"Please Write 'E' in This Box" Toward Self-Identification and Recognition of a Third Gender: Approaches in the United States and India

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Introduction

One to four percent of the world population is intersexed, not fully male or female. This biological fact is hard to reconcile with the tradition
of conferring rights based on what is found below one's belt buckle. The soundness of the practice of allocating rights on the basis of sex depends on two concepts. First, that sex is fixed at birth. Second, that everyone fits neatly into boxes labeled male and female. Today, the prevalence of intersexed individuals and our increasing ability to alter a person's birth sex through hormones and surgery reveals the male-female binary as a social construct. The law has never been equipped to handle intersexed individuals and this defect in the law is becoming more prevalent with scientific advances. This Article will examine the human rights abuses encountered by two minority sexual groups, one in the United States and one in India, stemming from the collision of law, biology, and societal expectations.

Most Americans cannot conceive of a sexual identity outside the male-female binary. Therefore, the medical standard of care for intersexed infants in the United States calls for corrective surgery aimed at "normalizing" external genitalia to fit societal expectations. These procedures are not medically necessary to preserve the child's health. In addition, the surgeries often occur without the informed consent of the parent or, in the case of older patients, the child. These procedures disproportionately target males, who the medical establishment views as having inadequate genitals even though they will be able have intercourse and possibly father children. There is a growing movement to stop intersexed infant surgery or at least require informed parental consent. While important, focusing on reforming the medical approach to intersexed infants ignores legal pitfalls, particularly the problems intersexed Americans will face if they try to marry or change identification documents like birth certificates or drivers' licenses.

In contrast to the United States, India recognizes the possibility of a third gender because of a visible and long-standing sexual minority

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2. I've adopted this metaphor from Julie Greenberg's article. See generally infra note 4.
3. Physicians told one twelve-year old intersexed patient that she had ovarian cancer and they were going to perform a hysterectomy. Hass, supra note 1, at 42 n.8. In fact, the patient did not have ovaries but testes that were removed during the surgery. Id. Another patient, who had had ten genital surgeries by the age of ten, wrote that "[m]y childhood was filled with pain, surgery, skin grafts, and isolation." Jeff McClintock, Growing up in the Surgical Maelstrom, 2 Chrysalis: J. of Transgressive Gender Identities 53, 54 (1997), available at http://www.isna.org/books/chrysalis/mcclintock. Even though he questioned the purpose of the surgeries, the doctors did not answer his questions and told him not to complain. Id. Another intersexed patient remembered the doctors telling her father that the surgery would make her "normal." Morgan Holmes, Is Growing up in Silence Better Than Growing up Different?, 2 Chrysalis: J. of Transgressive Gender Identities 7. 8 (1997, available at http://www.isna.org/node/743. Nobody told the patient or her father they were going to amputate her clitoris, but instead "they gave it a much more benign name 'clitoral recession.'" Id.
group called the hijras. The hijras are composed of intersexed men who identify as women and other transgendered or transvestite men who act and dress as women. This recognition may be due to the religious underpinnings of the group and the prominent role that hijras play in Indian culture. Intersexed hijras only include men who identify as women—never women who identify as men. Therefore, they are only a subset of the intersex population. While this subset of the intersex population in the United States would most likely undergo "normalizing" surgery, the hijras never complete the identification as women through the surgical construction of a vagina. One obvious reason for this is that the group has a long tradition that predates such complicated surgical procedures. But more than that, the group identity embraces the "third"—the space between male and female. The hijras, although historically discriminated against on the basis of laws imported by their British colonizers, are beginning to gain legal recognition in India when they self-identify as a third gender.

Part I of this Article defines intersexuality and highlights the legal and societal complications that occur when the concept of the fixed male-female gender binary is challenged. Part II describes the unique role of the hijras in India, who are both revered and discriminated against, and suggests that India is beginning to legally recognize a third gender through the grassroots advocacy of the hijras. Part III contrasts the experience of intersexed individuals in the United States by describing the current protocol to deal with the "medical emergency" of the birth of an intersexed child. This section forecasts legal issues facing intersexed individuals who choose to exist as a third gender in nonconformance to the male-female binary through an examination of case law on transsexuals in the marriage and employment context. The conclusion advocates the necessity of statutory reform to ensure that intersexed individuals receive the benefit of their Constitutionally protected right to equal treatment.

I. Not Male, Not Female: Defining Intersexuality and its Collision with Law, Medicine, and Societal Constructs

Before examining specific examples of intersexed individuals in India and the United States, it is important to define core terms. While we often conflate sex and gender, they are distinct. Sex identifies men and women based on biology, while gender is a social construct.\(^4\) Another

way of looking at this is to consider sex as fixed and constant across culture (unless there are surgical or medical interventions), while gender is mutable and determined by dress and behavior that identify the individual as male or female within the individual's society.

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

When all primary and secondary sex characteristics are considered, one to four percent of the world's population is estimated to be intersexed. This could equal 2.7 million people in the United States alone. To put this figure in context, even if the intersexed population in the United States was as low as one-tenth of one percent, intersexed individuals would be as common as people with Down's Syndrome, making this a significant subset of the population.

To further complicate sex and gender categories, gender identity is a distinct concept focused on the individual's self-identification as male or female, regardless of whether this gender choice matches up with one's external sex organs and other biological sex markers. Having a
gender identity that differs from your biological sex could lead an individual to become a transvestite (temporarily perform the gender of the opposite sex through dress and behavior), a transsexual (permanently change your biological sex through medical intervention), or self-classify as a third gender (a refusal to identify exclusively as male or female).

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

II. India: Acceptance of a Third Gender

A. Hijras: India's Third Gendered People

In India, the hijra (pronounced HIJ-ra) community has existed for more than four thousand years and is currently believed to number half a million. The word “hijra” designates an alternative gender to the male-female binary; the term translates as eunuch or hermaphrodite. The hijras' base their group's third gender identity on an episode in the Ramayana where Rama is banished. In the story, Rama tells a tearful group of men and women, lamenting his banishment, to leave and return to the city. A group of people “who were not men and not women”

15. Indian society seems to use the terms eunuch and hijra interchangeably, even though hijras do not prefer the term eunuch. See infra Part II(C) for a criticism of the "E" for eunuch designation. In this paper, I have only used eunuch when the original source utilizes this word.
did not know what to do and remained with him. Rama rewarded the hijras for their loyalty by giving them the power to bless auspicious occasions such as marriage and childbirth through customary singing and dancing known as badhai.

Irregular male sex organs are central to the group's definition. The hijras include both ceremonially emasculated males and intersexed people whose genitals are "ambiguously male-like at birth." Unlike the intersexed population in the United States, all hijras have a female gender identity. There are no ambiguous females who identify as males in the group. Instead, all hijras dress and act as women even though they are not biological women, nor are they surgically altered to have vaginas like many intersexed people in America.

Although one might label the hijras as transvestites, especially those who are not born intersexed, Serena Nanda, the only anthropologist who has studied the group extensively, uncovered elements of both a female and male group identity. The hijra are "not men" because of their imperfect or absent penis. In fact, when Nanda would ask "What is a hijra?," the hijra would lift her skirt and point to her ambiguous or mutilated genitals. Other components of the hijra definition as "not male" include: not having the same sexual feelings as men do (e.g. sexual desire for women), walking like women, taking female names, and wearing female clothing, jewelry, and bindi. However, even if hijras are like women in terms of their dress and mannerisms, it is clear that they are also not women. Nanda classifies their female behavior as burlesque—dancing, smoking, and acting in sexually explicit ways, all things falling outside of the traditional female role in Indian society. Hijras also work

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17. Id. at 13; see also PUCL REPORT, supra note 13, at 17–18 (describing alternative origin myths for the hijras).
18. PUCL REPORT, supra note 13, at 18.
20. Id. at 14.
21. See generally id.
22. See generally id. Coincidentally, John Money, the American creator of gender normalizing surgeries discussed at length infra in Part III(A) of this Article, wrote a forward to the first edition of Nanda's book. In his forward, he does not advocate labeling the hijra as a third gender and discounts their identity as hermaphrodites. Instead, he defines them as "women-mimetics" or acting like women. John Money, Forward to the First Edition of SERENA NANDA, NEITHER MAN NOR WOMAN: THE HIJRAS OF INDIA, at xi, xii (1st ed. 1990). This forward seems to conflict with Nanda's definition of hijras as an alternative gender.
23. NANDA, supra note 16, at 15.
24. Id.
25. Id.
26. Id. at 18.
in male occupations such as construction. Finally, hijras do not have female reproductive organs and are not able to have children.

How does Indian society cope with the hijras' choice to embrace a third gender identity as "not men and not women"? The evidence is mixed, although it does seem that the hijras have been accepted to a higher degree than their American intersexed counterparts. Nanda seems to say that while the hijras are accepted, they are also ostracized. The hijra identity is "deeply rooted" in Indian culture and the Hindu belief that all people contain male and female attributes. The hijras also play a sanctioned role in Hindu society through the practice of badhai—a contradictory ritual where infertile hijras bless births and marriages. However, Nanda notes that the status of hijras as "neither man nor woman, call into question the basic social categories of gender on which Indian society is built. This makes hijras objects of fear, abuse, ridicule, and sometimes pity." Attitudes toward the hijras are also colored by the fact that many work as prostitutes because societal discrimination makes it difficult for hijras to find appropriate employment.

B. English Colonization Began an Era of State-Sanctioned Discrimination

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

The Criminal Tribes Act required all members of criminal tribes to register with the authorities, operating under the assumption, common to India's caste system, that all members of certain communities were

27. Id. at 17.
28. Id. at 18.
29. Id. at 19–21.
30. Id. at 1–3.
31. Id. at 23.
34. Id.; see also PUCL Report, supra note 13, at 43–48.
criminal and unclean from birth. Article 26 of the act specifically targeted hijra practice by providing:

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

By forbidding the hijras to dress as women and perform in the street, the act effectively criminalized the group’s entire identity. Additionally, Article 29 of the act further eroded the legal identity of the group by prohibiting hijras from making a gift or a will. Although now repealed, this historical act encouraged the “contemporary perception of hijras as thieves as well as the brutal violence which is inflicted against them.”

Another colonial remnant, Section 377 of the Penal Code, is still on the books, even though Britain and other former British colonies such as South Africa have repealed similar laws. This law criminalizes even consensual homosexual contact and case law has broadened the interpretation of the act’s prohibition on “carnal intercourse” to include oral sex, anal sex, and thigh sex; “[b]asically any form of sex which does not result in procreation comes within the rubric of Sec[tion] 377.” As hijras by definition are men—or at least not biological women—who have sex with men, Section 377 can be used to criminalize their consensual sexual expression. As many hijras make a living through prostitution, they are particularly susceptible to prosecution under this law. In practice, the law is used “to target, harass, and punish lesbian, gay, bisexual, and transgender persons.” One police tactic is to physi-

35. PUCL Report, supra note 13, at 44.
36. Act No. XXVII of 1871, reprinted in Bockrath, supra note 33, at 88.
37. See id. at 87 n.29; cf. Shunned by the Majority, Hindustan Times, May 20, 2006 (describing how the Criminal Tribes Act transformed the hijras into a “condemned” and “intensely secretive” community).
38. Bockrath, supra note 33, at 88 n.30.
39. PUCL Report, supra note 13, at 46.
41. PUCL Report, supra note at 13, at 47.
cally attack, rape, or blackmail this group of people and use the threat of prosecution under Section 377 to make sure the victim does not report their crimes to other authorities. Although there are no cases using Section 377 to prosecute consensual sex, the continued existence of this law on the books stigmatizes the gay and transgendered community and forces them to keep silent about human rights abuses perpetrated by the police. The government continues to support the law and has stated that "public opinion and the current societal context in India does not favor the deletion" of Section 377 and the Delhi High Court has dismissed a legal challenge.

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

43. Id.
44. See PUCL REPORT, supra note 13, at 48.
46. PUCL REPORT, supra note 13, at 50. India is not alone in this respect, as most other countries discriminate in this manner.
47. Id. at 51.
48. Id. But see infra text accompanying note 63.
49. Id. at 50-51.
50. While the Indian Constitution has an equal protection clause that prohibits discrimination on the basis of sex, this guarantee has not barred the State's discriminatory practices, possibly because the equal protection clause does not prohibit discrimination on the basis of sexual orientation or gender identity. For example, in the electoral context, one writer has noted that the hijras have been excluded from the polls in spite of the equal protection guarantee because even if there had not been a blanket ban on participation, "most [hijras] were overlooked in the counting," or had
The political landscape in India is changing. Due in large part to non-governmental advocacy groups, there is growing recognition of the discrimination endured by the hijras. The Indian National Human Rights Commission (NHRC), established by the Human Rights Act of 1993, serves the purpose of investigating human rights abuses through research, intervening in human rights proceedings, reviewing the Constitution and implementing measures to safeguard constitutional rights. While laudable, the NHRC’s attention is not focused on hijras. The NHRC website does not mention hijras anywhere—hijras are noticeably absent in the index of human rights cases and human rights issues. In fact, the NHRC has stated that “gay and lesbian rights [are] not under its purview”, suggesting that it will not act on behalf of hijras, as the group is often considered in conjunction with the gay rights movement.

Advocacy that is not being done by the NHRC is being undertaken by NGOs and hijras themselves. First, NGOs are campaigning for the repeal of Section 377. Second, hijra candidates are running for local, state, and national elections now that they are listed on the electoral rolls. Hijras have formed their own political party, Jiti Jitai (translated as “We Have Already Won”, which references the “sexual mystique” they wield); six hijras recently won local and state elections and four eunuch candidates ran in the 2004 election. Based on their own experiences of discrimination, the hijras’ platform champions the rights of India’s other

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53. See Nat’l Human Rights Comm’n, supra note 51.
55. Change Laws to Protect Rights of Sexual Minorities, supra note 40; Eunuchs and Homosexuals Protest for Basic Rights in Bangalore, supra note 14; IPC Section Biased Against Sexual Minorities’, THE HINDU, Dec. 17, 2003; Repeal IPC Section 377, Urge Sexual-ity Minorities, HINDUSTAN TIMES, Apr. 1, 2006. The hijras have been joined in this effort by other human rights activists in a “high-profile campaign to overturn Section 377.” State Dep. Report 2006, supra note 45, § 5.
57. Watson, supra note 14.
poor and exploited citizens. However, two elections initially won by hijras have been nullified by courts who ruled that the candidates were men and could not therefore take posts that were reserved for women. Judicial decisions such as these could have a detrimental impact on the hijras' ability to gain political office in order to publicize and ameliorate the discrimination they and other minorities face. While there is a need within Indian society to reserve posts for women, hijras should be considered for similar political treatment or be permitted to take a small percentage of these posts, as it is doubtful that they will be elected in large enough numbers to dilute female representation in government.

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

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

58. Id.
59. PUCL Report, supra note 13, at 51. Unlike in the United States, it is a common practice for other governments, particularly in emerging democracies that use a parliamentary system, to exclusively reserve select positions for certain minorities, such as women.
61. Shibu Thomas, Column for Eunuchs in Passport Form, MID-DAY MUMBIA, Mar. 9, 2005.
62. Bhattacharya, supra note 60.
63. Passport Information Booklet, supra note 60, at 11.
federal level, where recent marriage and identification legislation mandates classification as male or female.  

III. United States: Obstacles to the Legal Recognition of a Third Gender

A. Intersex Surgery in the United States

In the United States, prior to the 1930s, society placed intersexed individuals in the male-female binary according to their dominant physical characteristics. Starting in the 1930s, the medical community began “treating” intersexed individuals with hormones and surgical procedures to turn them into “normal” women and men. However, while doctors assigned infants to a sex at birth, they waited until puberty before treating the intersexed individual. It was not until the 1950s, when physicians could identify intersex conditions at birth, that Dr. John Money, a professor and researcher at Johns Hopkins University, established the current standard of care: genital reconstructive surgery as close to birth as possible. In contrast to the previous model where doctors waited to intervene until puberty, Money’s theory posits that intersex is a social and medical emergency to be treated immediately.

Two primary theories underlie Money’s medical protocol. First, by placing nurture over nature, he theorized, “children are not born with a gender identity, but rather form an understanding of gender through their social upbringing.” Therefore, the earlier the surgical intervention, the better chance that the child would conform to his or her assigned gender upbringing. Second, Money surmised, “the only way to ensure that both the family and the child would accept the child’s gen-

64. See Defense of Marriage Act, 1 U.S.C. § 7 (1996) (establishing a federal definition of marriage as between a man and woman); REAL ID Act, Pub. L. No. 109-13, 119 Stat. 231 (2005) (requiring that state-issued driver’s licenses and identification cards identify a person’s gender). The Defense of Marriage Act assumes the existence of two sexes by limiting marriage to between a man and a woman. Both acts also implicitly assume that every person falls into a categorical box labeled male or female.

65. Haas, supra note 1, at 44.

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


68. Haas, supra note 1, at 45.

69. Lloyd, supra note 67, at 291.

70. Haas, supra note 1, at 45.
nder was if the child's genitals looked clearly male or female." Put in other words, Money's theory boils down to the belief that children could develop either male or female gender identities "if you made their bodies look right . . . and made them and their parents believe the gender assignment."

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

However, the John/Joan case was anything but the success Dr. Money claimed it to be. Family and friends observed that Joan acted as a tomboy and did not fit in socially as a girl. At fourteen, John rejected his assigned gender of Joan and began living as a boy. Subsequently, he had surgeries to reduce breast growth and construct a penis. He "later married a woman and adopted her three children." However, David Reimer—the name John adopted when he re-identified as a male—committed suicide in 2004, a death that his family attributes to a lifelong depression caused by his incorrect gender assignment.

71. Id. at 46
73. Haas, supra note 1, at 45.
76. Id.
77. Id. at 103.
78. Haas, supra note 1, at 45.
79. Beh & Diamond, supra note 74, at 10 (noting that Joan refused girl toys, activities, clothes, and was caught urinating standing up and trying to use the boy's bathroom).
80. Id. at 11.
81. Id. at 11-12.
82. Report of a Public Hearing by the Human Rights Commission of the City and County of San Francisco, A Human Rights Investigation Into the
The John/Joan case is strong evidence against Money's theory that children can successfully be raised in any gender identity. Although the supposed success of John's reassignment was widely disseminated, the rejection of John's assigned female gender was not. The general medical establishment continues to assume the validity of Money's model and its theoretical underpinnings. Moreover, other countries have adopted the United States model. Despite the prevalence of the practice, "there is no research showing that intersexuals benefit psychologically from the surgery performed on them as infants and toddlers . . . . [And n]o follow-up studies were ever done . . . ." There is insufficient empirical support for gender-normalizing surgery which is beginning to be questioned by advocates, including intersexed Americans.

Even though physicians are aware that gender reassignment surgery is not based on sound medical research and that there are further concerns about consent to the procedure, which will be discussed below, the surgical approach promulgated by Dr. Money remains the standard of care. The Intersex Society of Northern America estimates that one or two of every thousand live births are followed by surgical alteration of the genital organs. Kate Haas posits that five children are subjected to genital surgery every day in the United States. Reconstruction of genital organs so they match societal expectations is not simple. Intersexed children undergo an average of three to five operations and some undergo more than twenty. While many of the procedures occur within the first six months of a child's life, they can persist into puberty. It is no

83. Beh & Diamond, supra note 74, at 10.
84. Haas, supra note 1, at 46.
85. Id.
89. Intersex Society of North America, How Common is Intersex?, http://www.isna.org/faq/frequency (last visited Sept. 28, 2007) (containing more detailed statistics, including an estimate that one in every 100 children differs in some way from the normal male or female).
90. Haas, supra note 1, at 41.
91. Ehrenreich & Barr, supra note 75, at 105.
wonder that intersexed children begin to feel like lab rats, particularly as the surgeries are accompanied by a humiliating focus on their genital organs, which are continually manipulated and inspected.\textsuperscript{92} Surgically altering intersexed individuals at birth can prohibit self-identification as a different gender at a later age, denying the person the ability to undergo further surgery to match his or her biological sex with gender identity and receiving full societal recognition.\textsuperscript{93}

More troubling is the fact that intersex surgery is targeted at non-conforming males. Ehrenreich notes that ninety percent of intersex surgery "is aimed at changing the intersex child into a girl."\textsuperscript{94} The John/Joan case is an example of this type of intersex surgery. Alice Domurat Dreger notes some of the medical rationales for this phenomenon, all of which link back to preserving patriarchal gender roles:

[S]urgeons seem to demand far more for a penis to count as 'successful' than for a vagina to count as such. Indeed, the logic behind the tendency to assign the female gender in cases of intersexuality rests not only on the belief that boys need 'adequate' penises, but also upon the opinion among surgeons that a 'functional vagina can be constructed in virtually everyone [while] a functional penis is a much more difficult goal.' This is true because much is expected of penises, especially by pediatric urologists, and very little of vaginas.\textsuperscript{95}

This is exactly the rationale that Dr. Money used to convince John/Joan's parents that the only appropriate medical and social response to John's damaged penis was to surgically change him into Joan. Dreger notes that the high standards that doctors, including Money, seem to set for male sexual adequacy are contradicted by other research that shows "any penis is a big enough penis for male adjustment."\textsuperscript{96}

Another reason why most intersex surgeries are aimed at producing women is based on a sexist reproduction rationale. Dreger notes that doctors are more concerned with preserving the fertility of those born with ovaries as opposed to testes, even though some men with micropenises will be able to father children.\textsuperscript{97} Accordingly, babies who lack a Y
chromosome are always declared girls to conserve their fertility and are surgically altered to fit that role.\textsuperscript{98}

Intersex surgery in the United State is barbaric in practice, aimed at nonconforming men, and without empirical support that the procedure is necessary for the psychological health of intersexed people. Compounding these problems, there is a growing realization that parental consent to these life-altering procedures is inadequate. Dreger terms the United States medical protocol as “monster ethics,” stating that doctors ignore “ethical guidelines that would be applied in nearly any other medical situation . . . . Patients are lied to; risky procedures are performed without follow-up; consent is not fully informed; autonomy and health are risked because of unproven (and even disproven) fears that atypical anatomy will lead to psychological disaster.”\textsuperscript{99} Clinicians view the birth of an intersexed child as a medical emergency, urging parents to surgically establish a sex to rear the child in even though “the intersex state is typically not life threatening.”\textsuperscript{100} In short, the protocol followed in the John/Joan case is still being used today.

The Constitutional Court in Colombia is the only court in the world to have considered consent standards for gender reconstructive surgery in light of the country’s constitution and international norms.\textsuperscript{101} The court’s analysis questions the model of medical secrecy followed in Colombia, the United States, and throughout the world. Initially, the court found that an intersex surgery violated a “fundamental right to human dignity and gender identity” and requiring the patient’s own informed consent.\textsuperscript{102} The court later limited this holding, allowing for informed written parental consent for patients under five, after the parents had received detailed information, including pros and cons of the procedure, and time to consider the options.\textsuperscript{103}

Haas argues that Colombia’s heightened informed consent model should be adopted in the United States.\textsuperscript{104} Certainly, fully informed consent and other alternatives like assigning and raising a child in one gender without surgical intervention should be considered.\textsuperscript{105} While a

\begin{footnotesize}
\textsuperscript{98.} Id.
\textsuperscript{99.} Id. at 33.
\textsuperscript{100.} Beh & Diamond, supra note 74, at 43–44.
\textsuperscript{101.} Haas, supra note 1, at 49–50. For a detailed discussion of the court’s decisions, see id. at 50–55.
\textsuperscript{102.} Id. at 49–50.
\textsuperscript{103.} Id. at 52–54.
\textsuperscript{104.} See id. at 61–64.
\end{footnotesize}
step in the right direction to end barbaric United States practices, focusing on genital corrective surgery keeps us trapped in the gender binary. Ehrenreich acknowledges this when she attempts to discount the "corrective" rationale behind intersex surgery, finding that:

[only in a society in which sex is understood in binary terms (everyone is either male or female) does the hermaphroditic body become abnormal. Rather than conceptualizing such individuals as a 'normal' third sex or as occupying various points along a sex continuum, our society chooses to see them as suffering abnormalities that require repair.]

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

**B. Problematic Legal Recognition of Transsexuals and Intersexed Individuals**

Our history has shown the fallacy in using binary classifications as a proxy for individual rights. First, Brown v. Board of Education began the process of eradicating the "separate but equal" architecture that divided blacks and whites on the basis of race. The next binary to be questioned was sex. Now, the male-female binary is under further

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("Newborns with intersex should be given a gender assignment as a boy or girl . . . . Note that gender assignment does not involve surgery.) (emphasis in original).

106. Ehrenreich & Barr, supra note 75, at 117–118.
107. Id. at 130.
109. Craig v. Boren, 429 U.S. 190, 197 (1976) (holding that statutory classifications that distinguish between males and females are subject to equal protection clause scrutiny, must serve important governmental objectives, and be substantially related to the achievement of those objectives).
challenge and our understanding of sex and gender must be expanded to include homosexual, transgendered, and intersexed individuals.

Protection for sexual minorities is emergent at best. As recently as the 1970s, homosexuals faced blatant discrimination at their jobs and in their family lives, where courts refused to recognize same-sex marriages or extend child custody and visitation to same-sex partners. Homosexuals have greater constitutional protection today. However, protection varies greatly on the local level and one commentator has noted that "comprehensive equality [is] a yet unattained goal." Emerging protection of homosexual conduct has slowly and inconsistently extended to groups like transsexuals and the intersexed. One court has explicitly said that intersexed is not a suspect class for Fourteenth Amendment equal protection purposes. Homosexuals generally


111. Id. at 182-83.

112. Greater protection of homosexuals can be seen in all facets of the law. See Lawrence v. Texas, 539 U.S. 558, 575 (2003) (invalidating a Texas state law criminalizing sexual acts between same sex partners, reasoning that "[w]hen homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres"); Romer v. Evans, 517 U.S. 620, 635 (1996) (stating that a "bare... desire to harm a politically unpopular group cannot constitute a legitimate government interest" for equal protection purposes and using this reasoning to invalidate a state constitutional amendment that would exclude gays and lesbians from protection under the state's antidiscrimination law) (quoting Dep't of Agri. v. Moreno, 413 U.S. 528, 534 (1973). Also, Price Waterhouse and Oncale, discussed infra Part III(B)(2), have broadened protection for homosexuals who face employment discrimination. In family law, some states have begun to recognize same sex unions and sexually minorities are no longer automatically ruled unfit for child visitation and custody rights. Becker, supra note 110, at 184.

113. Becker, supra note 110, at 185.

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

115. DiMarco v. Wyo. Dep't of Corr., 300 F. Supp. 2d 1183, 1195–97 (D. Wyo. 2004) (denying an intersexual's Eight Amendment and Fourteenth Amendment Equal Protection claims for being placed in solitary confinement due to her intersex status while recognizing a due process claim "[c]onsidering Plaintiff was only placed in segregated confinement due to a genetically created ambiguous gender and the [prison]
live within the male-female binary, even though they challenge traditional heterosexual assumptions about male and female roles. On the other hand, transsexuals and the intersexed challenge the male-female binary head on—by seeking to either transition from one sex to another or by not fully expressing one biological sex.

Looking at how courts classify transsexuals in the gender binary is arguably a good predictor of how courts will address an intersexed individual who challenges that binary.\(^{116}\) Even if definitively born into one sex, transsexuals join the intersexed in the space “in between” male and female when they are transitioning from one sex to another. Courts have been asked to classify transsexual plaintiffs who are very similar to a would-be intersexed plaintiff. For example, some transsexual plaintiffs seeking the protection of Title VII have male external genitalia but take female hormones and dress and behave as women.\(^{117}\) Transsexualism and intersexed conditions exist on a continuum and may be more closely related than previously considered.\(^{118}\)

116. Even though the primary focus of the analysis in this Article is on intersexed, because there is very little case law on the rights of intersexed, the Article will also look at cases involving transsexuals to examine how and if the law permits an individual to discard birth sex and self-identify as male or female. Acknowledging that transsexuals do not make a perfect analogy (unlike intersexed, many transsexuals have a definitive birth sex) transsexuals do challenge the expectation that sex is fixed at birth. Moreover, intersexed individuals may want to change their sex, as David Reimer in the John/Joan case did, if they do not identify with their assigned gender. Haas argues that intersexed individuals prior to genital reconstruction surgery are in a better position to obtain court-recognition of their self-identified sex because they have “unclear genitals,” citing one case where an intersexed plaintiff succeeded in altering his birth certificate. Haas, supra note 1, at 60–61 n.197. Given societal attitudes and legal precedent viewing gender as fixed and binary, one case does not establish a rule that all courts will acknowledge an intersexed individual’s self-identity.

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

118. See Schroer v. Billington, 424 F. Supp. 2d 203, 213 n.5 (D. D.C. 2006) (“If, as some believe, sexual identity is produced in significant part by hormonal influences on the developing brain in utero, this would place transsexuals on a continuum with other intersex conditions such as [androgen insensitivity syndrome], in which the various components that produce sexual identity and anatomical sex do not align.”); Kastl v. Maricopa County Cmty. Coll. Dist., No. 02-1531, 2004 U.S. Dist. LEXIS 29825, *7 n.5 (D. Ariz., June 2, 2004) (“[D]esignation as a biological female and possession of male genitalia are not mutually exclusive states . . . . Medical evidence suggests that the appearance of genitals at birth is not always consistent with other indicators of sex.”); Johnson, 337 F. Supp. 2d at 1000 n. 5.
Sex classification is legally relevant when amending identifying documents like birth certificates and driver’s licenses and when seeking equal treatment in employment, marriage, and, less commonly, professional competitive sports. This Article will focus on marriage and employment, as these are the most common areas in which the requirement of a male-female binary classification have been challenged. United States courts have been unwilling to grant affirmative rights to homosexuals and transsexuals when the right to marry is at issue. Individuals who do not conform to the fixed gender binary have been more successful when confronting discrimination at work. Employment discrimination cases brought under Title VII show that courts are increasingly willing to recognize diversity beyond the gender binary.

1. Marriage

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


120. See In re Estate of Gardiner, 22 P.3d 1086 (Kan. Ct. App. 2001) (holding that a Kansas court may give little or no weight to a Wisconsin birth certificate amended to reflect a sex change).

121. Zablocki v. Redhail, 434 U.S. 374, 384 (1978); Loving v. Virginia, 388 U.S. 1, 12 (1967). Yet the fundamental right to marry is balanced against a state interest in regulating marriage through procedural requirements that prohibit categories of people from marrying, such as homosexuals and close family members.

122. Several of the Justices considered the effect of the Lawrence v. Texas, 539 U.S. 558 (2003), decision on same-sex marriage. Justice O’Connor, concurring in judgment under an Equal Protection rational basis review, argued that Lawrence could not be used to strike down the same-sex marriage prohibition because the state had a legitimate interest in promoting opposite-sex marriage. Lawrence, 539 U.S. at 585 (O’Connor, J., concurring). Justice Scalia criticized Justice O’Connor’s reasoning, calling her argument conclusory and based on the state’s moral disapproval of gay marriage. Lawrence, 539 U.S. at 601 (Scalia, J., dissenting).

123. Baehr v. Lewin, 852 P.2d 44 (Haw. 1993), gave same-sex couples the right to marry under the state constitution’s equal protection clause; however, a subsequent constitutional amendment took this right away. See Haw. Const. art. I, § 23; Haw. Rev. Stat. § 572C-2 (2005). In Massachusetts, same-sex couples were granted access to
If most states define marriage as being between one man and one woman, how do courts determine who qualifies as male and female when a transsexual or intersexed individual wants to marry? While there are no reported decisions of litigated intersexed marriages, there are some cases on transsexual marriage.124 Even though nearly half of all states allow transsexuals to legally change their birth sex on birth certificates and other state-issued identification, after sex reassignment surgery,125 this is no guarantee that the self-identified sex will control if the marriage is later challenged.126

So, how do courts decide? In the vast majority of cases, courts reject self-identified sex and rely on biology, which is viewed as objective and fixed.127 Littleton v. Prange128 is just such an example. In Littleton, the court ruled that a male-to-female transsexual could not bring a wrongful death claim as a surviving spouse because her marriage to a male was an invalid same-sex relationship. In reaching the judgment, the court looked at the plaintiff's birth certificate and concluded her marriage was void and conferred no legal benefits because she “was created and born a

marry under the state equal protection clause. Goodridge v. Dep't of Public Health, 798 N.E.2d 941 (Mass. 2003). In Vermont, same-sex couples can now enter into civil unions through a state statutory right. Baker v. State, 744 A.2d 864 (Vt. 1999). Most recently, the Supreme Court of New Jersey determined that denying committed gay partners the right to marry violated the state constitution's equal protection clause and ordered the state legislature to allow committed gay couples to marry or enact a statutory scheme providing similar benefits to marriage. Lewis v. Harris, 908 A.2d 196 (N.J. 2006). Connecticut also has a state domestic partnership law, which confers benefits similar to marriage. CONN. GEN. STAT. § 46b-38aa (2005). California, the District of Columbia, and Maine have similar laws. California passed “Domestic Partnership Rights and Responsibilities Act of 2003,” CAL. FAM. CODE § 297 (2004). The District of Columbia protected against discrimination on the basis of sexual orientation, gender identity, or expression by passing the “Domestic Partnership Protection Amendment Act of 2004.” D.C. CODE ANN. § 2-1401.01. Maine also provides for domestic partnerships. 22 ME. REV. STAT. ANN. tit. 14 § 2710.

124. For a recent survey of these cases, see Katie D. Fletcher, In re Marriage of Simmons: A Case for Transsexual Marriage Recognition, 37 Loy. U. Chi. L.J. 533, 546–554 (2006).
125. Id. at 555.
126. Id. at 565–66. Fletcher notes that:

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

Id.

127. Greenberg, supra note 4, at 294; see also id. at 297–98 (listing state and federal statutes that make this classification).
128. 9 S.W.3d 223 (Tex. App. 1999).
male. Her original birth certificate, an official document of Texas, clearly states. This analysis does not consider the plaintiff's own gender identification as a woman, the surgical procedures she underwent, or the change of her name or sex on her birth certificate. It also wiped clean the couple's seven-year union, which the husband had entered into with full knowledge of the plaintiff's sex reassignment surgery ten years earlier.

A minority judicial view allows for self-identification over birth sex and recognizes the complex biological continuum between male and female. This viewpoint was encapsulated nearly thirty years ago by a New Jersey court in *M.T. v. J.T.* The court validated a marriage between a man and a male-to-female transsexual. To reach this result, the court had to markedly disagree with other courts which had concluded that sex is "irrevocably cast at the moment of birth" and that biological sex was the determining factor of marital capacity. While recognizing that a person could change their role in the male-female binary, the court did not go as far as to recognize a third gender category. The court's holding was limited: "for marital purposes if the anatomical or genital features of a genuine transsexual are made to conform to the person's gender, psyche or psychological sex, then identity by sex must be governed by the congruence of these standards." This rule recognized that the plaintiff should be considered female and therefore the marriage was valid.

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

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129. Littleton, 9 S.W.3d at 231.
130. Littleton, 9 S.W.3d at 231.
131. Littleton, 9 S.W.3d at 227.
135. *M.T.*, 355 A.2d at 211.
indicators of sex, citing the eight different factors used to determine sex discussed in Julie Greenberg's article, and made an analogy to intersexed individuals who lacked congruence in these factors.\(^{137}\) The court validated the marriage of a male to a male-to-female transsexual under North Carolina law\(^{138}\) by looking at the petitioner's current birth certificate, which she had amended to designate herself as a female.\(^{139}\)

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

2. Employment Discrimination

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

Title VII makes it unlawful for any employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."\(^{140}\) Sex refers to biology and implicitly

\(^{137}\) Lova-Lara, 23 I. & N. Dec. at 752 (noting that medical experts use the following factors to determine sex: (1) genetic or chromosomal sex; (2) gonadal sex; (3) internal morphologic sex; (4) external morphologic sex; (5) hormonal sex; (6) phenotypic sex; (7) assigned sex and gender of rearing; and (8) sexual identity). Greenberg's article also influenced a Kansas court in validating a marriage between a man and a male-to-female transsexual. See also In re Estate of Gardiner, 22 P.3d 1086 (Kan. Ct. App. 2001) (determining that a court should evaluate sex when the marriage license is obtained and not at birth). However, this result was overturned by the Kansas Supreme Court. In re Estate of Gardiner, 42 P.3d 120 (Kan. 2002).

\(^{138}\) The court emphasized that the law of the state where the couple celebrated the marriage governed the issue and that regulation of marriage is an exclusive state matter. Lova-Lara, 23 I. & N. Dec. at 751. Refusing to preempt state law with federal law, even in the immigration context, will allow some states to recognize a broader concept of marriage.

\(^{139}\) Lova-Lara, 23 I. & N. Dec. at 753.

assumes that the plaintiff's sex will conform to the fixed male-female binary.\textsuperscript{141} This definition leaves out two overlapping classes of people: intersexed individuals whose biological sex determinants are ambiguous or transsexuals who have or are in the process of transitioning from one sex to another.\textsuperscript{142}

Recent court decisions suggest the judiciary is willing to complicate Title VII's presumptions about sex in order to protect intersexed or transsexuals from discrimination in the workplace. This represents a significant shift from older cases, exemplified by the Seventh Circuit opinion in \textit{Ulane v. Eastern Airlines, Inc.}\textsuperscript{143} Karen Ulane was a male-to-female transsexual who worked as an airline pilot for Eastern Airlines until she was discharged after sex reassignment surgery.\textsuperscript{144} Her attorney advocated that Eastern Airlines fired Ms. Ulane "for no reason other than the fact that she ceased being a male and became a female."\textsuperscript{145} The district court, in \textit{Ulane v. Eastern Airlines, Inc.}\textsuperscript{146}, held that Ms. Ulane stated a Title VII claim because termination for being a transsexual was discrimination "because of her sex."\textsuperscript{147} The Seventh Circuit reversed and held that Title VII does not protect transsexuals.\textsuperscript{148} The \textit{Ulane II} court, reluctant to liberally interpret the statute, reasoned that "because of . . . sex" should be limited to its plain meaning—"that it is unlawful to discriminate against women because they are women and against men because they are men."\textsuperscript{149}

Five years later, the sex stereotyping theory of \textit{Price Waterhouse v. Hopkins}\textsuperscript{150} opened the door to a new approach that would circumvent cases such as \textit{Ulane II}. \textit{Price Waterhouse} held that employers should not evaluate employees to see if their behavior and appearance match socie-

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\begin{itemize}
\item 142. \textit{Id.}
\item 143. 742 F.2d 1081 (7th Cir. 1984) \textit{cert denied} 471 U.S. 1917 (1985) [hereinafter \textit{Ulane II}].
\item 144. \textit{Ulane II}, 742 F.2d. at 1082–84.
\item 145. \textit{Ulane II}, 742 F.2d at 1082.
\item 146. 581 F. Supp. 821 (N.D. Ill. 1983) \textit{rev'd} 742 F.2d 1081 (7th Cir. 1984) [hereinafter \textit{Ulane I}].
\item 147. \textit{Ulane I}, 581 F. Supp. at 827.
\item 148. \textit{Ulane II}, 742 F.2d at 1087.
\item 149. \textit{Ulane II}, 742 F.2d at 1085. The court also noted that "[t]he total lack of legislative history supporting the sex amendment coupled with the circumstances of the amendment's adoption clearly indicates that Congress never considered nor intended that this 1964 legislation apply to anything other than the traditional concept of sex." \textit{Ulane II}, 742 F.2d at 1085.
\item 150. 490 U.S. 228 (1989).
\end{itemize}
tional stereotypes as to male and female roles. The plaintiff, Ann Hopkins, alleged that the Price Waterhouse firm had discriminated against her because of sex when considering whether she would be promoted to partner. While Ms. Hopkins' clients were extremely pleased with her work, the firm found her too abrasive and lacking interpersonal skills. In short, the firm reacted negatively to her brusque personality because she was a woman. One decision maker advised that in order to improve her chances to make partner, Ms. Hopkins should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." The Supreme Court found these remarks to be impermissible considerations in an employment decision.

In contrast to the Seventh Circuit decision in *Ulane II*, the Supreme Court interpreted Title VII more broadly by focusing on its remedial purpose. The Court concluded that:

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

... [W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for "[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."

It was not long before transsexual employees latched onto the sex stereotyping theory as an end run around *Ulane II*. Despite the fact that the federal courts of appeals have not agreed on how to resolve the tension between *Ulane II* and *Price Waterhouse*, *Price Waterhouse* represents the

156. Schroer v. Billington, 424 F. Supp. 2d 203, 207 (D. D.C. 2006) ([A] number of other courts have abandoned *Ulane* after *Price Waterhouse* [sic] and ruled that Title VII protects transsexuals who do not conform to their employers' gender stereotypes.").
possibility of unlocking the gender binary and protecting transsexuals and intersexed from discrimination in the workplace.

Courts applying *Price Waterhouse* to sex stereotyping claims by transsexuals follow three paths. Courts in the Fifth and Tenth Circuits still view *Ulane II* as controlling and hold that transsexuals are not protected by Title VII. Courts in the Third, Sixth, and Ninth Circuits find that *Price Waterhouse* controls and permits recovery for transsexuals who can properly plead a sex stereotyping theory. A court in the D.C. Circuit seems to tread a middle approach—not finding *Price Waterhouse* a satisfying theory yet seeking to recognize biological complexity and discrimination against non-conforming individuals. This third position is the best option because it recognizes the biological complexities long recognized in the medical community: that male and female are not exclusive categories.

These three approaches diverge on three key issues. First, how to read the congressional intent of Title VII's "because of sex" requirement. Second, whether transsexuals challenge the gender binary or conform to the binary by changing their gender. Third, what discrimination counts as sex stereotyping and what are universally accepted gender norms. To illustrate the third category, I explore an example that I have termed the "bathroom dilemma," which illustrates the challenges presented by sex-segregated bathrooms to individuals who are not clearly male or female.

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163. Author Terry Kogan has also explored the negative impact of sex-segregated bathrooms on transgendered and intersexed individuals. *See generally* Terry S. Kogan, *Sex Separation in Public Restrooms: Law, Architecture, and Gender*, 14 Mich. J. Gender &
INTERSEXED INDIVIDUALS

Oiler v. Winn-Dixie Louisiana, Inc.\textsuperscript{164} is an example of strict judicial interpretation of Title VII. The court found that Title VII did not protect a transvestite plaintiff, Peter Oiler, who cross-dressed as a woman in public (but never while working as a truck driver for his employer Winn-Dixie) one to three times a month in order to express his feminine side and relieve stress.\textsuperscript{165} Winn-Dixie fired Mr. Oiler because they feared that customers would recognize him while he was cross-dressed in public, disapprove of his lifestyle, and shop elsewhere.\textsuperscript{166} Agreeing with the viewpoint of Ulane II, the court found that this action did not violate Title VII, interpreting “because of sex” to mean biological sex, which does not include sexual identity or gender identity disorders.\textsuperscript{167} As further support for this proposition, the court noted that thirty-one proposed bills to amend Title VII to include discrimination on the basis of sexual orientation had failed.\textsuperscript{168} Further, the court distinguished Price Waterhouse by finding:

[T]hat this is not a situation where the plaintiff failed to conform to a gender stereotype. Plaintiff was not discharged because he did not act sufficiently masculine or because he exhibited traits normally valued in a female employee, but disparaged in a male employee. Rather the plaintiff disguised himself as a . . . female for stress relief . . . .\textsuperscript{169}

Another federal court expressed its fear that the male-female binary must be enforced more blatantly. In Etsitty v. Utah Transit Authority,\textsuperscript{170} the plaintiff, Krystal Sandoval Etsitty, was a pre-operative transsexual who still had male genitalia but was taking female hormones that changed her outward appearance. In other words, the plaintiff, just like an intersexed person, occupied a biological space “in-between” male and female. The defendant, the Utah Transit Authority, fired Ms. Etsitty after she told her supervisor that she would be appearing as a female at work and personnel became concerned that she would use a female

\textsuperscript{164} No. 00-3114, 2002 U.S. Dist. LEXIS 17417 (E.D. La. Sept. 16, 2002).
\textsuperscript{165} Oiler, 2002 U.S. Dist. LEXIS 17417, at *5-7.
\textsuperscript{166} Oiler, 2002 U.S. Dist. LEXIS 17417, at *9-10.
\textsuperscript{168} Oiler, 2002 U.S. Dist. LEXIS 17417, at *22-23.
\textsuperscript{169} Oiler, 2002 U.S. Dist. LEXIS 17417, at *28.
\textsuperscript{170} No. 2:04CV616, 2005 U.S. Dist. LEXIS 12634, at *1-2 (D. Utah June 24, 2005).
bathroom even though she was a biological male. 171 This problem concerned the defendant because transit operators must use public restrooms along their routes and the defendant felt it would be impractical to arrange for a unisex bathroom. 172

While noting the tension between Ulane II and Price Waterhouse, the court held that transsexuals are not protected under Title VII absent a Congressional mandate. 173 The court reasoned that Title VII does not call for a complete rejection of sex-related conventions and expressed fear that “if something as drastic as a man's attempt to dress and appear as a woman is simply a failure to conform to the male stereotype, and nothing more, then there is no social custom or practice associated with a particular sex that is not a stereotype.” 174 The court ruled that Ms. Etsitty failed to state a claim under Price Waterhouse's sex stereotyping theory. The Utah Transit Authority did not require Ms. Etsitty to conform to gender appearance stereotypes but only “to conform to the accepted principles established for gender-distinct public restrooms.” 175

In reaching this conclusion, the court seems to reach outside the record of the case and rule based on presumed societal mores. Ms. Etsitty argued that defendant's concern over restroom usage was pretextual because no one had complained to the defendant and the defendant had not even attempted to investigate reasonable alternatives. 176 The court found that no studies were necessary to determine that “[c]oncerns about privacy, safety and propriety are the reason that gender[-]specific restrooms are universally accepted in our society.” 177 By allowing an employer to hide behind the bathroom dilemma without proving it was an actual problem, the court reinforced societal stereotypes instead of questioning them.

Other courts have been more willing to use Price Waterhouse to protect nonconforming individuals. Smith v. City of Salem 178 provided an opportunity for the Sixth Circuit to extend the protection of Title VII to a transsexual because the facts closely mirrored Price Waterhouse. Jimmie Smith, a transsexual employee of the fire department, began expressing a more feminine appearance at work and his co-workers commented “that his appearance and mannerisms were not ‘masculine enough.’” 179

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178. 378 F.3d 566 (6th Cir. 2004).
179. *Smith*, 378 F.3d. at 568.
court overruled the district court, which had followed *Ulane II* in holding that Title VII does not protect transsexuals. It instead read *Price Waterhouse* as expanding Title VII’s protections not only to sex discrimination but to gender discrimination, which it defined as “discrimination based on a failure to conform to stereotypical gender norms.”

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

One federal court has recognized that making individuals with non-conforming genitalia conform to the sex binary in choosing a restroom at work can lay the basis for a Title VII claim. Transsexual plaintiff,

183. *Johnson*, 337 F. Supp. 2d at 998. The plaintiff posited that she may be intersexed but the court refused to consider whether there was a distinction between transsexualism and intersexuality since the plaintiff merely hypothesized about this alternative. *Johnson*, 337 F. Supp. 2d at 1000. Then, the court proceeded to chastise the plaintiff for failing to divulge her intersexed condition to the company as a “congenital abnormality.” *Johnson*, 337 F. Supp. 2d at 1000.
187. Kastl v. Maricopa County Cmty. Coll. Dist., No. 02-1531, 2004 U.S. Dist. LEXIS 29825, at *10 (D. Ariz. June 2, 2004) (denying defendant's motion to dismiss for failure to state a claim) [hereinafter *Kastl I*]. However, plaintiff's claim failed to survive the more stringent summary judgment standard. This may be because plaintiff's attorney did not provide an adequate evidentiary record and poorly framed the issues
Rebecca Kastl, was designated as a male at birth but began living as a woman and legally changed her name and driver's license to match her female gender identity. Ms. Kastl continued to work as an adjunct faculty member at Maricopa County Community College during the time period when she transitioned from male to female. The college required Ms. Kastl and another transsexual to use the men's restroom until they had completed sex reassignment surgery. Plaintiff refused to follow this policy and the college fired her. In denying the defendant's Rule 12(b)(6) motion to dismiss for failure to state a claim, the court recognized that being a biological female yet possessing male genitalia are not mutually exclusive because "[m]edical evidence suggests that the appearance of genitals at birth is not always consistent with other indicators of sex . . . ." For this reason, Ms. Kastl's claim survived a motion to dismiss because "to create restrooms for each sex but to require a woman to use the men's restroom if she fails to conform to the employer's expectations regarding a woman's behavior or anatomy, or to require her to prove her conformity with those expectations, violates Title VII." The court was one of the first to recognize that individuals with nonconforming genitalia should not be deprived of employment benefits and that this rule could not be "avoided merely because restroom availability is the benefit at issue."

One court in the D.C. Circuit has confronted the tension between Ulane II and Price Waterhouse head on by suggesting that it is time for the law to recognize the biological complexities identified by the medical community—in short, to return to the district court's opinion in

for litigation. See Kastl v. Maricopa County Cmty. Coll. Dist., No. 02-1531, 2006 U.S. Dist. LEXIS 60267 (D. Ariz. Aug. 22, 2006) (granting summary judgment for defendant) [hereinafter Kastl II]. The court struck several of plaintiff's evidentiary filings as untimely. Kastl II, 2006 U.S. Dist. LEXIS 60267, at *9–11. The court also ruled that the plaintiff failed to establish a prima facie case that she was a member of a protected class (a biological female) because she failed to support her theory that there were other determinants of biological sex other than genitalia, hormones, and chromosomes. Kastl II, 2006 U.S. Dist. LEXIS 60267, at *16–20. Plaintiff also failed to challenge defendant's policy of segregating bathrooms by sex. Kastl II, 2006 U.S. Dist. LEXIS 60267, at *20. Despite this later ruling that ultimately dismissed plaintiff's claim, the court's earlier opinion is still a novel legal recognition of the potential expansiveness of Price Waterhouse's sex stereotyping theory.

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190. Kastl II, 2006 U.S. Dist. LEXIS 60267, at *4
ULANE I. In Schroer v. Billington, the Congressional Research Service of the Library of Congress offered to employ plaintiff Diane Schroer, a male-to-female transsexual. Schroer, who had interviewed for the position as a male, had her offer of employment rescinded once she informed the Library that she would be reporting to work as a female. This employment decision provides a striking factual example reminiscent of Ulane: an employer hires a male employee and decides to fire that employee when she becomes a female. The court held that Price Waterhouse's sex stereotyping did not protect Ms. Schroer because that theory "creates space for people of both sexes to express their sexual identity in non-conforming ways" and Ms. Schroer "does not wish to go against the gender grain, but with it" because "[s]he seeks to express her female identity, not as an effeminate male, but as a woman." The crux of Ms. Schroer's employment problems, according to the court, is that her employer is intolerant of individuals whose gender identity does not match his or her biological sex and this could not be remedied under Price Waterhouse's sex stereotyping theory.

The court returned to the reasoning of the district court's decision in Ulane I, which recognized that "sex is not a cut-and-dried matter of chromosomes . . . [but] encompasses sexual identity" and is protected by Title VII. The court extrapolated that the Seventh Circuit's reason for overturning the district court's decision no longer held weight because subsequent Supreme Court decisions, such as protecting male-on-male sexual harassment in the workplace, applied Title VII in ways that were never contemplated by Congress. The court proposed a new rule that would protect transsexuals under Title VII:

[D]iscrimination against transsexuals because they are transsexuals is 'literally' discrimination 'because of . . . sex.' [This] approach ... [is] a straightforward way to deal with the factual complexities that underlie human sexual identity. These complexities stem from real variations in how the different components of biological sexuality—chromosomal, gonadal, hormonal, and neurological—interact with each other, and in

196. Schroer, 424 F. Supp. 2d at 205–06.
198. Schroer, 424 F. Supp. 2d at 211.
199. Schroer, 424 F. Supp. 2d at 211 (citations omitted).
turn, with social, psychological and legal conceptions of gender.

In support of this rule, the court describes intersexed conditions and further suggests that: "[d]iscrimination against such women . . . because they have testes and XY chromosomes, or against any other person because of an intersexed condition, cannot be anything other than 'literal[ ]' discrimination 'because of . . . sex.'"

After more than thirty years, it is time to return to the reasoning of Ulane I instead of contorting the sex stereotyping theory of Price Waterhouse. It is time for the law to recognize biological complexity and protect nonconforming individuals from discrimination because they challenge the notion of a fixed gender binary. This may be the civil rights struggle of our century, as the Ulane I court suggested when responding to Eastern Airlines's argument that allowing a transsexual in the cockpit would lead the public to question the safety of airline travel. The court stated:

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

201. Schroer, 424 F. Supp. 2d. at 212–13 (emphasis in original).
The court's parade of horribles mocks the "legitimate" reasons employers give for firing plaintiffs who challenge the gender binary. In hindsight, these reasons for not affording civil rights to blacks seem ridiculous, and they are no more believable as a basis for denying rights to transsexuals and the intersexed. These employment discrimination cases show an emerging trend of broadening statutory definitions to match the medical reality that some individuals do not neatly fall into one of two boxes labeled "male" and "female."

**Conclusion**

Why require birth certificates to designate children as male or female unless the purpose is to facilitate legal classifications on the basis of sex? A sizeable group—one to four percent—of the world's population, cannot be categorized as fully male or female. Individuals who live outside this sex binary face potential human rights abuses. Intersexed infants in the United States are surgically altered to fit into this binary, and the hijras in India, who embrace a third gender identity, continue to battle societal discrimination. Legislators and courts will need to address this collision.

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

There is a model for such statutory reform: the International Bill of Gender Rights (IBGR).204 This bill has not yet been enacted as binding law in any jurisdiction.205 Drafted in 1993 and adopted in 1995 by the International Conference on Transgender Law and Employment Policy, the IBGR grants ten rights, beginning with the right to define gender identity. The bill expresses the viewpoint that gender is "ever-unfolding" and therefore:

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204. Frye, *supra* note 7, app. B.
All human beings have the right to define their own gender identity regardless of chromosomal sex, genitalia, assigned birth sex, or initial gender role, and further, no individual shall be denied Human or Civil Rights by virtue of a self-defined gender identity which is not in accord with chromosomal sex, genitalia, assigned birth sex, or initial gender role.

The bill additionally guarantees the right to secure and retain employment; the right to control and change one's body to express self-defined gender identity; the right to competent medical care when changing one's body; the right to enter into marriage contracts regardless of an individual's or an individual's partner's assigned birth sex; and the right to conceive, bear, or adopt children.

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

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

207. Id., app. B.
209. Id.
outside the gender binary based on the fundamental right to privacy and bodily integrity derived from the Fourteenth Amendment's Due Process Clause.\textsuperscript{211} In the last forty years, the Court has expanded the right to privacy to include the right to obtain contraceptives\textsuperscript{212} and abortions\textsuperscript{213} and most recently, to protect private, consensual homosexual conduct from intrusion by the state.\textsuperscript{214} With each expansion of the right beyond the traditional family (a married, heterosexual couple), the right to privacy is positioned to challenge compulsory participation in the male-female binary.

This right to liberty makes explicit "a promise of the Constitution that there is a realm of personal liberty which the government may not enter."\textsuperscript{215} Moreover, the Court has emphasized that:

\begin{quote}
[T]he 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.
\end{quote}

\textsuperscript{211} Fourteenth Amendment protection of the intersexed has been suggested by other authors. See generally Sara R. Benson, \textit{Hacking the Gender Binary Myth: Recognizing Fundamental Rights for the Intersexed}, 12 CARDOZO J.L. & GENDER 31 (2005); Chai R. Feldblum, \textit{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). Feldblum's article points out a core problem in this approach: the traditional view that the Fourteenth Amendment only provides a "negative right"—that is, one that prohibits government intrusion or differential treatment but not one that requires the granting of affirmative rights such as marriage. See Feldblum at 127. Feldblum suggests if the particular tilt at issue is related to a person's core, essential self-definition, then the government has a constitutional obligation to rectify any tilt created by background social norms. An individual's choice to marry, to have (or not to have) a child, to engage in satisfying sexual intimacy, or to live in the gender that matches his/her sense of identity all relate to a person's core, essential self-definition. In these areas, the Constitution places on the State not only a negative obligation not to criminalize the conduct or status in question, but concomitantly, a positive obligation to rectify tilts created by society for those individuals who are seeking to live their authentic selves.


\textsuperscript{214} Lawrence v. Texas, 539 U.S. 558 (2003).

\textsuperscript{215} Lawrence, 539 U.S. at 578 (citing \textit{Casey}, 505 U.S. at 847).
Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.\footnote{216}

What is closer to the "heart of liberty" and more "central to personal dignity and autonomy" than an individual's chosen gender identity—to be granted full legal rights and protection against discrimination even if one does not fall into one of two neat societal boxes labeled male or female.\footnote{217} Undoubtedly, the right to identify beyond the fixed male-female gender binary should not be tainted by state compulsion.

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

\footnote{216} Lawrence, 539 U.S. at 574 (citing Casey, 505 U.S. at 851).
\footnote{217} One court has recognized that requiring proof of sex before being allowed to use bathrooms segregated by sex could implicate the fundamental right to privacy. Kastl v. Maricopa County Cnty. College Dist., No. 02-1531, 2004 U.S. Dist. LEXIS 29825 at *19–23 (D. Ariz. June 2, 2004).