to the Stockholm Consensus: The Tenuous *Lex Sportiva* of the Transgender Athlete.”

**PROF. SIGMAN:** Today, I'm talking about transgender athletes and *lex sportiva*, meaning the law of sports, which is its own unique body of law. I guess the first place to start out is that sports loves categories. We like categories to make sure that everything is going to be safe and fair, make sure that our athletes are competing in the way that we can compare them, and say, yes, this is showing what is really the best out there; this is what it means to be elite, to show how much you can push your body and mind and achieve. And so, there is this emphasis in sports to make sure that things are clean and pure. Those of you following doping and drugs in sports realize that this is a big issue in that field.

This also comes into play for transgender athletes. Depending on the sport, athletes are typically going to be divided into age. Kids get divided based on the level they are at, and after competing as youth (or junior), they ultimately become senior or adult, and then master, if you want to keep competing above a certain age. Weight classes exist for some sports too. In weightlifting, also in fighting sports, that makes a lot of sense. Affecting transgender athletes is the fact that most sports are divided by gender. It is very few sports that aren't, and those are sports like yachting or archery, where people feel that there is no particular gender difference. Depending on the situation, there are even more categorizations. Disabled athletes, for example, have very strong classifications. The kind of disability you have in individual sports determines the category you compete in. An above the knee amputee is not the same as a below the knee amputee, paraplegics are different from quadriplegics, and so forth. Even in team sports, the rules determine a particular disability “score” allowing athletes to compete in based on having an overall cumulative amount of disability. The classification system is pretty extensive in sports, and it goes far beyond our situation.

The next part of my talk will be an understatement: Women have been denied opportunities to participate in sports, and they have been discriminated against. This stems from the idea that, oh, gee, women are too weak and sports are not for them. Even as women in the twentieth century became more involved in sports, there was always this

push to keep things safer for women. That is the layout, the background we are working with. In basketball, it used to be that women played this half-court game; you didn't run, you passed the ball. It was very different. Some sports still maintain distinctions today. In volleyball, the women's net is lower than the men's. In gymnastics, the athletes are on different apparatus; it's not even the same sport so to speak. Women play softball rather than baseball. In ice hockey, which you may have heard is my passion, women don't have checking, whereas men do. One of the fields that was the slowest to allow women to participate in the first place is distance running, which seems even "funnier" in hindsight, because endurance running and endurance sports is an area where women start to have a physiological advantage rather than a disadvantage.

That is the layout of where we are starting. There is a long history of sex testing in elite athletic competition. The law of the sport is that we tested to see if you are a woman. We have the category of gender, and it is very important, because we only want "true women" participating in this arena. Sex-testing was introduced in the late 1960s, introduced regionally in about 1966, at the Olympics in 1968, and it was only recently dropped. The original method was very humiliating. It was a visual inspection. The athletes had to parade before judges, take their clothing off, and verify that they were indeed women. For athletes who fell under greater suspicion, they might have to undergo a more rigorous investigation. After this, the officials shifted to the Barr body test, which tests athletes' chromosomes, and after that, the polymerase chain reaction test ("PCR") was used, which is a DNA test of the exact same thing. What the officials wound up finding is that there were not secretly men pretending to be women. What they found is that there are women who have intersex or other conditions that would trigger a finding of not having an XX chromosome profile. You found people with different chromosomal disorders. You had people who had androgen insensitive syndrome, which means they are XY, but they lack the hormones to actually process androgen and testosterone. They are women, and they grow up as women and they don't even know they have this condition.

This history is actually pretty scary for the athletes, because a lot of them don't know about it until they are tested, and then it becomes a source of shame, humiliation, and embarrassment. There was a runner from India, who plunged into a deep depression after finding out she was of an intersex condition. And she committed suicide. This bad history is a longstanding one.

Why did the officials do this? What is the purpose of sex-testing? The first reason is doping. Sex-testing is introduced during the late 1960s. Mid-1950s, we are starting to synthesize testosterone, make it in the labs and give it to the athletes. What do you know, they are stronger, faster, bigger, better, and it is completely thanks to these hormones. At the time, there was no valid testing to figure out if an athlete was taking synthetic drugs. Female athletes who are doping using synthetic testosterone have masculinizing characteristics and they look male. The logic of the officials was to check to make sure they are female, because they look too male to be women. There is an athlete who is actually an FTM, Andreas Krieger, who competed as a woman for East

Germany. There was a very big lawsuit that found that the state had engaged in mandatory doping; it forced its athletes, including girls from a young age, to take testosterone in order to compete. And during the 1970s, they were very successful in the sporting arena, but it ruined a lot of people's lives. The officials and doctors had no idea what the effects of the doping dosage would be. It was completely unsafe. And Krieger, who was one of these athletes, claims that the drugs accelerated his gender identity confusion, and it made his life a nightmare for years. Now he is living as a male.

The second reason for sex-testing is that there actually were countries that did try and cheat. The idea that somebody would try and pass off a male as a female, well, it sounds kinds of silly. It sounds like something they make stupid movies about, but it's an idea someone came up with and followed through on. For example, the Nazis in the 1930s really did take someone who had an ambiguous genitalia condition, took advantage of it and forced him to live as a woman. Hermann "Dora" Ratjen competed in the Olympics in 1936. He lost, and he eventually was discovered and barred in 1938. The most famous quote from Ratjen was that living as a woman for five years was "incredibly dull." That was his main complaint about participating in this charade.

The third reason that we typically find sex-testing is related to the culture and societal biases that sports is a male domain. It is about proving masculinity, and any female athlete who is too good is not feminine enough. Some sports are simply not feminine, and, so, it becomes a situation in which we question either the actual femininity of the athlete or the sexual orientation of the athlete. They are two separate things, but both are often under attack. What we find in a lot of women in the masculine sports, pretty much everything that is not gymnastics and figure skating, the remaining sports we don't hyper-feminize, the athletes will often act in extremely feminine ways outside of competition to sort of prove that it's okay. For example, it is okay that I'm a really fast runner, I wear long finger nails.

We have Danika Patrick, a race car driver, who feels the need to pose in certain magazines to show that, yeah, she is race car driver, but she is a hot chick too. There is that duality that goes on in sports, and that still actually lingers to today that hasn't changed, even though sex-testing has been dropped in part because of the fact that we have better doping regulations, and because it is seen as a rights violation.

What we have instead is the understanding that we do have transgender athletes, and we need to have a procedure for them and a policy for them; how do we know when they can compete in athletics? The International Olympic Committee ("IOC"), which is the governing organization for Olympic sports, approved the Stockholm Consensus.<sup>36</sup> The officials convened a medical commission to talk about when and how transgender people should be allowed to compete in this sports system. Note that their system is only Olympic federation sports. It doesn't have anything to do with if you want to golf or if you want to participate in tennis. Sports are governed by different organizations. The

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<sup>36</sup> [http://multimedia.olympic.org/pdf/en\\_report\\_905.pdf](http://multimedia.olympic.org/pdf/en_report_905.pdf)



IOC umbrella governs a lot of athletes, though, and they decided that eligibility will be determined case by case. The standard is written. It's a one-page document. The Stockholm Consensus requires athletes go through a three-step process. The officials wanted you to have completed your surgical changes, assuming you are getting surgical changes, including external genitalia and gonadectomy. You also need to have obtained the legal recognition by appropriate official authorities; and we also want hormone therapy for a sufficient length of time to minimize any advantages.

The standard assumes a two-year waiting period after surgery. It also assumes that all transgender athletes are transitioning and will become post-op. Pre-op, don't care about you. Non-op, you don't even exist. So that is what we are starting with. A couple of problems with this, you might think.

The first problem is that this is a medical commission that put a legal standard in the document. This is a sports rule, and so the officials decided to reference legally recognizable categories. That's great, but did they do the research to see how many countries recognize people and in what form? You have countries like Japan that require individuals to be unmarried and childless before they will approve a legal sex change. The drafters haven't even thought about it, and they put this requirement in that for many athletes will be a complete bar.

The next part is that the Consensus standards assume that everybody is going to undergo surgery. Not everybody undergoes surgery. It is very expensive, and insurance does not always include it. Some people choose not to for other personal reasons. Doesn't it occur to anybody that having mandatory genital reconstruction surgery might violate rights of the athlete? The IOC and Olympic movement are supposed to be supporting equality and nondiscrimination, and, yet, the Consensus asks athletes to make this very personal choice, when the truth is that it has no medical connection to athletic performance. It's not a medical finding that if we make your outsides match your insides; all of a sudden it is going to change things on the playing field. And then the waiting period poses a challenge, because it is officially two years post-surgery. If you think about how long it takes a transgender athlete to get through surgery; first you have to have your real life experience, you have to have hormones for a certain amount of time, the recommended counseling, etc. The window of time for competing in some sports is very narrow. You aren't going to be a peak athlete for that long, and the Consensus may now force you to wait until the end of your window, depending on how long it takes you to transition. We certainly don't want people to rush transition to be able to compete in order to meet the standard. It is a pretty bad standard.

There is a standard, though, so give the IOC credit for trying and recognizing that there are transgender athletes, if not for getting it quite right. How many transgender athletes are there? Who are transgender athletes? The first famous one was Renee Richards, who was a tennis player who competed in the Masters division as a woman, had previously competed as a man. In the 1970s, Richards gained access through the courts in New York and human rights law and was allowed to play in women's events.

That was a landmark case, but it is region and sport specific. Currently there is a golfer, a mountain biker, a cyclist, all athletes who are governed by different eligibility systems. Different sports have different rules. Mianne Bagger, a golfer, for example, has been allowed to compete in England where she is from, and in some other countries, but has not been accepted by the Ladies Professional Golf Association (“LPGA”).

Kristin Worley is in the Olympic system, a cyclist, so she is covered by the Stockholm Consensus. Dumaresq and Worley are both Canadian bike riders, but since Dumaresq is a mountain-biker, which is not an Olympic sport, they fall under different competition rules. Canada, though, is very progressive on transgender athletes, and both women gained the opportunity to compete at least in their home country.

For some transgender athletes, sports are important. I think sports are important for everybody, so I don't mean to single out transgender athletes. But when you are growing up with that sort of identity confusion, a lot of times sports offers a place where people kind of accept you for what you can do rather than for who you are. Sports is about performing and competing, so it becomes this safe haven. It's also a way for some transgender athletes to express the gender confusion in an acceptable way. So if you are, for example, female to male, you know that sports is an okay activity for women for the most part to do, but it is considered to be a more male activity. And then there's the reverse; people who perhaps engage in the hyper-masculine to conceal what they are feeling, a male to female athlete who would be particularly involved in sports. As a result, you have people for whom sports may have been the place in which they previously felt comfortable and safe as they are going through the transition. Then once they are at that elite level and the transitioning status, these athletes are being told, sorry, we are going to close this window, because now you are finally becoming who you are. This is a cruel place in which to start cutting people out of the system.

I will be honest though, a lot of the complaints and protests against transgender athletes are not coming from officials at the top of the IOC saying, well, we don't want to deal with “these people.” It's the competitors. It is the other women, often those who are competing against male to females, who are complaining and saying the transgender athletes have an advantage; it's not right; they are really men; we shouldn't have to compete against them. And these protesting women find it demoralizing in some way. That is sort of the hurdle we are trying to overcome, the interest we need to balance.

In the previous session, we heard about what happens when you have same-sex and transsexual advocates at odds with each other about whose rights are more important. Women in sports also feel persecuted and discriminated against. The creation of Title IX and similar laws and policies, expanding opportunities for women, this all reflects the fact that there is this bad history lurking in the background. Some women are very hesitant to embrace transgender athletes, because they think it is infringing upon something they fought very hard to gain. You don't want to balance the rights of transgender athletes with that of all female athletes and say this person's rights are more important than somebody else's.

There are sort of two general conceptions of women in sports. One is the idea that every female is an athlete. Gender is just the way we have to separate people, a category, to make the competitions safe, fair, equivalent. The other concept is that because of this bad history, women's sports represent a sort of sisterhood, an acceptance that you are a woman. And part of what we are seeing with these protesting competitors is that some women don't understand transgender athletes. When they come to compete, they don't see them as other women, they see them as something else. Legalities aside, this is part of the problem we need to rectify. It is really a cultural perception among athletes rather than anything else.

This second conception also includes recognizing that maybe there is such a different thing as women's sports, rather than gender merely being a sub-category of all sports, because when women play the same sports, even with the same rules, the result can be a completely different game. Women's basketball is played below the rim, for the most part, even though there are an ever growing handful of women that can dunk, whereas men's basketball is an above the rim game. When we speak about women's basketball, then, for example, women sometimes do have a legitimate interest in protecting what that is, and they need to be educated in how that sport (like any other) can include male to female transgender athletes on the court.

We have to be honest. Do transgender people who transition have an advantage? People are much more worried usually about the male to female athlete, rather than the female to male. There is some research showing that at the one-year mark after hormone treatment has begun, male to female athletes still retain a minor lean muscle mass advantage. It's an advantage of a very small size, though at the elite level, small differences matter. There is not a lot of medical research on this, though. Most experts seem to think that the advantage tops out one year into hormones, and beyond that, it goes away. But, male to female athletes also maintain some of the characteristics of a larger frame without now having the hormones to support the skeletal structure. They might actually be at a disadvantage.

More significantly, in order to properly undergo hormone treatment, the athlete's testosterone levels typically wind up lower than what a lot of born-as-women people would present. Psychologically there may be effects to the hormones too. Dumaresq, the mountain-biker from Canada, claims -- and this is not substantiated by any research -- that at the time she began taking her hormones, she felt that her appreciation for risk changed; that when she had her biological testosterone, she was more willing to do "dumb things" (my quotes, not hers) as a mountain biker and take the kind of risks that mountain bikers take and be pushed by her friends to do dumb things. Once she underwent hormone treatment of estrogen and suppressed her testosterone, she kind of stepped backed and balanced things a little differently, and it changed her success as a mountain biker. That is one area that has not really been researched, but the claim seems highly plausible and worthy of more research.

Besides the potential for a hormonal advantage, the other big claim of competitors is that because of discrimination and gender segregation, it might be the case that male to female transgender athletes had better training and opportunities in the first place, because they grew up as boys with boy opportunities, and you can never take that back. Unfortunately there is no answer for that, because if you think that is an advantage as opposed to being mitigated by the disadvantage of having to deal with a gender identity problem in your childhood and adolescence, then you can't get any further in that argument.

What about female to male athletes; do they have an advantage? Well, their biggest problem is they are relying on testosterone, and that is doping. If you want to be able to take synthetic testosterone, you need a waiver from the IOC, and you have to show that it is medically necessary.

Now we are back to proving that it is medically necessary to transition. Nobody has any clue in terms of what the "fair" hormonal level would be for a female to male because, to be honest, most doctors prescribing the hormones are guessing and trying to find the right levels for the individuals, themselves. There is not a lot of great information available on standardized medical treatment anyway. Female to male athletes often have a smaller frame, but the hormones increase their muscle mass. There are some sports you might think of, where this could start to become an advantage, but there are many sports where it is a huge disadvantage.

We don't have examples of elite female to male athletes because the likelihood of finding them is so much smaller. It is hard enough to find a person who is an elite athlete. That becomes the first cutting block. Then we have many more male to females than females to males, within the transgender population. And then, there are the cultural pressures that may influence the athletes differently, depending on the gender they are transitioning from and to. So, there is no representative sample of female to male individuals to investigate to even make blanket standards for sports competition.

I'm going to wrap up here. My biggest problems with Stockholm, as I told you about earlier, are that it wastes a lot of time of an athlete's eligibility; it interferes with his or her training. Beyond that, we might not get the right results for people, especially for those athletes for whom surgery or legal opportunities are not the same. And at the core, the Stockholm Consensus always requires you to be worse than someone. We are deliberately making sure that you are disadvantaged, because we so much want to make sure that the transgender athlete is not advantaged. The attitude presented is that transgender athletes can play only if they will lose, which is not very encouraging for these athletes, although Dean Rafal said earlier this morning that we are supposed to be hopeful today.

Here is my hope. Here are my suggestions. The first recommendation is that I would like eligibility based solely on the length of hormone treatment. After a certain amount of time, the effects are significant, even if temporary, and, eventually, they

become permanent. This timing is different for each type of transgender, and I wouldn't set one particular set of guidelines. I would also judge eligibility based on presentation and real life experience. If you choose to live as a woman, bingo, no surgery requirements, no legal records, you can compete as a woman once there is no hormonal advantage. If you choose to live as a man, same situation. I favor biological passports for athletes in general, to prevent doping and other problems. I would also do that here, where transgender athletes are keeping hormones at a constant, stable level, rather than anyone having a sense that this is doping. This includes a default doping waiver for female to male athletes. I would encourage the IOC and other large sports organizations to sponsor more research into the endocrinology as it relates to sports. I think it would be helpful to the transgender community in general, even outside the context of sports, having more of this research. And I would suggest increasing education and awareness for all athletes, because a lot of the problems seem to be coming from the ground up from coaches and athletes in women's sports who are resisting the inclusion of these athletes.

Thank you.

**MR. KINKEAD:** Our lovely panelists are going to take questions after. The next person to speak is going to be Michael Silverman, Esq. He has been a member of the Transgender Legal Defense & Education Funds' ("TLDEF") Board of Directors, as well as its executive director since it was founded. In addition to his work at TLDEF, Michael is an Adjunct Professor of Law of at Earle Mack School of Law at Drexel University, teaching courses on gender, sexuality and the law. He has worked as an attorney in the LGBT civil rights movement since 1994. As a cooperative attorney with Lambda Legal, Michael worked on a number of groundbreaking cases, including *Baehr v. Miike*, one of the earliest challenges to restrictions on the freedom to marry and *Boy Scouts of America v. Dale*. In that case, Michael represented a coalition of religious organizations opposed to the Scouts' exclusionary policy, and his brief submitted to the United States Supreme Court on their behalf was cited in the opinion of the dissenting Justices.

While on a Georgetown University Law Center Women's Law and Public Policy Fellowship, Michael taught in the law school's domestic violence clinic and worked in the legal department at NARAL Pro-Choice America. Immediately prior to joining TLDEF, Michael worked for four years in New York Lawyers for the Public Interest's Access to Health Care Program and Disability Law Center. In that capacity he provided technical assistance to numerous community groups seeking to end discrimination in access to health care on the basis of race and ethnicity. He also successfully prosecuted large-scale litigation in conjunction with the United States Department of Justice against hospitals for violations of, among other things, the Americans with Disabilities Act. Michael is thrilled to be back in the movement for transgender equality.

Michael is a graduate of Vassar College and the University of Michigan Law School. And his topic today is, "Transgender Access to Health Care and The Role of Medicine in Transgender Civil Rights."

**MR. SILVERMAN:** Thank you, Mik, for that introduction. I want to quickly thank Jeannine Farino and Professor Miller. It is a treat for me to be here. As Mik mentioned, I do teach some law classes on gender and sexuality at Drexel, and so I will be seeing, meeting, talking to law students, and I think conferences like this are terrific and do a lot to raise awareness and may change a lot of things.

I want to thank Shayna and Frank who will be speaking as well. We did and I did bring a sign-in sheet of sorts. If anyone is interested in having us stay in touch with you, please just fill it out and just pass that around, so thank you very much.

I am going to be focusing on health care and the role of doctors on sort of both sides of the coin in the lives of transgender people. On the one hand, I will be talking about the problems that transgender people have accessing health care, which is an issue that we don't necessarily talk about a lot in the civil rights world in general, not just in transgender rights.

I am going to spend a little bit of time talking about a few choice examples of the role that medicine plays. It plays a huge role, and a role that we can't seem to sort of find our ways out of in some instances, in the lives and in the legal outcomes of cases for transgender people. I think that there is an overarching question that arises when we talk about transgender rights. I don't think it's the only question, but I think it's one that comes to me over and over and over again, and it's really the question of who decides; who decides what someone's gender is.

Sometimes I often come back to -- you know, I was born in the 1970s, and there was a very popular movie and an album called, "Free to Be You and Me." And often, you know, when I think about how complicated this stuff gets, and by no means am I suggesting it is not complicated because it is, there seems to be fundamental issues that are about free choice that we need to grapple with and come back to when we think about the question of who gets to determine what my gender is.

Unfortunately, the answer to that question often isn't me, and often isn't the person who ought to be afforded with the power to decide for themselves. Access to health care for transgender people and health care as a civil rights issue; we talk about health care a lot in terms of the haves and have-nots. It certainly is a big topic of discussion. Less often do we talk about it as a civil rights issue in terms of the discrimination that people face in the health care system. For transgender people it's a huge issue. We have a health care system that particularly for the most part hasn't even thought about the ways in which it interacts with the transgender population.

I will start by giving some examples. If you think about a hospital, and we do a lot of work improving access to care, and we see this kind of stuff all the time in my office. Take a transgender person going to visit a hospital. We will walk through a few steps of it. You go through the door and the first thing, at least in New York City in most hospitals, you are going to face is a security desk where you will be asked to produce

identification. For a lot of transgender people identification in and of itself is a can of worms. If you look in a transgender person's wallet, you may find different identifications ("ID's") that have perhaps different names on them. Some of them might be the person's legal name, some of them may be the name the person is using in an attempt to change their name in common law. I mean, some of them might be the name they prefer but don't use on a regular basis, but names their friends and family might know them by. You might find ID's with different gender markers on them. Some people may have figured out that at certain agencies they can get official ID's with the gender marker that matches the way in which they are living their lives, while in other agencies they can't because they are female to male on different ID's. You also might have different pictures, some of which match and some of which don't match the person's current gender identification. Right away at the security desk you are faced with an issue. So, before you get through the doors to see a doctor, you might have security guards interrogate you -- and we have seen it happen -- about your gender identification, about your gender expression, whether you really are the person who is presenting this ID.

You get through the doors and you are going to be triaged. In some hospitals that we work with -- and we are talking about ways to improve access to care -- triage is done, for example, through a window by a nurse who doesn't even ask you what your gender or sex is, which is one of the first things that you are asked on the triage forms; you know, name, sex, date of birth, that kind of stuff. The nurse will decide. The nurse takes a look at your name and may make a decision; or you are faced with a form. Well, for a transgender person that can be a loaded question especially in the medical setting. You are wondering what are going to be the implications for designating my sex on this form for my insurance claim. Is something going to get bounced by my insurance if I have insurance? If I have Medicaid? Are we going to have problems in the computer system because it's not going to match, and they are going to say this can't be paid? What am I supposed to say for purposes of medical care? I'm not a doctor. I don't know if disclosing that I was born female and now present as male is something that is relevant to the medical care that I'm about to receive.

You have a person who is in a stressful situation right there. You have gone through this; you decided to put your legal name; you decided to put your birth gender down and you don't look that way. So you are sitting in the waiting room and you look like Michelle, and it is your preferred name, but you gave your legal name as Michael and your legal sex as male. Now someone comes out to call you to come in and all of a sudden they are saying, "Michael, come in."

Right there your privacy is invaded. While no one is suggesting one should be closeted or not open about transgender, one, as is the same case as being lesbian or gay, should have the option of disclosing what one wants to disclose and when one wants to disclose it.

In these little instances, before you have even seen a doctor, we have so many levels of stress, so many hurdles that a transgender patient needs to get over to get care, that the system is all but inaccessible to many transgender people, who by and large in our experience check out of the health care system. We talk about the medical things like what level of hormones people are taking, whether they have had surgery; it all presupposes that people in some way can access these things. The fact of the matter is that from the perspective of transgender patients, these things are inaccessible on a host of levels.

I am not only talking about the cost and the insurance and who pays for what, but just the system in the hospitals, in doctor's offices, itself, is not geared to what one would want to see happening for transgender people. We are not talking just -- we focus a lot on hormones and sex reassignment surgery -- but transgender health care is just that, it's health care. We are talking about primary health care. We are talking about, what do we do for people who go to the doctor because they need to be treated for the flu, because they need to have a cut mended or a broken bone healed. We find that primary care, for large segments of the transgender community especially that we work with, is emergency room care. It is the kind of care that you traditionally see among populations that have very little access to health care.

It is a huge problem. Separate and apart from these structural issues that I talk about, we see the kind of garden variety hostility, if you will, towards transgender people that we see in all areas, whether in public accommodations, we encounter it in housing, we encounter it in employment. There is no difference in health care. We have cases of clients in emergency rooms, who were referred to by people in the hospitals as faggots. We have a case now that we're working on that's not even an access to health care case; it's an educational access case in Pennsylvania. What's interesting about it is that, the potential plaintiff we are working with was studying to be a radiation technologist and she was, as part of the program, interning at a variety of radiation facilities in this certain area in Pennsylvania. She experienced a tremendous amount of discrimination as a student, from supervising doctors who were supervising her internship, saying things like, "Sir, ma'am, whatever you are." She is male to female. And this kind of thing gives you an insight from the other perspective. If this is how people in medical facilities are treating one another when they are co-workers and things like this, it's no surprise that this comes out -- this hostility comes out in sort of horrible ways when it's patients, particularly as is often the case poor patients, who are transgender, who are seeking care. One of the problems in dealing with how do you reform access to health care, litigation is not necessarily a particularly good or useful tool in some of these instances. Certainly, in cases where people are being berated and they are outright denied access to care, there are litigation remedies; but it's not clear at all that things like having an environment that is unwelcoming, which has just the same effect in the end as something that would necessarily be amenable to litigation.

Having forms that do not contemplate transgender patients, having triage processes that don't contemplate that someone is transgender, having a way to track a



patient through the hospital so that every time they are being moved by every technician they don't have to explain again, again, and again who they are, what their preferred name is; it's not likely those would make for very successful litigation claims.

Here I have described a tremendous set of problems in the health care system for transgender people. But yet, as we have heard about over and over and over again already this morning, there is an outside role that medical providers play in the social and legal lives of transgender people. More often than not, we find ourselves in the situation where it is people in the medical professions, who decide whether someone is transgender enough to be protected under the law. Rarely, is it the individual themselves. That is a very odd dichotomy, that we have a system that has been so hostile, so negligent towards the needs of transgender people, while at the same time exercising tremendous power over their destinies. We have seen this from the start in some of the earlier cases of transgender people seeking to enforce their rights.

I'm going to talk about a couple of cases that I think are interesting. The first person I'm going to talk about – we don't really know how this particular plaintiff identified; transgender, transsexual, gay, or not any of above. It's a case from 1968, so these notions of transsexuality, Christine Jorgenson, it already happened ten, fifteen years before, but they weren't quite achieving the currency we see later in the 1970s. The case is called *People v. Archibald*.<sup>37</sup> In that case we had a defendant who was convicted of vagrancy, and the vagrancy statute at that time had a subpart, which made it a crime to impersonate a female. This was essentially an old-fashioned cross-dressing statute, which made it illegal to do so.

We had an officer who testified that he was patrolling a subway station in New York City at four o'clock in the morning, and he observed three people engaged in a loud conversation. He testified, "After I passed the group, the defendant turned around and over his right shoulder winked at me with his eye, and again turned around and continued walking away from me."<sup>38</sup> Apparently, the officer then spoke briefly with the defendant and asked whether he was a boy or a girl. And the defendant replied, "I'm a girl."<sup>39</sup> The testimony in the case further tells us, "The defendant was wearing a white evening dress, high-heeled shoes, blonde wig, female undergarments and facial makeup," as the Court described it.<sup>40</sup> The Court saw no problem upholding this conviction. There was nothing really looking at intent other than the intent to wear the particular garments. The Court said, you know, this person who appeared in a public subway station, dressed in female attire and concealed his gender and, therefore, violated the vagrancy law.<sup>41</sup> That's what we get. This is what we call a morality interpretation of the law. That's what we saw in this particular time. But what we start to see after that is a slight move away from

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<sup>37</sup> 58 Misc.2d 862 (N.Y. App. Term 1968).

<sup>38</sup> *Id.* at 862.

<sup>39</sup> *Id.* at 863.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 863-64.

morality towards what becomes more of a medical model of transsexuality. We start to see that.

I'm going to talk about a case called *The City of Chicago v. Wilson and Kimberly*<sup>42</sup> from 1978. It is an Illinois case. It's one of the early ones where we start to see a real emphasis on medical testimony in terms of deciding whether somebody should be guilty of the crime of cross dressing. It is certainly a move in the right direction, but it raises all sorts of interesting questions.

In this *Wilson* case, the defendants were arrested minutes after they emerged from a restaurant where they had breakfast. "Defendant Wilson was wearing a black knee-length dress, a fur coat, nylon stockings and a black wig."<sup>43</sup> "Defendant Kimberly had a bouffant hairstyle, and was wearing a pantsuit, high-heeled shoes," and what the Court called "cosmetic makeup."<sup>44</sup> "Both defendants were wearing brassieres and garter belts." And the Court tells us "Both had male genitals."<sup>45</sup> So the defendants were convicted and this is their appeal. The statute under which they were convicted stated, "Any person who shall appear in a public place in a dress not belonging to his or her sex, shall be fined,"<sup>46</sup> etcetera, etcetera, etcetera; a very similar kind of statute. But the Court tells us in this case that, the defendants testified that they were transsexuals, and they were at the time of their arrest undergoing psychiatric therapy in preparation for a sex reassignment operation.

We get our first hint from the court that, something is going on here that is different. We get an explanation of who the people are, and it seems like a fine explanation. The court tells us that the choice of appearance is not a fundamental right; nevertheless the state, the City of Chicago in this case, still has to justify its intrusion into this area of what is essentially the right to decide how you want to look. Chicago offered a whole bunch of reasons to uphold the conviction. They looked to the statute. They said the statute helps to prevent inherently antisocial conduct which is contrary to the norms of society. They made a morality argument. The court partially rejected that, but really didn't decide how sweeping it could be. It says on the one hand, the court tells us, "There is no evidence that cross dressing, when done as part of a preoperative therapy program or otherwise, is, in and of itself, harmful to society."<sup>47</sup>

On the one hand they are telling us one, here is a therapy program. It has been diagnosed by a doctor and accordingly, these people should be allowed to dress this way. So, there is no evidence that this is harmful to society. The court then says, in fact, the legislature in Chicago has enacted a statute that allows you to change your birth certificate after sexual reassignment surgery. Clearly the legislature has recognized that

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<sup>42</sup>75 Ill.2d 525 (1978).

<sup>43</sup>*Id.* at 528.

<sup>44</sup>*Id.*

<sup>45</sup>*Id.*

<sup>46</sup>*Id.* at 529.

<sup>47</sup>*City of Chicago*, 75 Ill.2d at 533.

this process needs to happen and it should be recognized. Then the court says, "It would be inconsistent to permit such surgery, and at the same time impede the therapy in preparation for such surgery. Individuals contemplating such surgery should, in consultation with their doctors, be entitled to pursue the therapy necessary to ensure the correctness of their decision."<sup>48</sup> There is nothing in and of itself on its face that is problematic for these particular defendants and, in fact, their convictions were overturned. But the court said we are not going to invalidate the statute. We are only going to invalidate it as to these two defendants. What do we get out of this? That you can, in fact, dress in garments that are not the norm for your birth gender as long as your doctor says, it's okay.

I had a bunch of other cases where we see this theme coming out over and over again where the doctors give their stamp of approval, it becomes all right. And then where the doctors say we reached the limit, and there are cases where the doctor and the particular plaintiffs in cases disagree about what the appropriate gender expression for that plaintiff is, it's the doctors that prevail, not the individual.

When we come back to this question of who decides, what we are seeing over and over again is a medical system that is not necessarily in tune, or even accepting, of the needs of transgender patients, that is in the position of making a whole lot of decisions that affect the nature and scope of their rights and the quality of their lives. I am going to leave it there, and we will have some time for question and answer at the end. Thank you very much.

**MR. KINKEAD:** Our final speaker is Franklin Romeo. Before I say that I just wanted to mention my apologies to the stenographer. I was told that I have been talking very fast. I'm really glad to see that the people who put together this day included transgender and transsexual panelists. And I have already met some transgender and transsexual students here, so it is really great that we are already defining for ourselves, speaking on the subject for ourselves, and that transgender and transsexual people are taking this into our own hands. And I think it is very exciting. I just wanted to say that before we went on.

Franklin Romeo is a staff attorney at the Sylvia Rivera Law Project ("SRLP"), a nonprofit legal organization that works to guarantee that all people are free to self-determine their gender identity and expression, regardless of income or race, and without facing harassment, discrimination or violence. His work focuses on public benefits, identity documents and immigration. Prior to joining the SRLP staff, Franklin was a Blackmun Fellow at the Center for Reproductive Rights, and a Kirkland & Ellis Fellow at Lambda Legal. He graduated from Columbia Law School in 2005. And as a side note, the Sylvia Rivera Law Project has a really amazing publication called "It's Warm Here," which looks at transgender women's experiences in men's prisons in New York State. So that might be a great follow-up on Benish's presentation.

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<sup>48</sup> *Id.* at 534.

Oh, my apologies, Franklin's topic is, "Transgender Name Changes and Legal Adjudications of Gender." Thank you.

**MR. ROMEO:** I want to put out a special thank you to our first panelists today. I work a lot with transgender issues in my organization, particularly low income transgender people, so I go to a lot of conferences and I talk about things like prisons, homeless shelters, medical care, so it was really refreshing to hear your conversation about sports. I really like sports; that was a nice twist on today.

What I would like to talk about today is name changes and gender changes, and what that looks like in the law and particularly in New York State at this time. One of the most frequent calls that we get at my office are people calling up to say I would like to get my name changed and a legal gender change. I think there is a common idea that those two things go together. So, I would like to disaggregate them a bit and talk about what's involved in a name change when there are gender implications, and then take a moment to sort of question what it means to have a legal gender, and then talk about the sort of murky state of what a person's legal gender might be.

This came up most recently in a case here in New York that my office litigated called *Golden*,<sup>49</sup> which for those of you who have packets can read the decision. Elisabeth Golden is a transgender woman who lives in Upstate New York. She applied for a name change the way people all across the state apply for name changes all the time. She originally started out as a *pro se* person, so she didn't have an attorney. She was doing it on her own. She submitted her petition to the Supreme Court, which is the court Upstate that hears name changes, and explained in the petition the regular information that a person needs to give to the courts about name and date of birth and where you were born and things like that. Under the reasons for her wanting a name change she wrote that she was a transsexual woman, and had been using the name Elisabeth in her personal life and at work for a couple years at that point. She got a letter back from the court basically asking for more information regarding her gender. The letter was a little murky, didn't state what the court wanted, but suggested that affidavits from surgeons or other physicians, mental health professionals or other -- I forget exactly how it was worded, but something basically along the lines of other people who are going to vouch for your gender who come from the medical establishment. At that point she contacted my office and we undertook representation of her. She declined to submit for the medical evidence because she rightfully felt that those documents were private and irrelevant to her name change. The Supreme Court denied her petition, stating they were concerned that without proof that she was actually a transsexual, who was irreversibly becoming a woman, permanently becoming a woman, that granting her name change could cause public confusion.

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<sup>49</sup> In re Golden, 56 A.D.3d 1109 (3d Dept. 2008).

We asked the Appellate Court that their department review that. They came back with a decision that said no, this petition needs to be granted, because public confusion is not a reason to deny a person's name change simply because they are changing from a name that is traditionally considered a male name to a name that is traditionally considered to be a female name. I think that decision in particular gives a couple of interesting lenses to look at how courts conceive of gender. I think one place to start out is to look at what is actually required to change your name in New York. New York's name change statute<sup>50</sup> is pretty typical of name change statutes in other states as well. What the Court is looking at is the Court considers people generally to have a broad right to change your name. Anybody can start using a new name that they prefer more, and you have the right to do that unless you are doing it for a fraudulent reason. When you look at the name change statute, the information that the Court is trying to gather basically is focused on two things.

They want to know whether you owe money to anybody, or whether you have criminal convictions, that the state would need to be notified about the change of name. The kind of things they are asking for are things like do you owe child support? Have you been married? Do you owe spousal support? Are there any judgments against you? What the statute requires is limited to trying to figure out if there are other parties who have a legal interest of knowing who you are so they can track you down and try to get money from you; or in the case of criminal convictions, to let the state know that you are changing your name so if that is relevant for some future criminal action, the state knows that you are the same person post-name change as you are prename change.

Prior to this case, the *Golden* case, there were a series of Civil Court cases from New York, mostly from the 1990s -- a couple in the 1990s, a couple dates being further back to the 1970s, where judges would ask transgender name change petitioners for evidence of medical documentation of a gender change in order to approve their name change petition. I think what this is coming from is the idea that transgender people are somehow inherently fraudulent. You are trying to pull a fast one on the general public and present yourself as a man when you are really a woman, or present yourself as a woman when you are really a man.

It goes back to the statutes where Michael was just talking about when it used to be a crime to do that. We got rid of those statutes, but the idea that presenting yourself as a gender other than the gender you were assigned at birth is somehow fraudulent, is something that pops up in different places through the law. One is places like name changes. So in the *Golden* case, what the Third Department did is they said no, you have to grant the name change. You can't require this medical evidence in order to overcome this idea of general public confusion. They got the decision mostly right, but at the end of the decision they included this odd line that the trial court should include, a line on the name change order saying that the order couldn't be used as evidence of a gender change.

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<sup>50</sup> N.Y. CIVIL RIGHTS LAW § 61 (McKinney 2006).

I like to think of the case as sort of like eighty percent right, but a "what the hell" thing on the end. It made me wonder, what else could I get on a name change order; could I get a name change order that also said this cannot be used as evidence that you are entitled to a free Caribbean vacation. The gender issue is irrelevant as far as what a person's name is. There is no sort of master list anywhere of male names and female names that parents get to choose from when your child is born. Parents aren't fined if they name their child Lee or Lynn, this could be confusing because someone doesn't know what the gender is immediately. Some of us cycle through the names to think of them as good names to raise potential kids.

I think one of the interesting things about this in the *Golden* order is in some ways what the court was doing is recognizing that there's no legal significance to the gendered connotation to a name. There is nothing legally significant about having a name that we think of as a boy's name or think of as a girl's name. The court was still concerned enough about the social implications that they wanted to specify that this name change order couldn't be used to legally determine what this person's gender is.

I think that it is useful to think about, when we think about what a person's legal gender is and whether we have legal genders and, if so, what is the meaning of that. One of the ideas that I would like to put forth is that a person's legal gender is really a slippery concept. When we think of gender matters for legal purposes, there is actually really only a handful of areas where a person needs a legal gender. We think of ourselves as having a fixed gender. For most people, that gender is assigned at birth and stays constant throughout their lives. For transgender, we often talk about a period of transition, or the idea that somebody is moving from one gender to another gender. For some transgender people they may be occupying a middle space where they don't want to identify as male or female all the time. We generally think that somewhere in the world we have a gender that is legally significant, which is sometimes true, but may be a more fluid concept than the average person on the street would think. When we think about the areas where your gender is legally significant, it basically boils down to two areas.

One is where a person's rights are somehow limited or made available because of what their gender is. The big one here is marriage. In the vast majority of states which limit marriage to different gender couples, whether or not you are female or male, the state categorizes you as male or female, has a big impact on whether or not you can access marriage and get the rights that come with that.

The other place where it comes up is where people are segregated by gender in some way. For the state's purpose the place where this happens most often is in prisons. We are going to separate men and women out in prisons. Then we need to know who is a man and who is a woman so we can put them in the appropriate place. That also comes up in other state-run places like some psychiatric facilities that are run by the state, homeless shelters, that kind of thing where people are otherwise segregated by gender. For most of us going through our day-to-day lives what gender we have on our driver's license is not going to have a huge effect on our legal rights. That's because we have

done a lot of work to do things like pass antidiscrimination laws where you can't be denied a job because you are a woman instead of a man; you can't be denied access -- occasionally you can't -- for the most part if you are going into the corner store, they can't say we'll let you in if you are a man but not if you are a woman, that kind of thing.

It is really sort of a handful of situations where somebody's gender is actually a legally salient fact. What is even more confounding is that the various bodies that pay attention to gender don't do so in any sort of consistent way. There are instances like marriage, for example, where gender is legally a salient factor, so that's an instance where gender is going to be determined by a court. More often, if you are trying to prove your gender to some sort of state actor, you are actually dealing with is an administrative agent. You are dealing with the Department of Motor Vehicle for your driver's license; you are dealing with the Department of State to get your passport; you're dealing with the Social Security Administration. Lots of people don't think that the Social Security Administration has a gender for you, because it doesn't say on the face of your Social Security card, but they actually do. That actually can cause problems, but that is another can of worms.

We have a couple of different ways where a person's legal gender may be determined. We have administrative agencies issuing birth certificates, driver's licenses, non-driver state ID's, Social Security cards, passports that have a gender for you, that transgender people often are in the position of trying to switch their gender from one to the other. These agencies have a variety of different standards that they apply to change those documents. Then we have even more rare cases where courts are actually adjudicating someone's gender.

Where that has come up most often is in the context of marriage cases, where a couple is married in the jurisdiction that only accepts opposite-sex marriages. Then for some reason that marriage is challenged; either the couple splits up and the non-transgender party says, this is not a divorce because the marriage was never valid. In even more rare situations, there were a couple of marriage cases where one party dies, and there is a dispute over the will and whether or not the marriage is valid. And so, that's the instances where courts have most often looked closely at a transgender person and asked, is this person male or is this person female?

For those of you who were here this morning and heard a more extensive discussion of marriage, the vast majority of courts unfortunately have said transgender people in that situation have failed to change their gender for the purposes of marriage, and most courts said you are stuck with the gender that the doctors said five minutes after you were born.

New Jersey is sort of the shining beacon of hope where the marriage of a transgender woman to a non-transgender man was upheld. The beacon of hope is, shall we say, a sort of gross overstatement if you actually look closely at the decision. That decision basically involved the transgender person in that case, who had undergone really

extensive medical gender reassignment procedures that are unavailable to the vast majority of transgender people because they are expensive and not covered by insurance. That is the category of instances where courts have taken a look at people's gender. Much more often what we are actually looking at, when the state is somehow invested in a person's gender what we are talking about is identity documents. We are talking about someone going into the Department of Motor Vehicle and saying, "My birth certificate says male, but I would like a driver's license that says female because since the time of my birth, I have transitioned to being a female;" or in some instances going back to the birth certificate registry saying, "I used to be female, but I have now transitioned and I'm living as a man. I need a birth certificate that identifies me as a male." What we found, those of us who deal with identity documents a lot, is that the standards applied by the different agencies vary widely. For the most part, they are all relying on some sort of medical evidence as to what a person's gender has become. The best case scenario, for those of us who are interested in making documents available to transgender people, are agencies like the New York State Department of Motor Vehicle, which basically requires that, you have a letter from your doctor saying that one gender predominates over the other.

You need to have a doctor's letter, but it doesn't need to say anything in particular about the kind of treatment you are receiving. On the opposite end of the spectrum, we have places like the New York State Birth Certificate Office, which wants an operative report about very specific, gender reassignment surgery. One thing people often talk about is "the surgery," as if transgender people have some magical surgery that switches them from male to female or female to male. The fact of the matter is, if you talk to medical experts, there are actually a variety of different medical procedures that transgender people might access, and there is no one standard procedure people have. They have a variety of different surgeries if they choose to access them.

The result of all of that is that people are pretty likely to have a mix of identity documents, where you might have a driver's license that says male and a birth certificate that says female. You might have a passport that says male, but the Social Security office thinks that you are female. People have a real hodgepodge of identities or gender markers listed on their identity documents. Where it even gets more confusing is that, when you then jump back to the court cases where people's gender has been litigated, it turns out the courts are not so persuaded for the most part by what the different administrative agencies have done.

What you see over and over again in these marriage cases are transgender people litigating their marriages where they are saying, "I'm legally male. I have a passport that says male. I have a birth certificate that says male. I have a driver's license that says male." The courts are coming back and saying that actually might not be good enough. That leaves us, who do this work all the time, in a quandary about what is the best strategy for getting people useful identity documents and a stable legal status when gender is a salient, relevant legal category.



I will try to wrap up quickly. What I will say is, I don't actually have any answer to that question of what the best strategy is. I think there are some interesting things to consider, one of which is something that was touched on in the first panel, which is that courts may find identity documents more persuasive, if they are based in statutes rather than policies.

There are a lot of places, like the New York City birth certificate policy is a good one, where they have this very rigid standing about wanting very specific medical evidence. But, when you ask them where they get that from, it doesn't come from a statute, it doesn't even come from a regulation. It is an internal policy that they have. That presents sort of an interesting quandary, where on the one hand it seems like the easiest policy to get changed, right. If you want to make identity documents more accessible to people, it is easier to sit down with people at the Department of Health saying, your policy doesn't make sense. You should change it, than it is to go knocking on the doors to the legislature and say, pass a law to do this.

When you get to the courts, it turns out that whether or not it comes from the statute may be significantly more persuasive, where you see things like the immigration case that Victoria Nielson was talking about, where immigration said if North Carolina gives a statutory means to amend your birth certificate, we think that that means they are considering you to have legally changed your gender by changing your birth certificate. Whereas marriage cases coming out of jurisdictions where people are able to change their birth certificate, but there is not a statute un-diverting that, the birth certificate has been much less persuasive when it comes down to the courts.

Wrapping up, I will say it presents an interesting strategy question for how to make identity documents more accessible to transgender people. I think to me that really comes back to a larger point, that these situations only come up really in the handful of situations where there is some sort of right dependent upon a person's legal gender, or in instances of state-sponsored gender segregation, in the instance of prison. This makes we wonder on the larger scale question; rather than parsing out how to get people legally-recognized gender changes, if we should be taking a longer view at looking at the instances in which gender is legally salient, and trying to minimize the instances in which those affect people's lives. If marriage is not dependent upon gender, or as some people would think is even a better solution; if legal rights are not tied to marriage, if you are not relying on having a state-sanctioned relationship in order to gain legal rights, then what gender you are legally becomes a much less critical question. Similarly, with the situation of gender-segregated facilities; if you are not in danger or in prison, then whether or not the state is categorizing you as female or male for purposes of incarceration becomes much less of an emergency level response.

I think where that leads us at this point, for those of us who do this work, we need to have a dual strategy when we are dealing with some of the putting-out-the-fire crises, like the horrible situations that transgender women frequently face in men's prisons, and needing to deal with that on a day-to-day basis. But, we also need to be doing work on a

much larger scale to sort of reduce the number of times the gender is legally salient in cases of things like marriage. In the cases of things like prison, we need reduce the number of times that people are locked up in abusive situations more generally; or look at whether or not gender is the underlying problem there, or what the underlying problem is that people who are held by the state are being mistreated.

We need to work on the larger issues as well as the narrower issues of how for transgender people living in these systems, they can have the gender recognized in a way that entitles them to be safe and also to access the rights and privileges that other people who are not transgender are able to. Thank you.

**MR. KINKEAD:** Questions?

**AUDIENCE MEMBER:** Michael, in the line of cases that you were discussing you had mentioned that the court had said that there is no fundamental right to dress and wear what you want; fine in that language. What about the First Amendment right to expression; how does the court parse, you know, those First Amendment protections from this quote unquote "non-fundamental right"?

**MR. SILVERMAN:** The question was does the First Amendment offer some protection. Yes, I think there are certain situations where the court has found certain kinds of clothing and things like that to be protected. Speech and things like that, it has not been the case generally speaking in the case of gender identity, gender expression. The court hasn't necessarily said the fact of being born male and wearing women's clothing is necessarily speech that gets protection.

On the other hand, one can find situations -- I don't think there are any in the transgender context, but we have seen some in the sexual orientation context, where the act of being openly gay has been held to be protected First Amendment conduct, speech, such that one can't be fired from a job by a state actor who would be subject to constitutional restrictions. That theoretically could be an argument for transgender people too. We are actually looking into it in one of our cases, but not much out there.

**AUDIENCE MEMBER:** My question is for Shayna. I was wondering if you did any research into how colleges are treating transgender people.

**PROF. SIGMAN:** To the best of my knowledge, the NCAA was thinking of adopting the Stockholm Consensus, but had not yet reached a conclusion on that.

**AUDIENCE MEMBER:** I had a question for Michael, a health care issue. In a practical point of view, you know that a lot of non-profits that represent primary care providers are given grants to provide primary care to transgender populations. The practical point of view is -- and I'm a labor attorney. Basically, I represent some of these situations, where you have represented doctors who because of moral or religious reasons refuse to treat transgender people, because they feel -- for whatever reason they have

these convictions. In these situations, you have to transfer the patient load, because they have their rights too, as far as that is concerned. And there are other situations, and this has huge ramifications, because when you are a primary care deliverer, for example, a pediatrician, and the mothers do not want to come with their children on the days that the transgender folks are there, because they are in various degrees of transition and some of the children are frightened because they are confused, now that may be their problem because it is an educational issue for them. But what we have had to do is, like, stagger the days when the pediatric patients come, that they are not necessarily accepting emergencies to days when the transgender folks come to their scheduled appointments. These are issues that if you are trying to operate a business, or you are trying to operate a clinic or a nonprofit, these are practical issues where you have to balance out things. It is not that clear-cut is what I'm trying to say.

**MR. SILVERMAN:** I think you raise some interesting points. There were a bunch of them in there. I certainly see one component of discrimination is often, or one response by providers of public accommodation to charges of discrimination, is often that other customers don't like these particular customers. That sort of categorically never has been allowed to be a defense to civil rights laws because, of course, we can't let those people that discriminate determine the outer limits of our antidiscrimination laws. But there are practical concerns; and generally speaking, I don not know too many people who sort of feel like I want to force myself into this situation where I'm going to be around people, who don't want me there. There are ways that that is often worked out, and sometimes it is specialized clinics and things like that.

The question about conscience clauses that you are referring to and doctors that refuse to treat, you know, it is complicated enough. The Bush administration, on its way out, tried to push through an even broader conscience clause protection, as they called it, for doctors who don't want to provide care. Look, this says something about larger issues than just transgender people. It's about a particular people who, on one side we will refer to as a moral view of the world. I personally don't accept it. I think there are certain things that doctors agreed to do by virtue of just being doctors and taking an oath to provide care; and certainly by virtue of the privilege they receive from the state by virtually getting a doctor's license. If you don't want to do it; if you do not want to provide care to certain people, get a different job. That is my political take on that situation. But the legal question at this point is, what the administration was trying to push through is not that -- there are still areas where these conscience clauses, particularly in the area of reproductive activities, are out there.

**MS. SHAH:** Just in line with that, legally I'm not sure about this, but you can't actually deny someone health care if you are a doctor, right?

**MR. SILVERMAN:** You can. There are rules like, for example, you have to stabilize a person. You can't put them away because they can't pay, for example. Once you have stabilized them, you can pretty much shut them off.

**MS. SHAH:** That is even with the doctors taking the oath that they take?

**MR. SILVERMAN:** Yes, they take the Hippocratic Oath. I do not know. I honestly don't know whether there is a legal significance to the oath that they take. I am suggesting that refusing to provide care doesn't comport with that.

**MR. ROMEO:** I do not know the specifics of the funding that this gentleman is referring to, but I mean generally aside from stabilizing patients, doctors do have some leeway if they are in private practice, that they can accept patients or not accept patients. I'm not an expert on that law, so I won't go into it. But often, public funding comes with various restrictions. For example, if it is the policy of the State of New York to provide nondiscriminatory health care, then I would argue that only doctors who are willing to provide health care to any patient who comes to them, including transgender patients, should be applying for that funding. If they want to have a more selective practice, they can do that in a private practice and only accept money from people they want to accept money from.

**PROF. GLAZER:** I just wanted to provide a comment to Shayna. I also enjoyed the fact that your paper was about sports. I suppose because I don't write about sports, I was thinking of the ways in which employment, which makes it probably less than exciting because one of the exciting things about it is that it is about sports. Nevertheless, I recently with a co-author reviewed a book called "Fat Rights" by Anna Kirkland. I was interested to think about the parallels that that book and Anna deconstruct when thinking about what are the presumptions of employment and the antidiscrimination law, and how those might map on to some of the stuff that you were indicating was part of the presumptions of sports. Notably, she identifies the six logics of personhood, which are basically the questions we might imagine legislators asking when adding a particular category to the list of protected categories. One of them is called functional individualism, which seemed very sports like in the way you were saying in sports, there's this sort of this relief in terms of all you are judged on is by how well you can do. To some degree, that is a presumption in the work context as well. There was also a blame-shifting, which is another logic personhood that is identified in this book, which is that perhaps there's a disadvantage that a female to male could have because of having grown up as a woman and having lesser expectations of excellence in sports and strength and that sort of thing. I offer that just as a parallel when you are working through solutions; you know, to make an analogy between work and sports isn't crazy, particularly since this author, who has identified these and demystified some of the presumptions, there may be even more parallels.

**PROF. SIGMAN:** I understand.

### **SESSION THREE: TRANSGENDER IDENTITY AND FRAMING TRANSGENDER EQUALITY**

**MR. KILMNICK:** Well, good afternoon, everyone. How is everybody doing? My name is David Kilmnick, and I'm the Chief Executive Officer of the Long Island Gay, Lesbian, Bisexual and Transgender Services Network, which I'm sure you heard about this morning a little bit, but we are an association of three nonprofit organizations. One is Long Island Gay and Lesbian Youth, which has been around since 1993, and then more recently, we started two other organizations, one called the Long Island GLBT Community Center, and the other is SAGE Long Island, Services and Advocacy for GLBT Elders, Long Island. Our center is located only about ten minutes away from here in Bay Shore, and we see lots and lots of people each month. We provide a lot of different services, lots of education, advocacy and support services, and it's my pleasure to be moderating such a wonderful panel this afternoon. I'll introduce our first speaker -- and by the way, we'll take all questions at the end, after each speaker has given their presentation.

The first presenter is M. Dru Levasseur, who is an attorney at the Transgender Legal Defense and Education Fund. He served two years as a law clerk to the justices of the Massachusetts Superior Court. Dru initiated and chairs the Transgender Committee of the Lesbian, Gay, Bisexual and Transgender Law Association of Greater New York (LeGAL) and is a member of the Legal Issues Committee of the World Professional Association for Transgender Health.

While in law school, he worked at the ACLU of Connecticut, the National Gay and Lesbian Task Force's Transgender Civil Rights Project, Western Massachusetts Legal Services, and the Massachusetts Commission against Discrimination. He received his law school's Public Interest Scholarship, and the CALI Excellence for the Future Award in Sexual Orientation and the Law.

Dru initiated and co-organized New England's first-ever Transgender Pride March and Rally, which was attended by a thousand people in Northampton, Massachusetts in June 2008. He has spoken at Yale Law School, University of Connecticut Medical School, Northampton Pride and Lavender Law. Dru received his bachelor's degree magna cum laude from the University of Massachusetts and his J.D. from Western New England College School of law. Please help me welcome Dru.

**MR. LEVASSEUR:** First of all, I want to say thank you for having me here today. It's been a great learning experience, and thank you to Meredith and Jeannine and everybody at Touro. So, when I heard from Meredith and was asked to present, I thought about picking something that I probably could have spoken about more confidently or that I had some tips on, but instead, I wanted to do something that was more of a hotly-debated topic that I, myself, wanted to do a little research on because I'm not sure where I stand on this issue. I think that every speaker here has alluded to the term, Gender Identity Disorder ("GID"). Recently, I was at a transgender round table with attorneys in Washington D.C., and this topic came up amongst the attorneys at the table, and I

realized that it was a pretty hot debate and sometimes the elephant in the room. What I'm going to be presenting today are just some ideas, some discussion that's happening in the trans communities right now, and that's happening in the legal community as well.

I think it is a pertinent time because right after I submitted my proposal there was an article in *The New York Times* – which is in the packet – that the DSM-V is coming out May 2012, and so right now there's a lot of discussion about any possible revisions of the DSM with Gender Identity Disorder. I'm also hoping that this presentation will help facilitate more discussions around this issue in our legal community.

I am going to give just a brief history of Gender Identity Disorder in the DSM; in 1973, homosexuality was actually dropped from the DSM after activists provoked a scientific review. That diagnosis went from homosexuality to sexual orientation disturbance, and then ego-dystonic homosexuality before it was completely dropped in 1987. Meanwhile, in 1980, for the first time, transsexualism appeared in the DSM, and in 1994 transsexualism was replaced with Gender Identity Disorder.

Here is the definition from the DSM-IV, Gender Identity Disorder: (1) the person has a strong and persistent cross-gender identification; (2) a persistent discomfort with his or her sex or a sense of inappropriateness with the gender role of that sex; (3) the disturbance is not concurrent with a physical intersex condition; and (4) the disturbance causes clinically significant distress or impairment in social, occupational, or other important areas of functioning.<sup>51</sup>

I am going to outline some of the arguments on both sides. Some of the arguments for keeping the GID diagnosis in the DSM-V are framed around the claim that GID provides access to transition-related care such as surgeries and hormones. Also, I know that there was some discussion around morality. When transsexuality was first placed in the DSM in 1980, for a lot of people in the transsexual and transgender community, that was a victory, particularly, the transsexual community, because the morality argument was now framed around a medical issue, that this was a validated identity, it was a validated diagnosis. It was validated into an identity. Another argument for keeping the GID is right-wing groups cannot argue that transsexuality is a moral failing. And third -- I'm going to get into this a little bit – their argument is that there are protections under antidiscrimination under the disability framework. Some of the arguments against having the GID diagnosis is that it pathologizes transgender and transsexual people. I just want to note, I'm not sure if Katrina is still here, but earlier we were talking about transsexual versus transgender. I am seeing a lot of debate about this online. I don't want the transgender umbrella to consume the transsexual identity because some people may feel very strongly about not being part of an umbrella, so I'm going to make an effort to say both "transsexual" and "transgender."

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<sup>51</sup> DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM-IV), § 302.85, 302.6 (American Psychiatric Ass'n ed., 4th ed. 1994) (2000).

Another argument is that even with this diagnosis, insurance companies exclude transition-related care, for example, the transsexual exclusion clause. The reliance on a medical model is expensive, access to transgender or cross-gender care is impossible for a lot of people who cannot afford to go to a therapist and get that kind of letter of diagnosis. And tied in with that is gate-keeping by providers --- there's a possibility of abuse in that kind of medical framework where you are relying on doctors for that type of care. As we saw in, I think it was Part B of the definition, you can't be a *happy* transgender person under the GID diagnosis. People argue that this is a social issue and not a medical issue, and also that GID is used to identify so-called pre-homosexual and pre-transsexual children for the purpose of preventing them from growing up to be gay or trans.

The final argument that, I think Pauline Park makes very well on her website is that, right-wing groups use this diagnosis against transsexuals saying they are sick and need treatment, instead of needing civil rights, and it's hard to get around that issue. Just to discuss the disability rights model, as you can see from the slide, the idea is that it's social barriers, not individual inferiority, that is the problem. The concept is that disabled people are capable of equal participation, but are currently barred from participating equally by artificial conditions that privilege one type of body or mind, and exclude others.

This is the disability rights movement framework of it's not what's wrong with the person, it's what's wrong with society in thinking through and not being able to make assumptions about able-bodied people. In one example of how that can be described in the situation for transgender people is, if you take a sex segregated facility, for example, like trans people are fighting about notions about what's normal and healthy. So, if you have a facility that's preventing a transgender person access, it's not what's wrong with the person themselves, it's what's wrong with looking at the situation of giving access to that person. That's the type of framework that was coming into political play when the Americans with Disabilities Act ("ADA") came around in the 1970s. There's a new understanding that social barriers, not individual inferiority cause the disadvantaged status of individuals with disabilities. So that was the background framework.

A little history of the ADA, in 1973, Congress re-authorized the federal vocational and other programs in the Federal Rehabilitation Act,<sup>52</sup> the FRA, and included for the first time a prohibition against discrimination on the basis of handicap. So you see this kind of framework coming into play, this shift in the idea of disability was changing. And the definition of "disability" at that time was framed around the three issues that I'm sure you are all aware of: who has a physical or mental impairment which substantially limits one or more major life activity, has a record of such impairment, and is regarded as having such impairment. In 1990, Congress passed the Americans with

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<sup>52</sup> Rehabilitation Act of 1973, 87 Stat. 355 (1973) (codified as amended at 29 U.S.C § 701 (2009)).

Disabilities Act,<sup>53</sup> but excluded transsexualism and transgender disorders not resulting from physical impairment.

One of the things that is going to come up when we're talking about using any kind of disability arguments is that, Congress must have believed that the general language defining "disability" included transsexualism if they had to specifically exclude it from the definition. At the same time that the Congress passed the ADA, the Congress amended the FRA with no such exclusion. Many state laws use the same language as the ADA and FRA to define "disability," but do not contain any such exclusion. Any type of argument to be made, we're talking about state laws, not any federal law here.

One of the background readings for this presentation was -- I contrasted two articles in this transgender rights book,<sup>54</sup> and this is an example of how in the legal community there's a debate happening where there's very polarized ideas of how we as attorneys should be going forward, and then there's the layer of the trans communities saying what they want. They have very polarized ideas as well. Take the GID out of the DSM versus no, leave it in, that's our only way to survive.

Jennifer Levi and Ben Klein, in their article, discuss the idea that instead of reproducing ablest thinking by fearing association of transgender rights with disability rights, transgender advocates would be well served to understand the thinking behind disability rights. They argue understanding the concept of the disability rights, and that this should be applied here. If you do not see it that way -- you have to get beyond ablest thinking, is the argument. When we're talking about these states that have -- there's many states that have an open door as far as they don't have an exclusion for transsexual or transgender identity disorder, but there's only seven states where we have any positive case law where this has actually been litigated; Florida, Illinois, Massachusetts, New Hampshire, New Jersey, New York and Washington.

This is in your materials as well, but I just wanted to flag it-- one of the arguments for taking GID out of the DSM comes from a well-known transgender attorney in Houston, Phyllis Frye. At the International Conference on Trans Law and Employment Policy in 1996, she and a group of attorneys and activists drafted the International Bill of Gender Rights.<sup>55</sup> And if you look at number seven, you can see it ties into the discussion, "the right to the freedom from involuntary psychiatric diagnosis and treatment."<sup>56</sup> It states, "Given the right to define one's own gender identity, individuals should not be subject to involuntarily psychiatric diagnosis or treatment. Therefore, individuals will not be subject to involuntary psychiatric diagnosis or treatment as mentally disordered,

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<sup>53</sup> 42 U.S.C. § 12101 (2009).

<sup>54</sup> Jennifer L. Levi & Bennett H. Klien, *Pursuing Protections for Transgender People through Disability Laws*, in *TRANSGENDER RIGHTS*, 74-92 (Paisley Currah, Richard Juang & Shannon Minter, eds., 2006); Judith Butler, *Undergoing Gender* in *TRANSGENDER RIGHTS*, 274-98 (Paisley Currah, Richard Juang & Shannon Minter, ed., 2006).

<sup>55</sup> Available at, <http://transgenderlegal.com/ibgr.htm>.

<sup>56</sup> *Id.*



dysphoric or diseased on the basis of a self-defined gender identity or expression thereof."<sup>57</sup>

Another example from a speaker from the transgender community is Julia Serano in her book, "Whipping Girl."<sup>58</sup> I really liked this definition because I thought it was a nice contrast to the definition that we just looked at in terms of the DSM. But she uses this term, "gender dissonance." She says, "It's a form of cognitive dissonance experienced by trans-people due to a misalignment of their subconscious and physical sexes. Gender dissonance differs somewhat from the psychiatric term 'gender dysphoria,' which typically conflates this cognitive dissonance regarding one's sex with the mental stresses that arise from societal pressure to conform to gender norms." And, along the same lines, this is the other article that I was talking about, coming from Judith Butler, in the transgender rights book, her article is entitled "Undiagnosing Gender."<sup>59</sup> She talks about how the GID diagnosis undercuts trans autonomy and self-determination and it tends to pathologize any effort to produce gender in ways that fail to conform to existing norms. She points out that it's given to people against their will at times and has effectively broken the will of many people, especially queer and trans-youth. She talks a bit about the risks involved, that there's so much at stake for people on this issue on either side, and it's a difference of life or death for a lot of people. And she asks the question: What does it mean to actually live with this diagnosis? One of the great examples in her article is that men who want penile augmentation or women who want breast augmentation are not sent to psychiatrists for certification because they are operating within the norm, making the adjustments within the acceptable norms and sometimes even confirming or strengthening traditional gender norms, versus a transgender person who needs a letter with a diagnosis.

Dean Spade's article, *Resisting Medicine/Remodeling Gender*,<sup>60</sup> is also part of your materials. He speaks of his concern as a lawyer of pleading discrimination claims for a trans-plaintiff. He has to find a diagnosable condition, and basically he has to rely on the GID to make a claim. And he points out that this is not accessible to many low-income people and that this diagnostic and treatment process for GID are regulatory and promote a regime of coercive binary gender, and he points out that there's possible misuse of medical practitioners with the diagnosis, and he doesn't want to legitimize those practices through reliance on the medical approach.

However, it's a hard thing for a lawyer because there's an ethical concern as a lawyer to plead all winnable claims. The risk is that judges will continually choose disability law claims and ignore more appropriate claims of gender discrimination. He summarizes that, attorneys and advocates working for trans law have to skate, "a delicate line," re-medicalizing legal approaches to gender identity where we can, educating medical providers on how to provide medical services to gender transgressive people in

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<sup>57</sup> *Id.*

<sup>58</sup> JULIA SERANO, WHIPPING GIRL (2007).

<sup>59</sup> Butler, *supra* note 54.

<sup>60</sup> Dean Spade, *Resisting Medicine, Re-Modeling Gender*, 18 BERKELEY WOMEN'S L.J. 15, 18-23, 30, 32, 34-35 (2003).

ways that respect and encourage individual expression, rather than conforming to binary gender, and also fighting for increased access to medical care for all people. And another example -- these are legal organizations weighing in on the issue. This is a joint statement from ICTLEP, which is the International Conference on Trans Law and Employment Policy with Phyllis Frye, and also National Center for Lesbian Rights -- this was issued in 1996. "Transsexualism should become a medical rather than a psychiatric status." And they argue that since the ADA and the FRA -- well, the ADA excludes transsexuals and there's not that many state law precedents, that it's not worth it, and they also point out that it "invests mental health professionals with tremendous authority to define appropriate treatment in any given case," which goes along with what Michael was saying earlier.<sup>61</sup>

Another thing that's interesting is that they pointed out the European Court of Justice recently held that employment discrimination against transgender people violates the fundamental human rights, and they are arguing that we should be getting away from this kind of diagnosis reliance and going forward with looking towards the human rights model.<sup>62</sup>

In one of the discussions that we had about this at the national trans legal roundtable, somebody mentioned that another appropriate model to use besides the disability rights model would be an abortion rights model. And that idea is that reproductive activists advocate for a woman's self-determination in terms of abortion. Similarly a trans- person argues that they are working for autonomy in their decisions with their bodies. One of the old models for abortion, well, unfortunately it's still used in many countries, is a therapeutic abortion model where a woman has to go to a doctor and get a diagnosis that she will basically kill herself if she doesn't get this abortion. And in that, the abortion is covered, or allowed. Using a similar framework as the reproductive justice movement - moving towards autonomy and self-determination rather than a medical model is one possible framework for the GID reform.

A new book that just came out by Kelley Winters is "Gender Madness in American Psychiatry."<sup>63</sup> Kelly Winters runs a website called GID Reform Advocates. They have a list of top ten reasons why the GID should be out of the DSM. I just took a clip from their revision of the GID reform. Her argument is framed around the fact that she believes that GID reform is not a question of stigma versus Sex Reassignment Surgery access, but rather it's a question of stigma *and* SRS access. And it seems that she's pointing out the argument that you can't have one without the other. We need this diagnosis so that we can have access to surgery. She's pointing out people aren't accessing surgery already, so we should be advocating to think about it in terms of both things, something that works for everybody.

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<sup>61</sup>International Conference on Transgender Law and Employment Policy, 1996, at A-1, 2, *available at* <http://www.transgenderlegal.com/ictlephis1.htm>.

<sup>62</sup>Case C-13/94, P. v. S and Cornwall County Council, 1996 IRLR 347.

<sup>63</sup> KELLEY WINTERS, GENDER MADNESS IN AMERICAN PSYCHIATRY, ESSAY FROM THE STRUGGLE FOR DIGNITY (2008).

As I said, the DSM-V is due in May 2012. On May 1, the American Psychiatric Association (“APA”) announced the composition of work groups to review the scientific advances and the research-based information to develop the fifth edition. Clearly, there's no consensus among trans-people about whether or how a GID diagnosis should be in the DSM-V. I did hear it's going to be in there; it's just a question of whether there's going to be any reforms to it. The APA has a website where you can go in and make suggestions. I don't know who's paying attention to it. There's a lot of drama happening right now within the trans-medical community because the committee that's formed is to be headed by Dr. Ken Zucker from Toronto, who's very controversial simply because he's been known to allegedly treat transgender and gender-variant kids using reparative techniques. The debate around GID in the DSM-V is a very hot issue. It's something happening right now in the community, and there's no consensus on it.

I included in the packet the petition for *O' Donnabhain v. Commissioner of Internal Revenue*.<sup>64</sup> I thought it was a great example of an argument being made around the GID diagnosis. The language is classic. GLAD in New England had to plead that she always felt she was born in the wrong body and wanted to self-harm and now that she's had surgery, she's fixed. GLAD's argument is that since Rhiannon has been diagnosed with Gender Identity Disorder, she needed to have SRS, she needed to have surgeries according to that diagnosis. And when she claimed her medical deduction for her surgery, the IRS said that is an elective surgery, it's cosmetic, it's not medically necessary. GLAD's argument is that based on her GID diagnosis, her surgeries are medically necessary and therefore should be tax deductible. This decision is due out any day. It's been about a year and a half since the trial, so stay tuned for that. But you can read the petition in the packet.

I am going to end with a quote I found by Susan Keller. "So long as transsexuality is defined in relationship to surgery and hormones, a relationship to medical specialists will be necessary for those who assume that identity. It is possible that this relationship will open up possibilities for some, while it restricts possibilities for others. How that relationship evolves, what is gained and lost, is to a certain degree in the hands of transsexuals and to a certain degree in the hands of the courts."<sup>65</sup>

Thank you.

**MR. KILMNICK:** Thank you, Dru. Our next speaker is Professor Elizabeth Glazer, who received B.A. and M.A. degrees in philosophy from the University of Pennsylvania in 2001. Professor Glazer received a J.D. in 2004 from the University of Chicago, while serving as a member of the Law Review. Following graduation from law school, Professor Glazer represented clients in connection with multi-million-dollar real estate deals in the New York Office of Fried, Frank, Harris, Shriver & Jacobson, LLP.

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<sup>64</sup> <http://www.glad.org/uploads/docs/cases/odonnabhain-taxcourt-petition.pdf>.

<sup>65</sup> Susan Etta Keller, *Crisis of Authority: Medical Rhetoric and Transsexual Identity*, 11 YALE J.L. & FEMINISM 51, 51-57, 69-70 (1999).

Professor Glazer's research borrows principles from analytic philosophy in an effort to solve problems in constitutional law, statutory interpretation, and property law. Professor Glazer is currently working to determine whether the rights to exclude in the First Amendment context and the property law context are grounded in the same, or different, theoretical bases. Professor Glazer teaches courses on the First Amendment Jurisprudence, Property and Transactional Lawyering. In January 2007, Professor Glazer was a visiting scholar at the Feminism and Legal Theory Project at Emory Law School. Please welcome Professor Glazer.

**PROF. GLAZER:** Hi. Thanks to Meredith and Jeannine for having me here at Touro, and for holding this symposium. There have been a number of transgender symposia this year. The paper that I will talk about today was actually delivered at another trans-rights symposium at Temple, which took place during this academic year as well.

What I will talk about today is *Transitional Discrimination*, an essay that is co-authored with Zak Kramer, who teaches at Penn State. The thesis of the essay is that in order to ensure more consistent results in cases of transgender discrimination, courts should embrace what we call a theory of “transitional identity” and a cause of action for “transitional discrimination.” The motivation for the theory of transitional determination was the way in which the *Schroer*<sup>66</sup> decision separated itself from its earlier precedents. The *Schroer* court said: "Imagine that an employee is fired because she converts from Christianity to Judaism. Imagine too that the employer testifies that he harbors no bias toward either Christians or Jews but only to 'converts'. That would be a clear discrimination 'because of religion'. No court would take seriously the notion that 'converts' are not covered by the statute. Discrimination, because of religion, easily encompasses discrimination because of a change in religion. But in cases where the plaintiff has changed her sex, and faces discrimination because of the decision to stop presenting as a man and to start appearing as a woman, courts have traditionally carved such persons out of the statute by declaring that transsexuality is unprotected by Title VII. In other words, courts have allowed their focus on the label of 'transsexual' to blind them to the statutory language itself."<sup>67</sup> The *Schroer* court's revolution was to protect Diane Schroer as a transsexual, or as a transgender person.

In prior cases, involving *Philecia Barnes*<sup>68</sup> and Jimmie Smith<sup>69</sup> individuals were discriminated against because they were transitioning. In cases like *Smith* and *Barnes* these plaintiffs have been successful. But they were only successful because their lawyers framed their causes of action as "gender nonconforming."

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<sup>66</sup> *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008).

<sup>67</sup> *Id.* at 306-07.

<sup>68</sup> *Barnes v. Cincinnati*, 401 F.3d 729 (6th Cir. 2005).

<sup>69</sup> *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004).

The theory upon which these cases are based derived from the Supreme Court decision in *Price Waterhouse v. Hopkins*,<sup>70</sup> which involved, not a transgender person but a masculine woman, Ann Hopkins, who essentially was discriminated against on the basis of sex, which the Court reasoned to be the appropriate cause of action for her because she was discriminated against for not acting like her sex. Of course, the gender stereotype for a woman is to act very femininely, not act masculinely. She did; therefore, there was a mismatch between how she acted and how anyone would have expected her to have acted. And the Court provided in *Price Waterhouse* that part of what Title VII means to protect when protecting sex discrimination is discrimination on the basis of gender nonconforming behavior. In some earlier transgender cases, and these are the successful transgender cases -- *Smith* and *Barnes* -- a gender-nonconforming theory has been applied to transgender plaintiffs, and it has been applied successfully.

Now, the *Schroer* court is also a successful transgender discrimination case, but it is very different from *Smith* or *Barnes*. And actually, it is more like cases like *Ulane*,<sup>71</sup> which is a case that was decided before *Smith* or *Barnes* where a transgender woman lost her discrimination claim against her employer.

In *Ulane* – which contains relatively the same facts as the other cases I have discussed, somebody is discriminated against. That person is transgender, Karen Ulane, and she was unsuccessful. She is unsuccessful because the Court says Title VII does not protect transsexuality. In this way the *Schroer* decision is more consistent with *Ulane* despite the fact that the outcomes are very different. In fact, the outcomes are exact opposites. In *Ulane*, the court says that Title VII does not encompass transsexuality and in *Barnes* and *Smith*, the courts do not address that question because they apply the gender-nonconforming theory, so they do not look at the plaintiffs as transgendered or transsexual, but only gender-nonconforming. In *Schroer*, we have somebody who is transsexual and is protected as transsexual because the court says that *Ulane* was wrong. According to the *Schroer* court, "transgenderism" is within the ambit of what the legislators meant when they stated "because of sex" in Title VII.<sup>72</sup> So, *Schroer* is, for the purposes of this paper, in Zak's and my view, a good decision. But what is problematic is that because there is a confusing set of cases, and a confusing set of successful cases, for transgender advocates to choose from, it is not clear that transgender advocates are only going to think that *Schroer* is the better case, because *Smith* and *Barnes* are cases where transgender people have won, which is from the perspective of a transgender rights advocate, a good thing. So, why is it that *Schroer* is better than *Smith* or *Barnes*? We contend that a theory of transitional identity offers transgender plaintiffs more avenues for relief, so they could be gender-nonconforming and they could also be protected on the basis of their transitional identity. Moreover, transitional identity also offers transgender plaintiffs a more stable basis for relief. Because in asserting a transitional identity, there is an assertion that is special to transgenderism. Transitional identity actually maps onto the reason that these people were discriminated against. What is "transitional identity"?

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<sup>70</sup> 490 U.S. 228 (1989).

<sup>71</sup> *Ulane v. Eastern Airlines*, 742 F.2d 1081, 1085-86 (7th Cir. 1984).

<sup>72</sup> 42 U.S.C. § 2000e-2(a)(1) (2009).

At this point, I imagine that the meaning of transitional identity is relatively clear. It does sort of map onto its colloquial meaning. It is an identity that is in some sense inchoate and has aspects of some extant identities. So for example, in the case of a transgender person, the person has aspects of the sex from which the person is transitioning, or the gender from which the person is transitioning, and also has aspects of the sex or gender to which the person is transitioning.

Now, some people think of this as very controversial. For instance, folks who do not want to identify as transgender would find this to be a pretty controversial characterization of transgender identity. And Zak and I are sensitive to that, but we are also sensitive to the fact that (a) those people tend not to be the folks we see in these cases, and (b) this cause of action for transitional discrimination -- which is basically discrimination on the basis of transitional identity -- does not preclude folks who do not identify as transgender from bringing other sex discrimination claims. For example, if you imagine a male to female transgender person who is discriminated against because she is a woman, the fact that a court understands transitional identity and a cause of action for transitional discrimination does not preclude that woman, -- assuming that her employer discriminated against her because she is a woman -- from bringing a cause of action against her employer on that basis. Transitional identity does not close off any other avenues of relief, whether it be traditional sex discrimination claims or gender-nonconformity claims. And, in fact, the court in *Schroer* itself does engage with the gender-nonconforming theory. The problem that motivates the thesis of the paper is that there is this confusing body of case law, and there is not a stable way for transgender plaintiffs to assert their identities and to bring claims on the basis of those identities.

Why is this helpful? Why is this sort of proposal for a special cause of action for transitional discrimination helpful? Moreover, how would it work, and why might it help not only transgender people but also antidiscrimination law more generally? First, how it works -- on the one hand we have the definition, which I explained a moment ago, which would say essentially if you are an male to female, that your identity has male and female aspects. There is no statute of limitations on how long you can have this inchoate identity, according to the theory.

Now, what is notable about transitional identity is that it is not unprecedented in antidiscrimination law theory or antidiscrimination law cases. The way in which transitional identity borrows aspects of identity subcategories (in the case of transgenderism, those subcategories would be male and female) is not so different from what intersectionality theorists have argued for quite some time should be protected by antidiscrimination. Take an Asian-America woman, as in the case of Maivam Lam,<sup>73</sup> a law professor at the University of Richmond in Hawaii who brought a discrimination claim against the university for discriminating against her on the basis of being an Asian-American woman. The court, even though it did not find in her favor, pronounced that

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<sup>73</sup> Lam v. Univ. of Hawaii, 40 F.3d 1551 (9th Cir. 1994).

there is a reason to be sensitive to the fact that somebody could experience discrimination on the basis of being Asian-American and somebody could experience discrimination on the basis of being a woman, but that somebody could also experience a different sort of discrimination on the basis of being an Asian-American woman. And so, the court in that case, as have many theorists before and after that case, put forward the idea of intersectional claims and the fact that courts should be more receptive to intersectional claims, because the social reality is that a lot of people do comprise of more than one identity. Furthermore, not only do a lot of people comprise more than one identity but they are discriminated against on the basis of comprising more than one identity, so the law should respond to that social reality by having an ability to identify discrimination on the basis of an individual's membership in more than one identity group.

Now, the problem is that courts have not really been so receptive to intersectionality claims. Why is that? Well, if you think about what goes into a regular discrimination claim, a lot of antidiscrimination law is a controlled experiment where only one thing can change. If we take for example an entire workforce and everybody was being promoted in the ordinary course of business, but one plaintiff (in a perfect discrimination case), was not promoted. And the only difference between the plaintiff and the rest of the workforce, in a perfect case, is the plaintiff's single differing trait. In a perfect discrimination case, this one trait would happen to fall into the identity categories that are protected by antidiscrimination law statutes. In a perfect discrimination case, a woman is said to have been discriminated against because of sex, because she, as a woman, was treated differently from all of the other people in the workforce, all of whom were men.

When imagining an intersectional case, one can already see that the controlled experiment of the perfect discrimination case is ruined. There are confounding variables. Because first the Court would have to figure out whether a plaintiff was treated differently because she was a woman, and then the Court would have to figure out whether a plaintiff was treated differently for being Asian-American. As Suzanne Goldberg has articulated, the fact that there is a wholly different sort of discrimination that might emerge from the combination of more than one identity characteristic is something the courts are not quite ready to embrace. I do not mean to suggest that I agree courts should not be more ready to embrace it, but empirically speaking, courts have not been ready to.

Transitional identity is actually an application of intersectionality theory, but it is a lot cleaner than regular intersectionality theory. The way that regular, intercategory intersectionality theory works is, by combining protected identity categories and applying them to a particular plaintiff. For example, an Asian-American woman fits into the "because of race" and the "because of sex" identity categories protected by Title VII, but the confounding variable problem is that it can be very hard for courts to assess whether that Asian-American woman was discriminated against both "because of sex" and "because of race" because either one of those determinations depends on being treated differently from everybody else who was not your race and was also not your sex. The only perfect case for an intersectional claim for an Asian-American woman would be if

she were the only Asian-American woman, and even then she might not be able to prevail against her employer. Thus the problem with applying intersectionality theory to discrimination cases is nothing more than a classic experiment problem.

On the other hand, a transitional discrimination claim is a lot easier than a traditional intercategory intersectional claim because only one identity category is involved. For this reason transitional identity represents the application of intersectionality theory intracategorically. A transgender person would fall into one identity group, sex. It's certainly possible that a transgender person could be discriminated against on the basis of race, as well, but that would be an entirely different discrimination claim. So for the moment, I can set aside additional identity categories into which transgender people may fall and assume that a transgender person may have a transitional identity, which involves an application of intersectionality theory, where she has aspects of one subcategory of sex, male or female, and also has aspects of another subcategory of sex, male or female. In the same way Maivan Lam was Asian-American and a woman, and therefore arguably had a basis for discrimination because she comprised the race category and the sex category, a transgender individual, falls into only one category, but the individual's identity has parts of one subcategory within the category of sex and parts of another subcategory within the category of sex. On the one hand, this has the advantage of providing transgender plaintiffs with a more stable basis for relief. And even if one disagrees that a claim for transitional discrimination is a more stable basis for relief, it is at least *another* basis for relief. In addition to gender-nonconformity, a lawyer arguing on behalf of her transgender client might also apply transitional identity, an intracategorical application of intersectionality theory, to argue that her client has a transitional identity in addition to having a gender-nonconforming constitution.

That is the advantage of transitional identity for transgender plaintiffs, but the theory also provides an advantage to antidiscrimination law more generally. If you believe the social reality that people tend to comprise more than one identity group, and that this societal reality is rampant enough for the law to respond with some sort of receptivity to intersectional claims, then transitional identity and its attendant cause of action for transitional discrimination might be exactly where the law should start. The law seems to be uncomfortable conducting experiments with confounding variables where plaintiffs in certain cases comprise not just one, but two, three or four different identity categories. Courts are less willing to undertake an analysis of whether a person has been discriminated against on the basis of an intersectional claim because first the court would have to figure out if the discrimination occurred because of sex, then the court would have to figure out if the discrimination occurred because of race, and then the court would have to figure out if the discrimination occurred because of religion. And the plaintiff before the court comprised all of those identity categories. In the case of transitional identity, the court's analysis would be much easier than in the traditional intercategory intersectional discrimination claim. The intracategorical claim of transitional discrimination operates by the same mechanics as the intercategory intersectional discrimination claim. Instead of analyzing a plaintiff by reference to more



than one identity category, courts would need only analyze a plaintiff by reference to subcategories within a single identity category.

Identity is textured. Therefore, people tend to comprise more than one identity category or more than one identity subcategory. Courts should embrace transitional identity and its attendant cause of action for transitional identity, and courts should embrace intersectionality theory as a general matter.

Thanks.

**MR. KILMNICK:** Thank you, Professor Glazer. Our next speaker is Dr. Jillian T. Weiss, who is Associate Professor of Law and Society at Ramapo College of New Jersey. Her field of research is transgender workplace law and policy. She has conducted research involving hundreds of companies and public agencies that have adopted gender identity policies, and has numerous research publications on the subject of gender identity. She also publishes a popular blog on the subject of transgender workplace diversity. Dr. Weiss is also Principal Consultant for Jillian T. Weiss and Associates, a consulting firm that works with organizations on transgender workplace diversity issues. She has trained hundreds of employees at corporations, law firms, diversity trainers and governmental organizations.

Dr. Weiss has worked successfully with Fortune 500 companies and other large organizations, including Harvard University, Boeing, HSBC, KPMG, Viacom and the New York City Department of Homeless Services. Her work has been featured in news stories by the New York Times, Associated Press, Fortune Small Business Magazine, and the Society for Human Resource Management, Workforce Management Magazine, and HR Executive Magazine. Her writings are available online at the Ramapo College website, which I imagine, is [www.ramapo.edu](http://www.ramapo.edu). Please, help me welcome Dr. Jillian Weiss.

**DR. WEISS:** What I'm going to talk about today is the idea that there is a right to gender autonomy. And "gender autonomy" is basically the idea that you have the right to determine your own gender free from state interference. And I think that forms a backdrop to a lot of what we heard today, because if the state recognized your gender, then we really wouldn't have an issue in terms of a lot of the medical access, prisoner care, you know, all these various things we are talking about.

What I'm going to be discussing is the idea that the right to privacy in the -- as expressed by the United States Supreme Court -- in the Constitution, gives somebody a right to say, "I am a male" or "I am a female" or "I'm something else entirely." Obviously, this is a fairly new idea. I'm going to try to demonstrate how United States Supreme Court cases that have come down recently, and the gloss that some commentators have given it, show a pathway to possibly create such a right. If somebody comes into your law office and says, "I'm a transgender person. I was denied X, Y or Z," whatever it might be, one possibility to say is, well, let's see if there's a statute or a policy

or some way we can argue. The other possibility is to say there may be a constitutional argument. It's rarely been adjudicated by any court, at least in the United States, but it has been adjudicated elsewhere.

I published an article in 2001 discussing this idea that there is something called "gender autonomy" and that it is covered by the right to privacy.<sup>74</sup> Here is my definition of it: The right of self-determination of one's gender free from state interference or contradiction and the right to state recognition. This means more than that the state will not tell on me, it means that if you say you are female, then that's what you are for state purposes.

People don't like the right to privacy nowadays. The Supreme Court has kind of dropped it to some extent because it sounds made up, and the word "privacy" doesn't appear in the Constitution. They have instead now grounded this in the due process clause, and the idea is substantive due process, an idea they shot down in the 1930's, when the Supreme Court kept knocking down all of Roosevelt's "New Deal" legislation. They were trying to have an economic stimulus package and the Supreme Court said you can't do that because it violates liberty in the due process clause. Roosevelt said, I'm going to come in with a dozen new Supreme Court members if you don't toe the line, and they said, how dare you. But we're going to drop this whole idea of substantive due process.

The idea crept back in the 1960s, and particularly with regard to reproductive rights, that's where we really saw it beginning to develop. We called this whole notion a right to privacy, but now it's back to substantive due process, and it's called "liberty." The term that's often used when we talk about substantive due process is "personal autonomy," the idea that you have the right to have your own personal decisions in your life. It's not like a right to do something behind closed doors, because a lot of things you can't do behind closed doors, like drugs – it is not legal.

The idea of autonomy here is that, until now, the state has been determining your gender, and now we're going to say, no, I get to determine my gender. But there is a second piece to the right to privacy, which is the unwanted publicity of private affairs. When the state records my gender as male, and then I want to say, "No, I'm female," and they say, "No, you can't do that" -- they are now forcing me to reveal myself on a fairly consistent basis, because that's my identity documentation. I have to show my birth certificate for certain purposes, and a lot of my identity is based on my birth certificate. If I want to get married, I have to show my birth certificate, and so on. So now they will say, "Oh, but you can't get married to that person because you are not that gender." In the article I use the term "heteronormative." These are social notions about sex and gender and gender identity and sexual orientation. I review in great detail the myths that we, as a society, have about sex and gender. The idea of heteronormativity is that you

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<sup>74</sup> *The Gender Caste System: Identity, Privacy and Heteronormativity*, 10 *LAW & SEXUALITY* 123 (2001).

have to have the same kind of sexuality that I do, same kind of sexual orientation, same kind of gender, gender identity, whatever it may be.

But there's also a second idea, which is that somehow the public has a right to know what my real gender is. And so when you impose that disclosure on people, you are also buying into, or perpetuating, this heteronormative notion. Now, my article was fine, except for the fact that at the time it was written there was a case that was still good law, called *Bowers v. Hardwick*,<sup>75</sup> which basically said that statutes which make criminal gay sex are perfectly constitutional. If you are heterosexual and you want to have sex, we cannot make that a crime, even if you are not married, even if you do it a way we don't like. But if you're gay, then that is a crime. And basically it said, look, the right to privacy doesn't go this far, okay? But a couple years after my article was published I was kind of hanging my head -- because people were like, "right to privacy, get out of here; what are you talking about?" And all of a sudden, 2003, *Lawrence v. Texas*<sup>76</sup> comes down and says, *Bowers* was wrong, is wrong now and it was wrong when it was written. And I was like, "Yes," even though I was just in my room and nobody heard me, and very few people have read the article, so hopefully you will all read it.

In *Lawrence*, the Court held that the Texas statute prohibiting, quote, "homosexual sodomy" was unconstitutional. The decision has been called "remarkably opaque." It doesn't tell you what standard of review it's using, it doesn't tell you whether "gay sex" is now a fundamental liberty, or if "sexuality" is a fundamental liberty or what. It doesn't really explain its use of what the state's interests were. So, the state has no interest in moral condemnation of gay sex, but that doesn't make a lot of sense because we condemn morally lots of things, and we pass statutes against them, and that's a fine reason. It's confusing to a lot of people.

When you read the *Lawrence* decision, it goes into this in great detail. It's like a history lesson: the history of the roots of law and Judeo-Christian ethics of laws against homosexual sodomy. A large part of what the Court said was, well, you know, really there is not a long tradition of antigay laws or homosexual sodomy. There are laws against sodomy, but they were never specifically homosexual, because they also applied to heterosexuals. And they also said those ancient roots don't matter. We don't stand by the ancient roots doctrine; it's only the last fifty years that really count, after all. This totally reverses fifty years of substantive due process adjudication. They talk about this "emerging awareness"<sup>77</sup> that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex. However, this is really not what the case is about, because there are all kinds of sex that are still illegal after *Lawrence*, and most of us say that is right. I think most of us would agree that many of those types of prohibitions are a good thing. We *want* prohibitions against incest and statutory rape and so on.

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<sup>75</sup> 478 U.S. 186 (1986).

<sup>76</sup> 539 U.S. 558 (2003).

<sup>77</sup> *Id.* at 571-572.

The other issue was what's called "desuetude," the idea that nobody really prosecutes this anymore. It's on the books, nobody cares, a lot of authorities said it's no good, so we really don't use them anymore. The Court said there's no state interest in enforcing these types of laws any more. Then they used the so-called mystery passage, which came from actually *Planned Parenthood v. Casey*<sup>78</sup> a couple years before. And it said, "These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."<sup>79</sup>

The problem with this passage is – though it's beautiful language, I have to say, and in the right context it would be very touching – it doesn't mean anything. Almost *anything* is personal autonomy. My right to use a toothbrush in a particular way is the right to personal autonomy, but no one is going to seriously contend that that is something to be defended against state intrusion. There's a lot of commentators who have looked at *Lawrence v. Texas* and said that when you begin to think about what that passage really means, that really could apply to a personal decision about your gender. I mean, it does make sense. I mean, talking about the most personal and intimate choices of personal autonomy, what's more personal than that? And so, you begin to have suggestions after *Lawrence v. Texas* in these various comments -- articles, like for example, in Greenberg and Herald's article<sup>80</sup> they looked at a number of different constitutional provisions; right to travel, equal protection, and full faith and credit.

If I have a birth certificate from Wisconsin, and I get it changed from "M" to "F," and then I go to Texas and want to say this is a valid determination, can I do so? The full faith and credit clause of the United States Constitution says you must give full faith and credit to acts and records of another state. If Texas says, no, no, no, we don't recognize that, why isn't that a violation of full faith and credit? The courts have tried to explain that, but not very convincingly. These are some of the issues that come up. As a matter of fact, some of these are written by people here today who have given talks -- certainly this article by Franklin Romeo<sup>81</sup>, and this article by Chai Feldblum<sup>82</sup>, specifically discusses what I'm talking about. Feldblum looks at what *Lawrence* means in terms of the right to choose your gender. She says you really do have a right. Here's Harper Tobin's article, and she's here today, "Against the Surgical Requirement For Change of

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<sup>78</sup> 505 U.S. 833 (1992).

<sup>79</sup> *Id.* at 851.

<sup>80</sup> Julie Greenberg and Marybeth Herald, *You Can't Take it With You: Constitutional Consequences of Interstate Gender-Identity Rulings*, 80 WASH. L. REV. 819 (2005).

<sup>81</sup> Franklin Romeo, *Beyond a Medical Model: Advocating for a New Conception of Gender Identity in the Law*, 36 COLUM. HUM. RTS. L. REV. 713 (2005).

<sup>82</sup> Chai R. Feldblum, *The Right to Define One's Own Concept of Existence: What Lawrence Can Mean for Intersex and Transgender People*, 7 GEO. J. GENDER & L. 115 (2006).

Legal Sex”<sup>83</sup>, discussing again, what should be the requirement? Isn't that matter of personal autonomy up to me, not up to you to tell me what the requirements are?

There are two articles I want to mention – one by Dean Spade and the other by David Cruz.<sup>84</sup> They say that privacy is a liberal fantasy. There's no such thing as privacy from the state. You really can't create privacy by litigating these cases or by announcing some broad principle of constitutional law. The truth is, the state is constantly looking at our gender; it's all over the place in order to get all kinds of state rights, and we need to abolish it completely. And actually, they make quite convincing cases.

Let's get back to *Lawrence v. Texas* and the client who walks into your office and says, I'm transgender and they won't recognize my gender identity. What does that “mystery passage” mean from *Lawrence*? What does *Lawrence* itself mean in terms of the standard of review? Is a non-recognition of gender identity going to be judged under a strict scrutiny standard? In that case, the other side has got to come up with a compelling interest to which that statute or policy is narrowly tailored. That would be nice; not likely, but nice. Cass Sunstein, over at Harvard, went through *Lawrence*, and said basically it means one of four things. We don't really know which one of the four things it means. I'm not going to review them in detail right now because I've got five minutes. First, is *Lawrence* saying that all sexuality is protected as long as it's consensual and noncommercial? Or, perhaps it is saying that it's okay as long as it doesn't actually cause harm? Or, to the contrary, is it saying that we do a poll to find out whether something is or is not considered morally condemnable? The last alternative Sunstein cites is that *Lawrence* only applies to homosexual versus heterosexual, and it has nothing to do with other forms of gender, sexuality or morality. We really don't know which one of these four interpretations it is.

The question that's going to come down ultimately when you are figuring out this transgender client's case is: Is the determination of someone's gender “intimate” and “personal” enough and “central” enough to “dignity and autonomy” -- this is the language from the mystery passage<sup>85</sup> -- to qualify for Constitutional protection? Well, in order to figure that out, you have to look at the case that came before *Lawrence v. Texas*, called *Washington v. Glucksberg*,<sup>86</sup> which was a right to die case. *Glucksberg* was a major problem for the Supreme Court, because a bunch of years earlier they issued an opinion in the *Cruzan*<sup>87</sup> case that said you have a constitutional right to withdraw life-sustaining treatment that will hasten your death.

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<sup>83</sup> Harper Jean Tobin, *Against the Surgical Requirement for Change of Legal Sex*, 30 CASE W. RES. J. INT'L L. (2007).

<sup>84</sup> See, e.g., Dean Spade, *Documenting Gender*, 59 Hastings L.J. 731 (2008); David B. Cruz, *Disestablishing Sex And Gender*, 90 CAL. L. REV. 997 (2002).

<sup>85</sup> *Lawrence*, 539 U.S. at 574.

<sup>86</sup> 521 U.S. 702 (1997).

<sup>87</sup> *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 279 (1990). (“But for purposes of this case, we assume that the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition.”)

In *Washington v. Glucksberg*, the Court was asked, well, if I have that Constitutional right, let's take a tiny baby step forward and say I have a right to die, or I have a right to physician's-assisted suicide. I have the right to put these chemicals in my arm, and to ask the doctor to take out the chemicals, so why can't I just ask the doctor to put them in? And then you had this "mystery passage" that seemed to expand on *Cruzan*, and the Court was backed into a corner. They were like, mmmm, that's a good point. We said doctors could withdraw, why can't we allow doctors to give? But what they said was, this does *not* create a "right to die." That "mystery passage" is limited. You cannot simply deduce from abstract concepts of personal autonomy what constitutes a fundamental liberty.<sup>88</sup>

What does that mean for your transgender client, who says "my gender identity is my personal autonomy and it's a fundamental liberty covered by substantive due process?" It means this is not true, not by itself. You need something more. What do you need? Well, the *Glucksberg* Court distinguished *Cruzan* because there's a common law rule that forced medication is a battery, which comes from a long legal tradition protecting the decision to refuse unwanted medical treatment. You need a long legal tradition protecting the right. But this explanation is specious because the *Cruzan* case didn't involve battery. Yes, if someone tied me down and medicated me, that would be a battery, but does that mean, therefore, my physician can *take out* the life sustaining treatment because it's considered a battery? If it wasn't a battery at the time of insertion, how can it become a battery later? But they found this long-standing tradition. That was their ticket in, and that's your ticket in representing your transgender client. Find a long-standing legal tradition of gender autonomy. But you still need to determine the standard of review.

Back to *Lawrence*. The Court went through this long historical discussion. What were they doing with this long historical discussion? Were they establishing that gay sex is a fundamental liberty? No, the case never uses the term. So then what were they doing? Why do we care about the history, then? Its function is to rebut the idea that the law had a rational basis for regulating homosexual sodomy. That's what you need to do in the case of a gender-nonconforming client -- and this requires another, you know, half hour or so, but we'll do that another time. You can read the article when it comes out in this publication from the symposium -- but basically there is a long history of gender autonomy. There are books out discussing gender-varying people from, you know, biblical times and to the present day. The birth gender regulations are of fairly recent origin. Back in the day, they didn't have any records of who was born or what their gender was and so on. It was really in the early 1900s that this became something that was considered important, and only for the purpose of understanding childhood diseases, infant mortality and so on, and looking at the sex ratio in society because that was important to determining birth rates and so on.

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<sup>88</sup> *Glucksberg*, 521 U.S. at 728-29.

There were never any laws against changing a birth gender. There have never been any laws here, though there have been elsewhere, against sex reassignment surgery. There were some laws passed in the 1920s and 1930s that you can't cross-dress, which somebody else talked about earlier in this symposium. Those have been universally struck down. We can also demonstrate there's a history of statutes being passed in states permitting you to change gender. One place I read said all but three states have a statute permitting you to change gender, though others give different percentages. I haven't really counted myself, but it's a big number, and you can go and change your birth certificate and your driver's license and a lot of other government paperwork. And that demonstrates a tradition of legal approval of this issue.

In terms of trying to find a pathway to argue a constitutional right through the right to privacy or substantive due process or liberty, or whatever you want to call it, for a transgender client complaining about their gender not being recognized, whether it be in healthcare access, marriage, partner benefits, prison, whatever it may be, this is the beginning of what may one day result in a Supreme Court ruling that says you have a constitutional right to gender autonomy.

Thank you.

**MR. KILMNICK:** Okay, thank you, Dr. Weiss. Our next and final speaker, and then we'll take questions following our next speaker's presentation, is Kyle Kirkup, who received his Bachelor of Humanities with Honors from Carleton University in 2006. He is currently completing the final year of his Baccalaureate of Law at the University in Ottawa. While studying law, Kyle has served as a Senior Editor of the Ottawa Law Review, and as a Course Tutor for the Faculty of Law. In addition, he is a volunteer for the Women's Legal Education and Action Fund, where he facilitates discussions with middle school students regarding sexual assault, equality, and the Canadian Charter of Rights and Freedoms. Go Canada.

He also volunteers for the Ottawa Young Lawyers Association as a mock trial presenter, where he assists grade six students in preparing and performing mock trials. Kyle's research is informed by queer theory, feminist theory, critical race theory, and critical disability theory. In particular, he is interested in what legal discourse might reveal to us about contemporary social inequalities. So, please, help me welcome Kyle.

**MR. KIRKUP:** Thank you. First of all, thank you very much for the opportunity to come and speak to you and give you a perspective of what's currently going on in Canada with respect to transgender rights. I'll just get right into it.

In recent years a considerable amount of scholarship has sought to examine the positions of trans people in our society. However, most of the recent literature focuses solely upon gender nonconformity. This relatively narrow focus results in a thin version of trans-inequality, one that seems ill-equipped to examine the complex interlocking systems of oppression that permeate the lives of trans women such as Rosalyn

Forrester.<sup>89</sup> Forrester is a 43-year-old black lesbian, pre-operative transsexual woman, who lives in Mississauga, Ontario. She brought an Ontario Human Rights Code<sup>90</sup> complaint against the Peel Regional Police alleging repeated acts of discrimination in services on the basis of sex. Forrester alleged that she was questioned, mocked, incarcerated and inappropriately strip-searched following several arrests. These arrests arose from the criminal harassment of Forrester's former common-law partner.

The key question that I'm interested in asking today is: what might an inequality analysis of trans issues that is attentive to multiple systems of oppression look like? And to answer this, I'll just give a little road map of where we're going. I'm first going to talk about what "interlocking systems of oppression" is; second, I'll give you a bit of an overview of critical disability theory; third, I'll go into some feminist theory issues; and then I'll complete the talk by talking a little bit about what critical race theory might have to reveal to us about trans issues.

Before I get there, let me just give you a quick overview of the Forrester case. I tried to edit it down into the material, so if you want to take a look -- I edited a one hundred twenty-four page decision down to thirty pages, so hopefully I've got the most relevant parts. So, it's a 2006 decision regarding Rosalyn Forrester, who was strip-searched in 1999. She was forced to undergo three strip searches after being detained by the police. In two incidents -- every time she says, "I want female officers to conduct this search. I'm a male-to-female pre-operative trans woman, and that's what I want," her requests were denied. On two occasions, male police officers did conduct the searches. And on the third occasion, Forrester was forced to undergo a split search. And the way this worked was that her lower half, which was still "male," they had a male police officer do that search, and then her upper half, which was becoming "female" due to hormone therapy treatments, was searched by female officers.

There were basically five issues that the Ontario Human Rights Tribunal took a look at, and they are listed here. I'm going to focus mostly on the first two issues. One, should trans detainees be offered a choice of being searched by a male or female officer or given a split search? And their answer was if they're transgender and they self-identify, it's their choice. That was the result from the Ontario Human Rights Tribunal.

The second point: What if there is a dispute about the trans detainee's self-identification, who gets to decide? And so what the tribunal does there, it says self-identification is the most important, but if there is a doubt in the minds of the police officers, then they are supposed to take the detainee aside and conduct a "gender determination" using seven questions. And we'll get into those questions a little bit more in the remaining time that I have. And so, the full treatment of issues goes beyond the scope of my presentation and so, instead, what I'm interested in doing is talking about

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<sup>89</sup> Forrester v. Peel, 2006 HRTO 13 (2006).

<sup>90</sup> Human Rights Code, R.S.O. 1990, ch. 19.



what the case might reveal to us if we're looking at it through an interlocking system of oppression lens.

We talked about intersectional theory, and, of course, just to recall, that's a theory that gender plus race will sometimes actually intersect and create a unique system of oppression. I'm a bit hesitant of using that language. I prefer the language of interlocking systems of oppression. So instead of implying that you can unbraid the two strands of equality to identity categories, interlocking systems suggest that it's a knot, that it's tied together in such a way that you can't simply unbraid and look at identity categories in a discrete fashion, which is what the law tends to want us to do.

Let's get into critical disability theory, and I've given you a site. It's a great interdisciplinary anthology from Canada called *Critical Disability Theory: Essays in Philosophy, Politics, Policy and Law* by Dianne Pothier and Richard Devlin.<sup>91</sup> And the goal of the anthology is to develop an anti-disciplinarian understanding of disability that focuses on a genuine inclusiveness, not just abstract rights. So there's three key themes that the authors are interested in; (1) language, definitions and voice, finding the right language to talk about people with disabilities; (2) contextual politics and the politics of responsibility and accountability; and (3) philosophical challenges. It sounds all very abstract, but it is not particularly so.

To get to theme number one, language, definitions and voice. The authors go through and talk about different types of language to describe disability. So you can say, "disabled," "living with a disability," "living with impairments" or "as having activity limitation." Then the second question that follows from that is what actually qualifies as a disability? And the authors reject the idea that there's a monolithic, singular experience of identity. It's very dependent on context. And what the authors really want us to focus on is the social construction of disability to suggest that some people are actually manufactured as disabled while others are not.

Point two, contextual politics; there's three things I want to focus on here. The first idea is that society can shift to empower those who have experienced the social inscription as disabled, instead of putting all of the onus on the person with the disability. Second, critical disability generally posits that the fundamental liberalist assumption of disability as misfortune is incorrect. The third point is that we should start to shift our gaze and look at society at large. Why and how are certain people constructed as being empowered while others are not, and what does that say about our society?

The third theme of critical disability theory is philosophical challenges. So again, we're back in the language of ablest assumptions. What assumptions does society at large make about people with disabilities? And again, we're back in the language of deconstructing the notion of a singular category of identity. And what we're finally

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<sup>91</sup> CRITICAL DISABILITY THEORY: ESSAYS IN PHILOSOPHY, POLITICS, POLICY AND LAW (LAW AND SOCIETY SERIES) (Dianne Pothier & Richard Devlin eds., 2006).

getting to is that, different people experience disability in different ways, often based on how much they can “pass.” If there's a politics of passing, being able to hide your disability to the world, and there's a certain amount of privilege that goes with that.

If we do a critical reading of *Forrester*, where does that get us? Transgender rights are usually understood in terms of non-conformity with traditional norms on the basis of gender and sexuality. Two themes come out of the decision in *Forrester* that I want to highlight using a critical disability lens. The first is through the decision; *Forrester* is constructed as being disabled. The court gives a lot of evidence within about the first ten paragraphs of the decision describing *Forrester* as hating the way she looks, feeling disgusted when she's in the shower, having recently torn up childhood photographs, all of these things, right at the very beginning of a one hundred twenty-four page decision, which frames her experiences as being “broken.” From a critical disability theory perspective, that's problematic. Instead, we should perhaps ask why society has constructed *Forrester* and put her into a broken position, instead of asking, why is *Forrester* in this position?

The second theme that I want to talk about is that, the decision implicitly creates a hierarchy of transgender subjects, and that's really problematic. And where we get into this hierarchy is if there is a dispute about whether or not the person is actually transgender. For example, this situation may come about regarding private gender determination. If there's doubt in the police officer's mind about whether or not the detainee is actually transgender. And I'll just give you a sense of the questions that the police have been told by the Human Rights Tribunal to ask people who they doubt, who they think might be trying to get something they are not entitled to have. For example, female police officers conducting a search when there actually should be males doing it. Okay, so a few of the questions are: What name appears on your identity documents? What is your gender identity? Have you disclosed your gender identity to your friends and/or family? What steps are you taking to live full time in a manner consistent with your gender identity? How can you demonstrate that you are living full time in your gender identity? Have you sought or are you seeking medical or professional guidance from a qualified professional? If so, can you give the names of these people and their professional designations? What medical steps, if any, have you taken to help your body match your gender identity? Do you get the sense that the questions are extremely intrusive in nature? And it would be interesting to pose those questions to general members of society at large, and try to answer how they conceptualize their gender and who knows about their gender and what doctors know about their gender. It's interesting to shift the burden onto the claimant, as opposed to shifting the burden onto society.

That is critical disability theory in a nutshell, and I'll move on now to feminist theory. So much feminist theory readings in the contemporary period talk about this standoff between essentialist conceptions of gender and constructivist conceptions of gender, and a key example of that would be Judith Butler. However, one thing that I'm interested in looking at is what feminists have to say about the social entrenchment of male privilege. Throughout the decision, what the court does is it invokes this notion of

the transgender community, "the transgender community." And what that language to me implies is the idea that there is a monolithic experience. However, if we use feminist theory, we might look at the socialization differences between male babies and female babies, and how, from an early age, they're socialized differently. And so, if we accept that that's true, then male-to-female trans people and female-to-male trans people may experience the world in very different ways. So, again, we're deconstructing this idea of a singular transgender community. And the way that this comes out in the case is actually the reason why Forrester encountered the police in the first place is due to the criminal harassment of her former common-law partner, who happened to be female. And so in that instance, when she was criminally harassing her partner, we would have to -- in my view, we would have to argue that she was replicating male privilege, and so that seems to, in some ways, not accord with her statement that she is a woman. And so we have to be careful about centralizing transgender people around an umbrella category and not realizing they are differently situated in society.

We're into critical race theory now, and what critical race theory might have to say about transgender issues. As I suggested to you in the introduction, Forrester was, in fact, a black woman from Mississauga, Ontario, which is a suburb of Toronto. However, the decision never mentions, other than that one word, "black," that systemic racism might have anything to do with her encounter with the police, despite well-documented systemic racism analysis from scholars such as David Tanovich in "The Colour of Justice."<sup>92</sup> We might think that that lack of race consciousness exists in general society, but it also exists within so-called progressive movements. And this has been well documented by scholars such as Patricia Williams in "The Alchemy of Race and Rights: A Diary of a Law Professor."<sup>93</sup>

I also want to highlight the fact that there have been commentators who have suggested that there is a whiteness that exists within so-called queer cultures. For example, Tracy D. Morgan in "Pages of Whiteness, Race, Physique Magazines & The Emergence of Gay Public Culture,"<sup>94</sup> suggests that gay white men worked to dominate and silence not only in women's voices and experiences, but also those of people existing in racialized positions. The all but complete erasure of blacks within a variety of communities is not a new phenomena, and the best example that Morgan gives is the Stonewall riots from 1969, for the queer community -- however you want to define that, however you want to conceptualize it -- but what that often fails to do is to take into account that a large proportion of people at Stonewall were racialized drag queens. And so Morgan argues that gay white men -- male elites within the queer community often work to silence the racial dimensions of the events, and thus foreclose the opportunity of that event being a rallying cry for more than just gender variance or sexual variance, but also for people who are racialized. The last point I want to make with respect to critical

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<sup>92</sup> DAVID TANOVICH, *THE COLOUR OF JUSTICE: POLICING RACE IN CANADA* (2006).

<sup>93</sup> PATRICIA WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS: A DIARY OF A LAW PROFESSOR* (1993).

<sup>94</sup> TRACY D. MORGAN, *PAGES OF WHITENESS: RACE, PHYSIQUE MAGAZINES AND THE EMERGENCE OF PUBLIC GAY CULTURE*, *QUEER STUDIES: A LESBIAN, GAY, BISEXUAL, AND TRANSGENDER ANTHOLOGY*, (Brett Beemyn & Mickey Eliason eds. 1996).

race theory is the story of Louis Fitch. She was a female-to-male black trans woman. And what happened with her was she went through some hormone treatments and sort of became a “man,” and she notes that within the first six months of becoming a man, she was pulled over three hundred percent more than she had as a woman. And so, that example to me demonstrates the fact that when we speak about trans rights, we also have to be attentive to the ways in which disability, gender and race, to name just a few identities, work to frame people's realities in different ways. And so I just want to get us thinking about asking the other question. So if it's not just gender conformity, maybe it's race, maybe it's disability, and think about what our own blind spots are.

Okay, so I'll quickly wrap up. As my interlocking analysis of Forrester has suggested, it is impossible to understand trans equality merely on the basis of nonconformity of gender and sexuality; rather, to get closer to identifying Forrester's lived experiences of dominance and insubordination it is important to value the insights and reflections offered by critical disability theory, feminist theory and critical race theory. And I know that the law is uncomfortable when it gets beyond a singular identity category. Perhaps one of the most important critiques of legal analysis comes from Mari Matsuda in *On Causation*.<sup>95</sup> She argues that the law offers simple understanding of causation over more complex and more nuanced approaches. This desire for simplicity is demonstrated in the well-known torts metaphor of the pebble being dropped into the ocean. In describing the narrowness of legal causation, Matsuda writes, "A pebble cast in the water makes ripples, and we limit liability to the rings that are closest in time and space. The fewer causes and effects we identify, the cleaner and more predictable the doctrine. Single causation, linear causation, causation no further than the eye can see."<sup>96</sup>

My last point is that those interested in meaningful and substantive trans equality must do more than simply push ourselves and the judiciary to see the overlapping rings of dominance and insubordination. We also have to encourage ourselves and the judiciary to take the rings in a serious way. Attempting to consider the interlocking rings of oppression is often a complicated and messy endeavor. However, the costs of failing to do the more complex and difficult arguments are simply too high. A failure to recognize, let alone take seriously, interlocking arguments results in a thin version of trans equality, one that will do little to improve the interlocking, marginalized positions of people such as Rosalyn Forrester.

Thank you.

**MR. KILMNICK:** Thank you, Kyle. What a wonderful, wonderful, panel. So, we have about fifteen minutes for questions.

**PROF. MILLER:** I think all the presentations today were very interesting. I think as a starting point, the question comes from both Jillian's and Dru's presentations, but I think it touches on a lot of what I've heard today. And so, the question is, Jillian frames gender

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<sup>95</sup> 100 COLUM. L. REV. 2195 (2000).

<sup>96</sup> *Id.* at 2201.

identity in terms of autonomy as a choice, and I know one thing -- sexuality and gender are two separate things, but one thing with sexuality that's been so politicized is whether or not it is a choice. And so, are there any risks in framing -- legal risks in framing gender identity as a choice?

**DR. WEISS:** There are some risks, and I think this is an area that's very complex. I think my short answer would be that while my gender identity may not be a choice in the sense that it's not a behavior, it's not a lifestyle, it's something that's more deeply felt on a psychological level, I think my taking steps to move forward with changing my gender markers on government identification and other steps, gets closer to the idea of choice. And for myself, I like to analogize this to the sense that left-handedness is not a choice, but if I want to switch to being right-handed, I can. There are costs and a lot of work; my handwriting may not be as good, but, you know, "choice" is a word that has a lot of meanings. Yes, there are risks and I think those need to be weighed, and hopefully someone else will write that article.

**MR. LEVASSEUR:** I think I'll go back to the Rhiannon O'Donnabhain example. I think what was interesting to me about that case is that they had medical experts come from both sides. And this is the paradox about gender identity disorder. Ironically, the expert for the IRS said this is a choice -- you know, basically all the autonomy arguments, I want to have a choice; I don't want to be diagnosed -- here's the medical expert saying this should not be covered, saying all the right things for that argument, and whereas GLAD's (Gay and Lesbian Advocates and Defenders) expert witness came in and said "She's mentally ill." So, that's the kind of question you have to ask as an attorney.

But the point I made was that you have a duty to be a zealous advocate, what do you do about the situation? I don't have the answer.

**DR. WEISS:** I think this is a political controversy within the transgender community and it's one that's not easily reconciled. Different trans people have different...

**PROF. GLAZER:** It has been my experience, reading and writing sexuality and law scholarship, that most folks get whatever their arguments off the ground by setting aside the question of whether gender identity or sexuality is a choice or is immutable. My experience has told me that it is best to set that debate aside, and I have noticed that a lot of folks have done that because it is an internally contentious debate.

**MR. KILMNICK:** Any other questions?

**MR. KILMNICK:** The other thing about choice, as well, is it's a choice for gay and lesbian bisexual people; it's a choice for heterosexual people as well. Choice is choice, so...

**DR. WEISS:** Choose wisely.

**AUDIENCE MEMBER:** My concern about the *Smith* and *Barnes* cases as an issue when I read them, is we hear cases with broadly similar facts that are adjudicated – and in the case of *Schroer*, somebody is in the process of an application. And I'm worried, you know, that with the gender non-conforming theory that, you may have a problem with different facts. For example, someone who transitions years ago, applied for the job after the transition and they got it. The fact that the transition comes to the employer's attention days, months, weeks, years later, and is the basis for some adverse action, that the nonconformity theory might not get you as far because the employer was treating this person all along on the basis of the gender that they are today. They are not perceiving them as a trans woman or man, they are not perceiving somebody, at least, as someone who is being gender nonconforming. Does your theory get around that problem, or does it come up again because you know, after your transition, this concept of transgender doesn't apply?

**PROF. GLAZER:** My theory offers an alternative for trans plaintiffs that either are not gender-nonconforming or do not wish to cast themselves as gender-nonconforming. After all, the backdrop to this project is a larger project that Zak and I are working on about the ways in which the antidiscrimination law sees plaintiffs differently from how those plaintiffs see themselves. That larger project is not just about trans plaintiffs, but also bisexual plaintiffs and fat plaintiffs, which all share in common that the law views those plaintiffs differently from how they view themselves. In the context of trans issues, I do not see much of a difference because transitional identity is just an alternative to the gender-nonconforming theory. It is in my view, a more stable alternative.

**AUDIENCE MEMBER:** I guess my question is just: Is its application any different depending upon when the discrimination occurs in relation to the person's transition?

**PROF. GLAZER:** No, I do not see it as different, and that was why I said there is no statute of limitations applicable to the inchoateness of an identity. Even if you were discriminated against for being trans, and you have already transitioned, you might continue to identify as trans rather than as either male or female. So why wouldn't you be able to have a transitional identity at that point? The only time in which there could arguably be a statute of limitations is if you have totally not identified as trans and you are just completely assimilated into your surviving gender or sex, in which case, you would still have available to you a sex discrimination claim, by which of course I mean a traditional sex discrimination claim. At that point, you would be a woman or a man, and assuming you incurred some discrimination at work, then that discrimination, presumably, if you didn't identify as trans, if you didn't tell anybody that you had transitioned, and if you passed well enough, would not have been discrimination that arose because you were trans.

**MR. KILMNICK:** How about other questions?

**AUDIENCE MEMBER:** Well, firstly, a comment. I would like to thank the last speaker. The question I've had and that I can't tell anymore, why I get so many more tickets than my girlfriend.

The other thing, I'm coming from a psychological point of view, and I don't know if it's because of theory or -- that homosexuality is a disorder, and then over time it's removed, accepting, socialized, whatever you want to say, if they are considering putting that in *GID*, what does that do for the pathologization of such a situation? Will it just be a time when it's accepted and then we'll remove it from *DSM* at that time?

**MR. KILMNICK:** Did everybody hear that question? It was that besides him getting more tickets than his girlfriend -- it has nothing to do with driving 90 miles per hour, right -- it is that with homosexuality being taken out of the *DSM* back in 1972 and 1973, what does it do with keeping Gender Identity Disorder in terms of the pathology or the pathologization of transgendered folks. Did I get that right?

**AUDIENCE MEMBER:** Pretty much.

**MR. LEVASSEUR:** So, two things. I think in terms of where we are from, where we are going, that kind of thing -- like I said, this is my point of view -- but I think we came from going from morality into medicalization where we're in pathology right now, and possibly the next step could be informed consent, that's one of the ideas out there. And in terms of the difference between homosexuality and transsexuality or *GID*, one of the differences, I think you know, a lot of people, as soon as homosexuality was taken out, gays and lesbians had rights. It's not that simple, I think in terms of transsexuality, probably because there's a reliance of that in connection with medical needs such as surgery and hormones, the fact that they are linked into that diagnosis, it's not as simple as -- you know, whereas homosexuality, there's no benefit to gays and lesbians to have that in the *DSM*.

**MR. KIRKUP:** And I just want to add, in Ontario gender reassignment surgery is associated with -- well, their original surgery is covered by *OHIP* (Ontario Health Insurance Plan), and *OHIP* is our -- basically our free medical service. But the reason it's covered is because Gender Identity Syndrome -- Disorder exists. So, is there a way of using the *GID* strategically without basically pulling in the pathologization that goes with it? So, I guess that's the question, and I think it's open for discussion, and I don't think anyone has solved that debate yet, or ever possibly.

**MR. KILMNICK:** Okay. I think also just to make a point that, if something comes out of the *DSM*, it does not mean it's not pathologized anymore, as well. Okay, any other questions? Let's thank our wonderful, wonderful panel, and thanks to Touro, again, as well.

## **CLOSING REMARKS**

**PROF. MILLER:** I just want to close by thanking everybody who made it here today to speak and to listen to these remarkable and enriching presentations. A special thanks to Jeannine Farino, the Journal's Editor-in-Chief, for handling the logistics. And, also to Barbara Hakimi for her tireless assistance. Finally, deep gratitude to LeGAL and the Long Island LGBT Community Center for co-sponsoring today's program.

Thank you all for your participation, and we hope you will come back to Touro for other programs.