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Trans-Phobia and the Relational Production of Gender

*Elaine Craig**

In 1431, Joan of Arc, a nineteen-year-old cross-dresser, was burned alive at the stake because she refused to stop dressing in men's clothing.¹ Nearly six centuries later, in 2002, Gwen Araujo, a seventeen-year-old male-to-female transsexual, was strangled to death by two men who later claimed what can be described as a "trans panic defense" because they hadn't realized that Gwen was biologically male before they had sex with her.² Individuals who transgress gender norms are among the most despised, marginalized, and discriminated against members of many societies.³ A deep seated fear of transgender individuals reveals itself in a plethora of contexts and across a wide spectrum of demographics. Perhaps most disturbingly, intolerance towards and discrimination against transgender individuals is found not only among the ranks of those whose gender offers them opportunity and privilege, but also among those whose own gender identity and expression has been a source of oppression and persecution. To reduce or eliminate the discrimination against, and oppression of, those whose gender is nonconformative, it is important to understand why it is that gender transgression in others is experienced by many people as so disruptive.

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1. LESLIE FEINBERG, *GENDER WARRIORS: MAKING HISTORY FROM JOAN OF ARC TO DENNIS RODMAN* 31 (Beacon Press 1996).

2. Carolyn Marshall, *2 Guilty of Murder in Death of A Transgender Teenager*, N.Y. TIMES, September 13, 2005, at A20, col. 1.

3. See Dylan Vade, *Expanding Gender and Expanding the Law: Toward a Social and Legal Conceptualization of Gender That is More Inclusive of Transgender People*, 11 MICH. J. GENDER & L. 253, 256-60 (2005) (where he reports that transgender people are disproportionately the victims of hate crime and disproportionately disadvantaged in terms of housing and healthcare as a result of the employment discrimination that they face).

I. INTRODUCTION: TRANS-PHOBIA: THE FEAR OF GENDER TRANSGRESSORS⁴

Knowing one's place in the social order, whether that place is one of relative privilege or not, serves two psychologically ameliorative functions. It relieves one from the "anxiety of [gender] identity interrogation"⁵ and it helps to inform one as to the socially agreed upon, acceptable conduct for interpersonal exchanges — the episteme of social interaction. This Paper will demonstrate that gender identity is produced through relational, contextually influenced, interpretative processes. Because gender is constructed in societies which strongly embrace static, binary conceptions of gender, and in which social, familial, occupational, and sexual

4. Due to the advent of new terminology and the reclamation of previously denigrating or pathologizing terminology, there has historically been confusion and a lack of clarity as to the meaning of many of the terms used in discussions concerning transgender issues. Transgender is often used as an umbrella term to describe a variety of gender diversities. I use the terms "transgender," "gender transgressor," "nonconformative gender" and "gender nonconforming" interchangeably to indicate a wide variety of people whose gender does not conform in some respect to the gender traditionally associated with the biological sex assigned to that person at birth. I include within this category people who identify or live some or all of the time as a gender other than the one with which their biological sex is traditionally associated: intersex people (individuals born with reproductive or genital anatomy which does not fit typical definitions for male or female), transsexuals (male to female (MTF) and female to male (FTM) individuals who undergo or contemplate undergoing anatomical and/or hormonal modifications in order to live in and be recognized as a sex other than the one assigned at birth), cross-dressers (often referred to as transvestites), genderqueers (individuals who do not identify as male or female or whose gender identity is not always male or female), individuals who identify as "masculine women" or "feminine men," and Two-Spirited individuals (often referred to as "berdaches," a term used by European colonizers to label aboriginal persons who did not fit their conception of a "normal" man or woman). By the term gender identity I refer to one's internal sense of being a man or woman or some variation thereof. By the term gender expression I refer to the expressive manifestation of one's gender identity — the outwardly observable activities, gestures, behaviors and attitudes culturally associated with gender signifiers. By the term gender I refer to the social-psychological construct that designates how persons are categorized by others and how they categorize themselves in terms of masculine and/or feminine and/or some derivation or combination thereof. The choice in terminology used in this paper reflects my understanding of how individuals within these communities self-identify. The meanings of the terms feminine and masculine and man and woman are themselves socially constructed, contested and often contextually variable. I self-consciously employ them because it is difficult to examine the implications of the manner in which gender is produced without using this language.

5. This phrase is borrowed from Professor Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353, 362 (2000). In this work Yoshino argues that bisexuals pose an identity threat both to heterosexuals and gays and lesbians, and that this serves as one of the factors motivating both groups to render bisexuality invisible. *Id.* Yoshino borrows from Mary McIntosh who, in a pre-Butler, pre-Foucault examination of the social construction of sexuality, suggests that both heterosexuals and homosexuals are invested in conceptualizing homosexuality as a condition, "[f]or just as rigid categorization deters people from drifting into deviancy, so it appears to foreclose on the possibility of drifting back into normality and thus removes the element of anxious choice." Mary McIntosh, *The Homosexual Role*, 16 SOC. PROBS. 182, 184 (1968).

interactions are heavily influenced by gendered social scripts, gender expressions which are ambiguous, or which have changed since a prior interaction, or which are strongly incongruent with normative understandings of the correlation between gender and biology, are typically experienced by others as at least uncomfortable, and often actually disruptive. The dominant social response to disruption is an ultimately futile effort to reinforce a gender binary. The law is frequently invoked in aid of this re-inscription of gender. In this Paper I argue that the disruption is produced by the binary model itself, and I propose legal strategies which will assist in a re-conceptualization of gender.

In order to reduce the disruption experienced as a result of this uncertainty, static or binary understandings of gender must be re-conceptualized. Law is a critical location of re-conceptualization. Legal approaches that will assist in instigating such a re-conceptualization include the elimination of unnecessary gender designations on legal documents such as birth certificates and the adoption of litigation strategies that critically challenge the necessity of gender designations in particular contexts, rather than simply asserting individual gender identity claims.

Gender transgressions are experienced as uncomfortable or disruptive for two interrelated and mutually compounding reasons. Gender transgression in others disrupts the processes through which one understands one's own gender within a given context, interaction, and role, because of the dominant paradigm within which gender is currently understood in this society, in conjunction with the relational, interpretive manner in which gender identity is produced. The disruption experienced because of this uncertainty is compounded by the gendered nature of a great number of the social scripts that govern interpersonal interactions. Gender transgressions disrupt the episteme of "appropriate" social interaction because interpersonal interactions are so greatly influenced and governed by these gendered scripts. This disruption of social scripts that inform interpersonal interactions, often experienced as "not knowing how to behave" in what would usually be considered routine social interactions, is then compounded by the disruption to one's own gender identity created by these transgressions. People react negatively, fearfully, and discriminatorily in the face of nonconformative gender presentation because the uncertainty it creates makes them feel uncomfortable — both uncomfortable about themselves and uncomfortable about how to "act."

Presently, social and legal efforts to address the disruption created by these uncertainties often revolve around attempts to artificially stabilize gender categories and reinforce a binary gender order. Unfortunately, these efforts only serve to perpetuate the social processes through which gender transgression becomes experienced by others as disruptive. It is not the relational development of self-understandings that perpetuates transphobia. The problem stems from the false construct of gender that our

relational efforts have been socially programmed to try, in vain, to maintain. Current conceptions of gender demand from our relational processes affirmation of an understanding of gender that does not reflect reality, and as a result, gender transgressions of all sorts are often experienced as disruptive. The degree of trans-phobia prevalent in our society will be reduced by lessening the cognitive dissonance people experience in the face of gender transgression. Adopting a more nuanced conceptualization of gender will reduce this cognitive dissonance; this will result in an understanding that recognizes its fluidity and relational nature. The difficulty, of course, is that the binary gender order in our society is continually and significantly reinforced both through cultural norms and through legal infrastructure.

So, how can the law be used to instigate a re-conceptualization of gender in our society? The most effective reforms aim to be constitutive; they seek to shape and transform personal identity. For example, a person who has begun to perceive of themselves as environmentally friendly is much more likely to diligently recycle and compost their household waste. Although it is unlikely that legal reform will have everyone perceiving themselves as transgender anytime soon, nor is it necessary, legal reforms which reduce and eliminate unnecessary gender designations could be deployed to create more nuanced and fluid understandings of gender. Sex designation and distinction, and concomitantly gender designation and distinction,⁶ in our legal system are pervasive. While there are contexts that may legitimately require sex and/or gender distinctions, there are others in which it is unnecessary. The relevance of the designation of sex should be critically challenged in an effort to distinguish between those contexts in which such designation serves a legitimate function and those in which it occurs simply because of habit, practice, tradition or for some more nefarious purpose. In those contexts where its utility is questionable, legal gender designations and/or distinctions should be eliminated. Both the process of re-evaluating the pervasive and unchallenged designation of gender, by creating a discourse in which we question the relevance of gender to a particular context, as well as the end result of such re-evaluation, would contribute to a de-emphasis and corresponding re-conceptualization of gender.

6. Both traditionally, and contemporarily as well, with the exception of some very recent anti-discrimination statutes and jurisprudence, legal distinctions premised on categorization by sex, are done so with the underlying assumption that sex is determinative of gender. Correspondingly, because of such assumptions, legal designations of sex are often perform *de facto* legal designations of gender.

II. THE INTERPRETIVE, RELATIONAL CONTRIBUTION TO THE PRODUCTION OF GENDER

Dressed as I am in jeans and sweater, I have no idea to which sex the policemen will suppose me to belong, and must prepare my responses for either decision. I feel their silent appraisal down the corridor as I approach them, and as they search my sling bag I listen hard for a "Sir" or a "Ma'am" to decide my course of conduct.⁷

In large measure intolerance towards transgender individuals stems from a discomfort, almost universally experienced, when one is confronted with someone whose gender is, in some respect, less stable or ascertainable than one's own. This discomfort with gender ambiguity, uncertainty and instability may be explained in part by the relational, interpretive manner in which gender is created. Identities, including gender identities, develop not only through internal biological and psychological processes but also through interactions with people, cultures and environments.

A. THE SOCIAL CONSTRUCTION OF GENDER

Judith Butler, noting historical and anthropological work that understands gender "as a relation among socially constituted subjects in specifiable contexts," observed that, "what gender 'is,' is always relative to the constructed relations in which it is determined."⁸ Butler went further, suggesting that not only is there "a radical discontinuity between sexed bodies and culturally constructed genders," but moreover, gender designates "the very apparatus of production whereby the sexes themselves are established."⁹ As a result, she argued, "gender is not to culture as sex is to nature; gender is also the discursive/cultural means by which 'sexed nature' or a 'natural sex' is produced and established as 'prediscursive' . . ."¹⁰ One of Butler's central claims is that sex is as culturally constructed as gender, and that as such, "the distinction between sex and gender turns out to be no distinction at all."¹¹

Paradoxically, Butler's work simultaneously attenuates the identity claims of many transgender, in particular transsexual, individuals. While her conception of gender as a social construct, and its corresponding disaggregation of gender and biological sex, supports the legitimacy of

7. MARJORIE GARBER, *VESTED INTERESTS: CROSS-DRESSING AND CULTURAL ANXIETY* 1 (Routledge 1992) quoting JAN MORRIS, *CONUNDRUM: AN EXTRAORDINARY NARRATIVE OF TRANSEXUALISM* 110 (Henry Holt & Co. 1986) (1974).

8. JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* 14-15 (Routledge, 1999) (1990).

9. *Id.* at 10-11.

10. *Id.* at 11.

11. *Id.*

transgender claims asserting incongruity between sex assigned at birth and gender identity, Butler also privileges those transgender individuals who choose to remain ambiguous in their gender presentation over those who attempt to resolve, through surgical or other means, the dysphoria they experience between their gender identity and their material being. She does so by distinguishing between transgender transgressions, which evidence the gender-sex split that she articulates,¹² and “transsexual capitulation to ‘hegemonic constraint,’”¹³ which she insinuates results from a society that conflates genitals with gender.¹⁴ Terry S. Kogan observes that gender theorists such as Butler have argued “[f]or a transsexual to insist on a correspondence between *his* gender identity and *his* sex is to adopt an essentialist view that there is a necessary tie between a person’s sexed body (as male or female) and a person’s gender.”¹⁵ Although the split between biological sex and gender experienced by many transfolk may indeed evidence the constructedness of sex and gender, some scholars argue that it is inappropriate to herald transgenderism as the subversive poster child for the sex-gender split because it denies the pursuits and claims of the many transsexual individuals who very much aspire to the “real;” these are individuals who “seek very pointedly to be non-performative, to be constative, quite simply to be.”¹⁶

B. INCORPORATING A MATERIAL PERSPECTIVE

The aim of this work is not to challenge many transsexual (or transgender) individuals’ strongly held convictions as to the immutability of their core gender identity; nor is its aim to embark upon the infinitely regressive path towards deconstructing embodiment. Although Butler’s ground-breaking work on the social construction of gender is essential to understanding the processes through which gender as a whole is produced, at the same time, people do experience their bodies and they often experience them in a very material sense.¹⁷ Indeed, these experiences

12. JUDITH BUTLER, *BODIES THAT MATTER: ON THE DISCURSIVE LIMITS OF “SEX”* 126-27 (Routledge 1993).

13. JUDITH HALBERSTAM, *IN A QUEER TIME AND PLACE: TRANSGENDER BODIES, SUBCULTURAL LIVES* 51 (New York University Press 2005) [hereinafter *QUEER TIME*].

14. BUTLER, *supra* note 12, at 51. For a discussion of this argument, see HALBERSTAM, *supra* note 13, at 51.

15. Terry S. Kogan, *Transsexuals and Critical Gender Theory: The Possibility of a Restroom Labeled “Other,”* 48 *HASTINGS L.J.* 1223, 1229 (1997).

16. See Jay Prosser’s critique of Butler’s examination of the film *Paris is Burning*, in JAY PROSSER, *SECOND SKINS: THE BODY OF NARRATIVES OF TRANSEXUALITY* 45-55 (Columbia University Press 1998).

17. This is not an assertion that constructivists such as Butler would necessarily dispute. While perhaps often misconstrued by readers, Butler does not deny the existence of embodiment. “Every time I write about the body, the writing ends up being about language. This is not because I think the body is reducible to language; it is not. Language emerges from the body, constituting an emission of sorts. The body is that upon which language falters, and the body carries its own signs, its own signifiers, in ways that remain largely

become part of the interpretive processes through which gender identity is created. This is not to suggest however, that the corporeal experience is solely, or even predominantly, biologically determined. “[T]he biological and the social interact; chance, choice and determination interact; childhood learning and adult life interact; symbols and the material worlds interact. Even words like ‘perversion’ and ‘normality’ interact in everyday worlds. And in this interactive process, of course, new forms emerge.”¹⁸

In an effort to avoid, if not reconcile, the tension between these claims of social construction and material corporeal experience, it is instructive to emphasize the interpretive and the interactive elements of the production of gender. It is instructive because it allows for a productive relationship between the social and the material. The application of an interpretive, symbolic optique, such as the one outlined below, may be more conducive to grounding “social life, subjectivities, discourses and bodies together,”¹⁹ than is possible from a purely constructivist perspective.

C. SYMBOLIC INTERACTIONISM AND THE ESSENCE OF GENDER

Based on the notion that human beings have an evolved capacity for communication through symbols and an ability to “reflect internally upon their actions,” George Herbert Mead developed a view of society as an interpretive process. Mead, a social psychologist, argued that we develop a shared set of concepts and values in the course of socialization through “taking the role of other.”²⁰ He suggested that “[i]f we abandon the conception of a substantive soul endowed with the self of the individual at birth, then we may regard the development of the individual’s self, and of his self-consciousness within the field of his experience”²¹ Building on Mead’s theories, sociologist Herbert Blumer first named the theory “symbolic interactionism.” Mead’s understanding of society as an interpretive process, and Blumer’s theory of symbolic interactionism, focus on the interpretive elements of the social production of meaning in a manner less emphasized under Butler’s theory of gender performativity. Symbolic interactionism rests on the following premises:

The first premise is that human beings act toward things on the basis of the meanings that the things have for them The second premise is that the meaning of such things is derived from, or arises out of, the social interaction that one has with one’s

unconscious.” JUDITH BUTLER, *UNDOING GENDER* 198 (Routledge 2004).

18. Ken Plummer, *Queers, Bodies and Postmodern Sexualities: A Note on Revisiting the “Sexual” in Symbolic Interactionism*, 26 *QUALITATIVE SOC.* 515, 524 (2003).

19. *Id.* at 526.

20. Max Travers, *Symbolic Interactionism and Law*, in *AN INTRODUCTION TO LAW AND SOCIAL THEORY* 209, 210 (Reza Banakar & Max Travers eds., 2002).

21. GEORGE H. MEAD, *MIND, SELF, AND SOCIETY: FROM THE STANDPOINT OF A SOCIAL BEHAVIORIST* 1 (University of Chicago Press 1934).

fellows. The third premise is that these meanings are handled in, and modified through, an interpretive process used by the person in dealing with the things he encounters.

....

... [S]ymbolic interactionism sees meanings as social products, as creations that are formed in and through the defining activities of people as they interact.²²

Arising from this theory is the notion that "society is in a constant state of evolution and flux."²³ While the focus of Blumer's work was on the development of social institutions, his theory has ontological implications for the social development of self-understandings as well.²⁴ If society and social meaning is in a constant state of flux as a result of the interpretive and interactive manner in which social meaning is produced, and if social meaning plays such a constitutive role in the formation of gender identity (as gender theorists would argue), then as people interact with and interpret each other, and their material environments (including their physical beings), it follows that individual identity will also be in a continual state of potential change.

What then of the many transfolk (and non-transfolk) who irrefutably experience their gender as immutable? An essentialist element to one's gender identity, regardless of whether that identity conforms to culturally prescribed understandings as to the "appropriate genitals" for said identity, is not necessarily inconsistent with the claim that gender is produced relationally through interpretive processes. "[C]onstructivism claims that important features of human beings and our world are contingent, historical products of human activity and interaction, but it does not claim that anything it describes as socially constructed would be easy, or even possible, to change."²⁵ Symbolic interactionism does not dismiss the existence of certain recurrent and habitualized features to our ongoing interactions and interpretations — features that I would argue contribute to both the scripts that guide our interpersonal interactions and the manner in which gender identity is often experienced as immutable. While nature is considered the paradigmatic source of "true essence," it is possible to distinguish essentialism from pure biological causation.²⁶ As Professor

22. HERBERT BLUMER, *SYMBOLIC INTERACTIONISM: PERSPECTIVE AND METHOD* 2, 5 (Prentice-Hall, Inc. 1969).

23. Travers, *supra* note 20, at 210.

24. For a discussion of the application of the theory of symbolic interactionism in the context of sexuality, see Plummer, *supra* note 18, at 515.

25. See Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503, 552 (1994).

26. *Id.* at 547. Halley distinguishes between claims of weak essentialism ("attribution of any irreducible and therefore constitutive characteristic, regardless of its

Janet E. Halley suggests “[a]ny attribution of an irreducible, constitutive characteristic to a person or a thing attributes to it an essence.”²⁷

Acknowledging the construction of social meaning through contextually influenced, interpretive, interpersonal processes does not per se exclude the possibility that some element of this process is essential, constitutive of the individual and even experienced as immutable. The existence of such an essence does not necessarily conflict with the notion that one’s sense of “being a man” or “being a woman” or “being queer” is somewhat fluid, nor does it disrupt the idea that its flow is contextually driven by the particular social role one is performing, the manner in which one interprets a given environment, and the gender expressions of those with whom one is interacting. Because gender plays such a significant part in informing understandings of social roles, one’s sense of femininity or masculinity is likely to shift at least somewhat as one moves, for example, from the role of mother to the role of boss or lover, or as one leaves the office and heads to a sporting event, bar, or courtroom. Nor is the existence of such an essence antipodean to the assertion that one’s performance or expression of masculinity and/or femininity may vary depending on context. Indeed, if one’s gender identity varies somewhat depending on context, it follows that one’s expression of gender would also be contextually influenced. Isn’t it almost axiomatic to suggest that my gender expression will be different when I am at home with my lover than when I am at work as a correctional officer? The same gender expression will also vary from when I am out for lunch with my grandfather. At the risk of reifying or capitulating to anachronistic gender stereotypes, one need only observe two butch dykes do the stutter step trying to figure out which one should open a door to realize that there is some relational element to the expression of gender.²⁸ Perhaps an essential element to gender, experienced by some as an immutable sense of self, may govern the manner of and degree to which one’s gender varies, but not the fact that it varies.

source”) and claims of strong essentialism (“attribution of such a characteristic that is also natural and biological”). Halley, *supra* note 25 at 548. Under Halley’s paradigm, the claim that I am making would be one of weak essentialism with an imbricating constructivist assertion involving the proposition that self-understandings about gender arise, in part, through interactions with other gendered beings.

27. Halley, *supra* note 25, at 547.

28. This point, while offered with tongue somewhat in cheek, illuminates one of the shortcomings of the analysis posited here. See note 1 for a discussion of the inherent limitations to the use of terminology necessarily employed in discussing these concepts; the shortcoming pertains to the difficulty of advancing this theory without reifying stereotypical gender roles.

D. RELATIONALLY DEVELOPED SELF-UNDERSTANDINGS OF GENDER

In describing gender, writer and gender activist Riki Wilchins states:

[O]f all the things we have to say to each other, first and foremost among them is our gender. It's the reason we dress as we do every morning, style our hair specific ways, stand and walk and gesture and inflect our voices the way we do In fact, throughout our entire waking lives we are carrying on a continuous nonverbal dialogue with the world, saying, "This is who I am, this is how I feel about myself, this is how I want *you* to see *me*."²⁹

Wilchins contends that this is not a one way dialogue. She suggests that the world is talking back, telling us "[n]o, no — this is how we see you, this is how you should feel about it, this is who *you* can *be*."³⁰ With respect to gender, much of the information an individual receives back from the world is delivered via interactions with, and interpretations of, other individuals' gender expressions. This exchange, what Wilchins describes as a continuous nonverbal conversation, and what might also be articulated as one form of symbolic interactionism, plays a significant role in the production of gender both individually as manifested in our self-understandings and macrocosmically as social understandings and meanings of gender.

The constant production of gender through these relational, interpretive processes results in context specific self-understandings; as a result, gender identity, and consequently, gender expression, varies depending on where we are, with whom we are interacting, and what, in particular, we are doing. An overt example of this process is demonstrated by the manner in which many transsexual individuals understand their gender. There is often a conscious recognition, on the part of transsexual individuals, that the manner in which they are perceived by the world has a significant impact on how they perceive their own gender.³¹ Autobiographical literature includes claims that transpeople often have a high degree of awareness as to the intricacies of gender presentation.³² "Transsexuals are keenly aware of what it means to present oneself as a woman," and often come to the conclusion that while one's posture, gait and gestures play an integral role in one's gender presentation, what is perhaps most important is one's

29. Riki Wilchins, *A Continuous Nonverbal Communication*, in GENDER QUEER: VOICES FROM BEYOND THE SEXUAL BINARY 12 (Joan Nestle, et al. eds., Alyson Books 2002).

30. *Id.*

31. Dean Spade, *Resisting Medicine, Re/modeling Gender*, 18 BERKELEY WOMEN'S L.J. 15, 26 (2003).

32. See FEINBERG, *supra* note 1; see also KATE BORNSTEIN, GENDER OUTLAW: ON MEN, WOMEN AND THE REST OF US (Routledge 1994).

“interactions with others in the culture.”³³ Judith Halberstam provides a self-account of growing up as a tomboy that illuminates the significant impact that one’s interactions with people and culture can have on the development and maintenance of one’s gender identity:

For a large part of my life, I have been stigmatized by a masculinity that marked me as ambiguous and illegible. Like many other tomboys, I was mistaken for a boy throughout my childhood, and like many other tomboy adolescents, I was forced into some semblance of femininity for my teenage years. When gender-ambiguous children are constantly challenged about their gender identity, the chain of misrecognitions can actually produce a new recognition: in other words, to be constantly mistaken for a boy, for many tomboys, can contribute to the production of a masculine identity. It was not until my mid-twenties that I finally found a word for my particular gender configuration: butch³⁴

Susan Keller’s discussion analogizing transsexual identity strategies, as she describes them, to the rhetorical strategies employed by judicial decision makers, also illuminates the relational manner in which gender identity is produced.³⁵ Keller suggests that “judges construct their own identity while interpreting the identity claims of transsexuals.”³⁶ This can be observed, according to Keller, in judicial attempts to “maintain and shore up a coherent ideology of gender” when adjudicating the claims of transsexual litigants.³⁷ She argues that the methods used by judges to repudiate transsexual litigants’ claims about gender, in order to maintain a consistent ideology of gender, parallel the “repudiating identity strategies of some post-operative transsexuals who ‘erase’ their pasts.”³⁸ Keller’s analysis of the manner in which courts, by repudiating transsexuals’ identity claims and thus placing them on the outside, help to constitute the identity of those left inside, demonstrating how understandings of gender, and identity more generally, can be produced relationally. “The exteriorization of the ‘contaminated’ other helps define both the boundary between the interior and exterior and, through opposition, the qualities of the privileged interior position.”³⁹ Keller notes that Western society’s

33. Kogan, *supra* note 15, at 1228.

34. Judith Halberstam, *An Introduction to Female Masculinity: Masculinity Without Men*, in *THE MASCULINITY STUDIES READER* 355, 365 (Rachel Adams & David Savran eds., Blackwell Publishers 2002) [hereinafter *Female Masculinity*].

35. Susan Etta Keller, *Operations of Legal Rhetoric: Examining Transsexual and Judicial Identity*, 34 *HARV. C.R.-C.L. L. REV.* 332 (1999).

36. *Id.* at 338.

37. *Id.*

38. *Id.*

39. *Id.* at 367-68.

gender ideology is based on an unquestioned overarching assumption that every human being is either male or female.⁴⁰ This gender ideology provides judges attempting to make decisions concerning the gender identity of others with “a degree of confidence and certitude that is self-constitutive of the decision maker.”⁴¹ When judges rely upon this gender ideology in deciding claims by transsexual litigants, they simultaneously comment on and help to construct not only transsexual identity, but their own identity as self-assured interpreters of gender.⁴² Keller argues:

Gender attribution at once helps construct the person about whom the attribution is made and, less obviously, the person making the attribution. When we confidently attribute gender, particularly when we purport to discover the “true” gender in cases of ambiguous visual clues, we assert our own position within society as someone capable of making such claims about others. Such an assertion does not seem like much of an identity statement only because we regularly assume that everyone is capable of making such distinctions. However, the centrality of this capacity to our own sense of identity is revealed in the intense discomfort generated by those occasions in which we feel unable to distinguish, or in which we believe a prior attribution has been demonstrated to be incorrect.⁴³

E. RELATIONALLY DEVELOPED SOCIAL UNDERSTANDINGS OF MASCULINE AND FEMININE

The production of gender through relational processes occurs on both an interpersonal/individual basis and on an inter-group/societal level. On a societal level these relational interpretive processes create contextually specific cultural meanings for the concepts of feminine and masculine, meanings that then interact with and influence individual conceptions about gender. Halberstam's work on what she describes as “female masculinity” articulates one relational process that contributes to cultural understandings of masculine and feminine; she observes the numerous ways in which female masculinity has been blatantly ignored both culturally and within academic studies of masculinity.⁴⁴ She suggests that “[t]his widespread

40. Keller, *supra* note 35, at 339.

41. *Id.* at 341.

42. *Id.* at 339.

43. *Id.* at 341-42.

44. Halberstam, *Female Masculinity*, *supra* note 34, at 360-62. “Female masculinity” is a term Halberstam employs to describe her gender identity. It may be that, rather than extending understandings of masculinity to non-male bodies, or creating new taxonomies of masculinity, more would be achieved towards the pursuit of tolerance for gender transgression by critiquing assumptions and understandings about what is and is not “masculine.” Regardless, Halberstam's work is of heuristic utility in exploring the relational processes through which social meanings about gender are created.

indifference to female masculinity . . . has clearly ideological motivations and has sustained the complex social structures that wed masculinity to maleness and to power and domination."⁴⁵ While Halberstam's work is devoted to the assertion that masculinity should be deregulated or extended to non-male bodies,⁴⁶ her analysis also supports the proposition that understandings of "masculinity" are produced through relational processes between actors. Halberstam suggests that as a society, we spend significant amounts of time and money ratifying and supporting the versions of masculinity we enjoy and trust; she asserts that many of these "heroic masculinities" depend in large measure on the subordination of what she describes as "alternative masculinities."⁴⁷ In proposing the possibility of alternative masculinities, such as "female masculinity" and "queer masculinity," Halberstam argues that, "female masculinity," rather than simply an imitation of maleness, "actually affords a glimpse into how masculinity is constructed as masculinity."⁴⁸ Halberstam suggests that "female masculinities are framed as the rejected scraps of dominant masculinity in order that male masculinity may appear to be the real thing."⁴⁹ To illustrate her point, Halberstam discusses the James Bond movie *Goldeneye*. She suggests that in *Goldeneye*, the masculinity of James Bond — the classic male hero — "appears as only a shadow of a more powerful and convincing alternative masculinity."⁵⁰ Halberstam argues that in *Goldeneye*, masculinity is produced as much through the film's portrayal of Bond's boss, M, a discernibly butch woman and through its portrayal of Agent Q[ueer], the campy science geek who provides Bond with all the gadgets that help to establish Bond's own (what Halberstam suggests is an unnatural and prosthetic) masculinity, as it is through the film's portrayal of the heroic Bond himself.⁵¹ "The gay masculinity of Agent Q and the female masculinity of M provide a remarkable representation of the absolute dependence of dominant masculinities on minority masculinities."⁵² Halberstam claims that integral to the construction of mainstream conceptions of masculinity are representations of alternative, subordinated masculinities. If Halberstam is correct that the invisibility of female masculinity vis á vis male masculinity functions to perpetuate the automatic association of power and dominance with maleness, then concomitantly, stemming from the dominant dyadic

45. Halberstam, *Female Masculinity*, *supra* note 34, at 356.

46. Judith Halberstam, *Oh Bondage Up Yours! Female Masculinity and the Tomboy*, in *CURIUSER: ON THE QUEERNESS OF CHILDREN* 191, 192 (Steven Bruhm & Natasha Hurley eds., University of Minnesota Press 2004) [hereinafter *Oh Bondage*].

47. Halberstam, *Female Masculinity*, *supra* note 34, at 355-57.

48. *Id.* at 355.

49. *Id.*

50. *Id.* at 356.

51. *Id.* at 357.

52. *Id.*

understanding of gender, this same process presumptively attaches the inverse of power and dominance — powerless and submissive — to femaleness. Thus, through the interrelationship of representations of masculinity with representations of femininity, cultural understandings of what it means “to be a man” or “to be a woman” are produced.⁵³

Just as relations with, and contextually driven interpretations of, others' gender expressions serve a role in producing both self and societal understandings about masculinity and femininity, so too do groups produce understandings as to what gender means in the context of a particular group, via the group's historical relationships to, interactions with, and interpretations of, other groups. An example of this phenomenon is demonstrated by the relationship between gay and lesbian communities and transgender communities.

In *Transgender Jurisprudence: Dysphoric Bodies of Law*, Andrew Sharpe observes that the nineteenth century study of same-sex oriented subjects, and their characterization as inverts, inaugurated the field of sexology, and with it widespread medical, legal, and cultural understandings of homosexuality and transgenderism.⁵⁴ He suggests that “[t]his trope of inversion, premised on disembodiment as it is, illustrates how the mapping of transgender bodies was at the heart of sexological discourse from the beginning.”⁵⁵ In other words, he suggests, “transgender operated as the structuring principle for comprehending same (bio)logical sex sexual desires.”⁵⁶ Sexologists at the time used the term “sexual inversion” to denote a broad range of deviant gender behavior of which same-sex desire was only one aspect.⁵⁷ Sharpe suggests that there was considerable hostility among some same-sex oriented men towards the coupling of male homosexuality with effeminacy, and correspondingly, an intentional disassociation by many gay men from both transgender communities and those gay men unwilling or unable to conform to normative gender roles and expression.⁵⁸

The twentieth century evolution of sexual practices and prevalent gender expressions among gay men in North American culture, examined in light of the historical underpinnings illuminated by Professor Sharpe, exemplifies the relational, interactive manner that produces both individual and collective understandings of gender identity and expression. Historian

53. It should be noted that this discussion of Halberstam's work was offered for the process it demonstrates and not for any normative assumption that there exists a stable or non-constructivist meaning to the terms masculine and feminine. For a reference to the difficulties associated with employing the terms masculine and feminine, see *supra* note 4.

54. ANDREW N. SHARPE, *TRANSGENDER JURISPRUDENCE: DYSPHORIC BODIES OF LAW* 17 (Cavendish Publishing Ltd. 2002).

55. *Id.*

56. *Id.*

57. *Id.* at 19.

58. *Id.* at 22 n.4.

George Chauncey writes that it was not until the mid-twentieth century that homosexual behavior per se became the basis for labeling and self-identification by men as gay or queer.⁵⁹ “[B]efore then, most men were so labeled only if they displayed a much broader inversion of their ascribed gender status by assuming the sexual and other cultural roles ascribed to women.”⁶⁰ Chauncey, and others, have argued that gay men during this era generally did not seek or desire sex with other gay men, but rather were much more likely to pursue sexual interactions with “straight,” and usually stereotypically masculine men, in which the straight participant always played an insertive and non-reciprocating role.⁶¹ Chauncey states that “[m]any fairies and queers socialized into the dominant prewar homosexual culture considered the ideal sexual partner to be ‘trade,’ a ‘real man,’ that is, ideally a sailor, a soldier, or some other embodiment of the aggressive masculine male ideal.”⁶² He suggests that, “[t]he centrality of effeminacy to the definition of the fairy in the dominant culture enabled trade to have sex with both the queers and fairies without risking being labeled queer themselves, so long as they maintained a masculine demeanor and sexual role.”⁶³ A confluence of factors in the middle of the twentieth century shifted public perceptions as to the defining features of “the homosexual,” so that the division between gay and straight no longer turned upon gender expression more broadly, but instead exclusively upon sexual behavior; any party to same-sex relations, regardless of their role in the interaction, now became labeled a homosexual.⁶⁴ Straight men who had once felt no stigma being “serviced” by queers and fairies began to withdraw from such sexual practices, and “[t]his growing sexual iron curtain cut many homosexuals off from their traditional objects of desire, and created a dilemma for those who had grown used to such partners.”⁶⁵

59. GEORGE CHAUNCEY, *GAY NEW YORK: GENDER, URBAN CULTURE, AND THE MAKING OF THE GAY MALE WORLD, 1890-1940* 13 (Basic Books 1994).

60. *Id.* See also EVE KOSOFKY SEDGWICK, *EPISTEMOLOGY OF THE CLOSET* 2 (University of California Press 1990), where she notes that, despite its present day ubiquity, the categorization of people based on sexual choice is a relatively new cultural phenomenon within Western societies.

61. CHAUNCEY, *supra* note 59, at 21. See also ALLAN BERUBE, *COMING OUT UNDER FIRE: THE HISTORY OF GAY MEN AND WOMEN IN WORLD WAR TWO* 42 (Free Press 1990).

62. CHAUNCEY, *supra* note 59, at 16.

63. *Id.*

64. This multitude of factors included: developments in psychiatry, which changed perceptions about the meaning of deviance, Sharpe, *supra* note 54, at 17; the return of a vast number of gay and lesbian veterans, whose exposure to one another during WWII had spawned a realization that there were others like themselves, and a corresponding emergence of group identity and new found pride, ROTELLO, *infra* note 65, at 51; the McCarthy era “Red Scare,” in which homosexuals were often cast as communists and vice-versa, *id.* at 53; and the rising civil rights movement in the United States, *id.* at 54.

65. GABRIEL ROTELLO, *SEXUAL ECOLOGY: AIDS AND THE DESTINY OF GAY MEN* 52 (Dutton 1997).

In the aftermath of this shift, a more diverse spectrum of gender expression emerged within gay male communities; gay men who identified as butch, gay men whose gender expressions were very conventionally masculine, and new, more versatile sexual practices in which gay men, regardless of their gender expression, were much more likely to play both insertive and receptive roles.⁶⁶ As relations between heterosexuals and homosexuals changed, so too did gender expressions (both of a non-sexual and sexual nature) and social understandings about the gender implications of homosexuality. While the emergence of the butch gay male and the re-gendering of certain sexual practices, such as the receptive role in male-on-male anal sex, must also be considered in light of a newly emerging gay liberation movement in which gays and lesbians had begun to shed their shackles of shame and create a community, it is unlikely that greater visibility and public acceptance could alone account for this shift in the sexual practices, gender expressions and self identities of mid 20th century gay men.

Susan Faludi's conclusions following her investigation into why male cadets at the Citadel were so enraged by the admission of women into the military academy also demonstrates the manner in which meanings of masculinity and femininity are relationally produced and contextually dependent. Faludi concludes that the reason the Citadel did not want females admitted was a fear that the presence of females would interfere with the manner in which the male cadets interacted with each other. There was a concern on the part of the cadets, and the institution itself, that if females were admitted, the male cadets would be precluded from the nurturing and care-giving behavior they typically provided one another, thus depriving them of important bonding interactions.⁶⁷ As one officer put it, "[w]ith no women, we can hug each other. There's nothing so nurturing as an infantry platoon."⁶⁸ What was considered suitable gender expression for the group changed in the presence of what the men perceived to be another differently gendered group. In other words, they interpreted the same relational behavior, between the same members of the group as masculine in one context and feminine in another.

66. ROTELLO, *supra* note 65, at 50-53. In many cultures, including pre-WWII North American culture, insertive and receptive sexual roles have been imbued with meanings of masculinity and femininity respectively. In many cultures in which all gay men are understood to be effeminate, the participant playing the insertive role in sodomy between two men is not considered homosexual, *see, e.g.* Don Kulick, *The Gender of Brazilian Transgendered Prostitutes*, in *THE MASCULINITY STUDIES READER* 389, 389 (Rachel Adams & David Savran eds., Blackwell Publishers 2002).

67. SUSAN FALUDI, *STIFFED: THE BETRAYAL OF THE AMERICAN MAN* 126 (William Morrow & Co. 1999).

68. *Id.* at 127.

III. TRANS-PHOBIA AND ITS RELATION TO THE RELATIONAL PRODUCTION OF GENDER

In *Transgender Nation*, Gordene MacKenzie analyzed over forty American television talk shows and documentaries depicting transgender individuals, airing from 1985 to 1992;⁶⁹ she consistently observed a fearful response in the majority of audience members. MacKenzie suggested that the reaction of fear was often articulated by the audience members as an attack on their own gender identity.⁷⁰ She observed that “the majority of televised audience members . . . exhibited varying degrees of discomfort and anxiety. Without exception, each program featured at least one audience member or call-in viewer who responded as if their personal identity were under severe attack.”⁷¹

Numerous reasons related to gender inequality and its corresponding inequitable material wealth and power distributions suggest why hegemonic gender systems endeavor to police strict gender roles and sustain a binary gender order. Such inequities provide one plausible explanation for why trans-phobia exists both within certain social infrastructure and among particular demographics, such as some heterosexual men. However, such explanations do not necessarily account for the intolerance towards gender transgression found within gay and lesbian communities, feminist communities, and transgender communities.⁷² The intolerance towards gender transgression demonstrated by gays, lesbians, feminists, and even transgender individuals themselves suggests that trans-phobia is not simply the product of a hierarchical gender order reliant for its proper functioning upon the ability to maintain a strict gender binary in which the feminine is subjugated to the masculine. But then what does cause this widespread intolerance towards gender transgression? Why is it that for many people, “few things are more uncomfortable than seeing someone whose gender you can’t discern?”⁷³ In my view it is not the transgression itself that generates this intolerance, but rather the disruption experienced as a consequence of the uncertainty that transgression can cause.

69. GORDENE MACKENZIE, *TRANSGENDER NATION* 109 (Bowling Green State University Popular Press 1994).

70. *Id.* at 109-10.

71. *Id.* at 110.

72. For a discussion of this intolerance, see PAT CALIFIA, *SEX CHANGES: THE POLITICS OF TRANSGENDERISM* (Cleis Press 2003) (1997); see also Riki Wilchins, *Deconstructing Trans*, in *GENDER QUEER: VOICES FROM BEYOND THE SEXUAL BINARY* 55 (Joan Nestle, et al. eds., Alyson Books 2002) [hereinafter *DECONSTRUCTING*].

73. Wilchins, *DECONSTRUCTING*, *supra* note 72, at 56.

A. DISRUPTING IDENTITY

In identifying what he describes as bisexual erasure by both heterosexuals and gays and lesbians, Kenji Yoshino offers, as one motivating factor for this phenomenon, a shared investment in stabilizing group identities by eradicating the threat to these identities posed by bisexuality.⁷⁴ “In a world that denies bisexual existence, cross-sex desire and same-sex desire are mutually exclusive. This means that the presence of cross-sex desire ipso facto negates the presence of same-sex desire and vice versa.”⁷⁵ He argues that the existence of bisexuality, however, calls into question the sexual orientation of the self. It does so, he suggests, by disrupting the bifurcated identification strategies deployed by gays and straights to understand their sexualities; bisexuality disrupts their identity categories, thus depriving them of the comfort members of all groups take “in knowing their place in the social order.”⁷⁶

Professor Yoshino's analysis can also be applied in the context of gender. Halberstam suggests that “[t]ransgender may indeed be considered a term of relationality; it describes not simply an identity but a relation between people, within a community, or within intimate bonds.”⁷⁷ She notes that transgender is an important term not just for those “who want to reside outside of categories altogether but to people who want to place themselves in the way of particular forms of recognition.”⁷⁸ Not unlike the perceived threat to sexual identity posed by the bisexual, the existence of transgenderism challenges dyadic and biological, genitally determined understandings of gender. In a world in which each of us is supposed to be either a man or woman, identifying to which of “the two gender categories” another individual belongs, affirms one's understanding of which category one's own gender may be located. Under a binary understanding of gender, and because gender is produced relationally, the very fact that one cannot easily or instantly determine whether another individual is “the same” as them or “the opposite” of them disrupts affirmation of one's own gender categorization.

B. DISRUPTIONS TO THE EPISTEME OF SOCIAL INTERACTION

The disruption caused by this uncertainty in identity is then compounded by the gendered nature of a great number of the social scripts that govern our interpersonal interactions. Knowing one's socially agreed upon role in any given interaction is comfortable. With respect to those elements of identity, such as gender, which are produced through relational

74. Yoshino, *supra* note 5, at 362.

75. *Id.* at 401.

76. *Id.*

77. HALBERSTAM, *QUEER TIME*, *supra* note 13, at 49.

78. *Id.*

interpretive processes, a clear sense of one's role or social script, and also the scripts of those with whom one is interacting, allows one to affirm self-identity with less cognitive effort than is required in situations of uncertainty.

Halberstam's discussion of the "wrong bathroom phenomenon,"⁷⁹ as she describes it, exemplifies the negative or intolerant reactions frequently provoked by the uncertainty that gender transgression creates or perhaps illuminates. Her bathroom account is a story familiar to any girl who grew up as a tomboy, or any woman who presents herself as being somewhat butch; being questioned and/or accused of being in the wrong bathroom. Halberstam, who identifies as a masculine woman, recounts one plane trip she took where she encountered the "aren't you in the wrong bathroom?" challenge both on the way to her destination and on the way back! Halberstam suggests that usually it is not that those women challenging the presence of another in the bathroom actually believe that the individual is male, but rather are disconcerted by the presence, in their washroom, of a masculine female.⁸⁰ Why are they more disconcerted about the presence of a "masculine female" in an airport bathroom than say a school or restaurant restroom? Halberstam discusses airport bathrooms in particular because of what she describes as the intensified gender policing by "in transit" people, in response to the disruption they experience as a consequence of their uncertain circumstances. She draws the following conclusion:

Needless to say, the policing of gender within the bathroom is intensified in the space of the airport, where people are literally moving through space and time in ways that cause them to want to stabilize some boundaries (gender) even as they traverse others (national).⁸¹

The socio-legal efforts deployed to stabilize gender categories in response to perceived gender transgression demonstrate how it is often the uncertainty created by these transgressions at which these stabilization tactics are directed. Legal and social skirmishes over whose privilege it is to define what is a real woman, or to define gender in general, illustrate a desire to reduce this uncertainty through gate-keeping measures that attempt to stabilize gender categories.

79. Halberstam, *Female Masculinity*, *supra* note 34, at 365.

80. *Id.* at 368.

81. *Id.* at 366.

C. SOCIAL EFFORTS TO STABILIZE A BINARY GENDER ORDER: THE POWER OF NAMING

Imagine, then, the turmoil created in this “womanspace” when one day a tall, quiet woman who had shown up regularly at meetings for several weeks suddenly came out to the group as a transsexual female. Not only that, she was a transsexual female who identified as a lesbian. Suddenly “Micki,” who had simply appeared as an unusually tall, rather quiet and professionally dressed woman, looked very different to the group’s members In the following weeks . . . a few women, both lesbian and not, reacted strongly, sharing that they felt threatened by Micki’s continued presence. Micki’s feminine appearance bore witness to the wonders of modern medicine, but to some she was nothing but a fake

Her chosen identity as a lesbian posed another gender and sexuality enigma. Having castrated “his” penis while leaving “his” sexual orientation unscathed, to what label was s/he entitled? The choice of a lesbian identity to express her (his) new identity as a “woman-loving-woman” communicated an unfamiliar sex and gender ambiguity. For some, the ambiguity only generated hostility and feelings of mockery for this once-man’s appropriation of a label — lesbian — which they felt belonged only to “real women.”⁸²

In her examination of female masculinity Halberstam discusses the Lacanian concept of “urinary segregation.”⁸³ She notes that Lacan used the term to describe “the relations between identities and signifiers, and he ultimately used the simple diagram of the rest-room signs ‘Ladies’ and ‘Gentlemen’ to show that within the production of sexual difference, primacy is granted to the signifier over that which signifies”⁸⁴ In other words, naming confers, rather than reflects meaning.⁸⁵ And so, the system of urinary segregation creates rather than reflects the categories “men” and “women.” “Although rest-room signs seem to serve and ratify distinctions that already exist, in actual fact these markers produce identifications

82. Elvia R. Arriola, *Law and the Gendered Politics of Identity: Who Owns the Label “Lesbian”?*, 8 HASTINGS WOMEN’S L.J. 1, 2 (1997) (describing her experience as a member of a women’s support group).

83. Halberstam, *Female Masculinity*, *supra* note 34, at 369, citing Jacques Lacan, *The Agency of the Letter in the Unconscious*, in *ECRITS: A SELECTION* 151 (Alan Sheridan, trans., Norton 1977).

84. *Id.*

85. *Id.*

within these constructed categories.”⁸⁶ Under Lacan’s theory then, the act of naming what is a real woman is itself constitutive of this social category.⁸⁷ Thus, exerting an authority to stipulate or “name” what does and does not constitute a real woman or a real man carries with it significant implications. To borrow from William I. Thomas’ famous sociological theorem: “If men define situations as real, they are real in their consequences.”⁸⁸ Those who wield the power to name possess the ability to include or exclude others and in doing so, the ability to create categories and to define themselves. This is demonstrated in the case of *Nixon v. Vancouver Rape Relief*.⁸⁹ Vancouver Rape Relief Society is a nonprofit women’s organization dedicated to assisting women in crisis due to male violence. The organization describes itself as a feminist, anti-racist, pro-choice, and pro-lesbian organization dedicated to the principle, among others, that all members must work towards eliminating their existing prejudices.⁹⁰ Kimberly Nixon, a post-operative transsexual woman who was herself a victim of male sexual violence, responded to an advertisement by the Vancouver Rape Relief Society for volunteers who wished to train as peer counselors.⁹¹ Although they initially accepted her into the volunteer training program, this feminist, anti-racist, pro-lesbian organization whose members espouse a dedication to work on an on-going basis on their existing prejudices, forced her to leave the program upon discovering that Ms. Nixon was a transsexual woman.⁹² Ms. Nixon filed a complaint under the British Columbia Human Rights Code.⁹³ The Vancouver Rape Relief Society argued that it was entitled to determine who was “woman enough” to meet the organization’s purposes.⁹⁴ They maintained that unless they could decide who a woman was for their purposes, their integrity as an organization devoted to promoting the interests and welfare of women would be so compromised as to render the organization meaningless.⁹⁵ While Ms. Nixon was successful before the Human Rights Tribunal,⁹⁶ upon judicial review, the British Columbia

86. Halberstam, *Female Masculinity*, *supra* note 34, at 369

87. *Id.*

88. WILLIAM I. THOMAS & DOROTHY SWAINE THOMAS, *THE CHILD IN AMERICA: BEHAVIOR PROBLEMS AND PROGRAMS* 572 (Alfred A. Knopf 1928).

89. *Nixon v. Vancouver Rape Relief Society*, [2003] 22 B.C.L.R. (4th) 254, appeal dismissed by British Columbia Court of Appeal, *see* *Vancouver Rape Relief Society v. Nixon*, [2005] BCJ No. 2647 601 CA (leave to appeal denied, [2006] SCCA No. 365).

90. *Nixon*, 22 B.C.L.R. (4th), ¶ 8, at 260.

91. *Id.* ¶¶ 6, 8, at 260.

92. *Id.* ¶ 9, at 260.

93. *Id.* ¶ 9, at 260.

94. *Id.* ¶ 28, at 263.

95. *Id.* For the purposes of their “women only” policy, the Vancouver Rape Relief Society wanted to define “woman” as including only those individuals who had been raised and lived their lives exclusively as women. *Id.* ¶ 29, at 263.

96. *Nixon v. Vancouver Rape Relief Society*, [2002] BCHRT 1 (B.C. Human Rights Trib.)

Supreme Court, despite its finding that Kimberly Nixon was “legally and medically” a woman, agreed with the Vancouver Rape Relief Society: The Court held that the Tribunal had erred in failing to conclude that the Vancouver Rape Relief Society had the right under the Code to exclude from its Peer Counseling Program individuals who had not lived their entire lives as women.⁹⁷ An appeal of this decision to the British Columbia Court of Appeal was denied.

This effort to exert control over the process of naming what is a “woman” can be found in Janice Raymond’s 1979 book *The Transsexual Empire*.⁹⁸ One of Raymond’s foundational premises, in what can only be described as an exceptionally hostile and trans-phobic piece of work, highlights the importance often attached to the process of naming.⁹⁹ Raymond alleges that transsexualism is a medical invention formulated by a patriarchal medical community in an effort to create for themselves, the ability to determine who and what constitutes a real woman. Raymond argues that:

In the medical theodicy, transsexuals surrender themselves to the transsexual therapists and technicians. The medical order then tells transsexuals what is healthy and unhealthy (the theological equivalents of good and evil). Thus the classification function of the term *transsexualism* analyzes a whole system of meaning that is endowed with an extraordinary power of structuring reality.¹⁰⁰

While in large measure, Raymond’s characterization of the medical community’s response to and treatment of transfolks may be apt, the preceding passage also underscores the significance Raymond attaches to the process of naming and the power of the signifier.¹⁰¹

97. *Nixon*, 22 B.C.L.R. (4th), ¶ 119, at 276-77.

98. JANICE G. RAYMOND, *THE TRANSSEXUAL EMPIRE: THE MAKING OF THE SHE-MALE* (Beacon Press 1979) (I reference Raymond’s 1979 book because it was heavily relied upon by segments of the second wave feminist movement to support anti-trans sentiment and scholarship).

99. *Id.* at 104 (“[a]ll transsexuals rape women’s bodies by reducing the female form to an artifact, appropriating this body for themselves.”).

100. *Id.* at 2. Raymond superficially addresses the obvious challenge to her claim — the existence of FTM transsexual people — by offhandedly suggesting that trans men are tokens intended to artificially validate transsexualism as a human reality. RAYMOND, *supra* note 98, at 26-27.

101. Raymond’s assertion that transsexualism is a medical invention of the 20th century, *id.* at xv, is ill conceived. A wealth of anthropological and historical literature establishes that transsexualism, of some variety, has existed and continues to exist across a broad span of time periods and cultures. See FEINBERG, *supra* note 1, at 22-29. See also JONATHAN NED KATZ, *GAY AMERICAN HISTORY: LESBIANS AND GAY MEN IN THE U.S.A.* 281-84 (Meridian revised ed. 1992) (1976) (discussing the Two-Spirited people, referred to as “berdaches,” observed in many Native American tribal Societies). See also CALIFIA, *supra* note 72, at 120-42 (discussing various transgender communities in Native American tribal societies, India, and Myanmar). Notably, Califia also suggests that gay and lesbian historians, such as Katz, have glossed over transgender identities by co-opting them into a

D. A WOMAN NAMED BILL?

“‘But it’s all wrong, you know,’ declared Dorothy, earnestly; ‘and, if you don’t mind, I shall call you ‘Billina.’ Putting the ‘eena’ on the end makes it a girl’s name, you see.’”¹⁰² Said Dorothy upon first encountering Bill, a talking yellow chicken. “In her Oz adventures, Dorothy encountered cyclones and earthquakes, witches and wizards, and all manner of miraculous happenings. She accepted the incredible with great aplomb. But one occurrence she simply could not accept: a woman named Bill. Even if that ‘woman’ happened to be a ‘talking chicken.’”¹⁰³

The gender policing often exercised through the process of naming is repeatedly found in case law addressing transsexual individuals seeking legal name changes that better reflect their gender identities and/or expressions. In *The Matter of Anonymous for Leave to Change His Name*, an American court denied a pre-operative MTF woman’s application for a change of name on the basis that “the change of name from a ‘male’ name to a ‘female’ name would be fraught with danger of deception and confusion and contrary to the public interest.”¹⁰⁴ The case illuminates an effort on the part of the legal officials who originally denied the petitioner’s application, as well as the court itself, to maintain the authority to determine not only who shall have “boys’ names” and who shall have “girl’s names,” but also, implicitly, the ability to decide what are “boys’ names” and what are “girl’s names.”¹⁰⁵ The court’s reference to the deception and confusion that they suggest could arise were they to grant this woman’s request is puzzling. The petitioner in this case identified and presented as a woman. Her application stemmed from a desire “to avoid embarrassing situations” by changing her name to one which more accurately reflected her self-identity and expression.¹⁰⁶ How could a name that “matches” this petitioner’s gender expression be more confusing to people than one which does not?¹⁰⁷

gay/lesbian paradigm for understanding these individuals’ experiences. *Id.* at 123-26.

102. L. FRANK BAUM, *OZMA OF OZ* 31 (William Morrow & Co. 1989) (1907).

103. Baby Name Wizard Blog – Discussing Trends in Baby Names, The Sound of Androgyny, <http://thebabynamewizard.ivillage.com/parenting/archives/2005/11/index.html> (last visited Jan. 27, 2007) (commenting on L. Frank Baum’s famous character, *see id.*).

104. In *The Matter of the Application of Anonymous for Leave to Change His Name*, 587 N.Y.S.2d 548, 549 (N.Y. Civ. Ct. 1992).

105. By overlooking the fact that names are a matter of social tradition, not a legal creation, and that some names are traditionally associated with either gender, it seems clear that the court’s exercise of authority was deployed in an effort to maintain gender norms.

106. *Anonymous*, 587 N.Y.S.2d at 548.

107. This point is made for descriptive purposes in recognition, but not endorsing, the culturally constructed attachment of particular names with a particular gender. Kate Bornstein relates an amusing anecdote about the Montana Educational Telecommunications Network, a computer bulletin board that enabled students in tiny rural schools to communicate with other students from all around the world. One teacher reported: “When we got our first messages from Japan, a wonderful little fifth-grade girl named Michelle was

In *In the Matter of Frank Joseph Guido* the court denied a pre-operative transsexual woman's application to change her name to Cynthia Alexandria Frank, without prejudice to renew her application upon completion of sex reassignment surgery and a divorce from her wife.¹⁰⁸ The court supported its denial on the basis that:

Under the present state of the law, same-sex marriages are not recognized. It would therefore be inconsistent for this court to grant the relief requested, to permit the applicant to appear and represent himself as female, while in fact he remains in a legal relationship with his wife premised on his being male.¹⁰⁹

That the court considered refusing the name change to be a measure that would prevent the petitioner from "represent[ing] himself as female" is illustrative of just how much stock this particular court placed in the importance of a name.¹¹⁰ One wonders what the court would have done if Cynthia's parents had named her Dale, or Pat rather than Frank.

E. ADJUDICATING IDENTITY CLAIMS: LEGAL ATTEMPTS TO STABILIZE GENDER

Courts often endeavor to stabilize and make certain categories of gender through legal analysis developed to determine a litigant's sex in the context of a particular legal claim. By conceptualizing gender as biologically determined by one's sex and then ignoring or denying the transitive reality of sex for many transsexual litigants, the law is able to maintain a static understanding of gender thus reducing uncertainty; if gender is understood as static, it appears as more certain.

In examining the judicial response to transsexualism, Professor Keller suggests that courts typically conceptualize transsexualism in one of two ways.¹¹¹ In those cases where the court is willing to accept the claim of a transsexual litigant, the court usually adopts a model of identity that seeks

asked if she was a boy or a girl. She was extraordinarily indignant at that, and said, 'I'm Michelle — I'm a girl of course.' Then I pointed out the Japanese name of the person who had asked the question and said 'Do you know if this is a boy or girl?' She said, 'No, how am I supposed to know that?'" BORNSTEIN, *supra* note 32, at 23.

108. *In the Matter of Frank Joseph Guido, Jr., for Leave to Assume the Name of Cynthia Alexandria Frank*, 771 N.Y.S.2d 789 (N.Y. Civ.Ct. 2003).

109. *Id.* at 790 (citing a decision/order of the court, dated September 25, 2002, denying the application for a name change). The court's reasoning in this case is also indicative of heterosexist or homophobic attitudes. For a discussion of the intersection between same-sex marriage and transgender jurisprudence, see SHARPE, *supra* note 54, at 17. See also Phyllis Randolph Frye & Alyson Dodi Meiselman, *Same-Sex Marriages Have Existed Legally in the United States for a Long Time Now*, 64 ALB. L. REV. 1031 (2001).

110. The court granted her renewed application, but not before Ms. Frank had undertaken the humiliating process of providing the court with a notarized "Consent" from her wife and a letter from her physician confirming that Ms. Frank was being treated for Gender Identity Disorder. *Guido*, 771 N.Y.S.2d at 789.

111. Keller, *supra* note 35, at 334.

to erase the transsexual's past. Conversely, in those cases where the court views the transsexual litigant's claim as untenable, the court frequently denies the transsexual's identity claim altogether.¹¹² She notes, for instance, that in *Richards v. United States Tennis Ass'n*¹¹³ the court, in endorsing the post-operative MTF litigant's gender claim, "cites approvingly the testimony of Richards' expert witness that . . . Richards' internal anatomy was 'that of a female who has been hysterectomized and ovariectomized,' even though Richards never in fact had a uterus or ovaries to be removed."¹¹⁴ The court, Keller suggests, accepts Richards' gender claim by rewriting her anatomical history and thus erasing both her transsexual past and the transition itself.¹¹⁵ Keller also highlights, in contrast, the court's reasoning in *Ulane v. Eastern Airlines*.¹¹⁶ In *Ulane* the court denied an MTF transsexual woman's claim of employment discrimination, arguing that Ulane was "a biological male who takes female hormones, cross-dresses, and has surgically altered parts of her body to make it appear female."¹¹⁷ In either line of reasoning, whether the Court finds for the transsexual litigant or not, it has adopted an understanding of gender as fixed, immutable and biologically determined. While perhaps it is unsurprising that in those cases where the transsexual litigant's claim is denied the Court has refused to give legal recognition to the individual's transition, it is remarkable that even where the Court does recognize the transsexual litigant's identity claim and correspondingly their preferred gender, it does so in a manner that discursively leaves intact the notion of gender as static, binary, and biologically determined.

Another tactic employed by courts to secure a jurisprudential understanding of gender as fixed and immutable is to invoke natural law or religious rhetoric. This tactic was demonstrated by the Texas Court of Appeals decision in *Littleton v. Prange*.¹¹⁸ In *Littleton*, a post-operative transsexual woman was denied standing to file a medical malpractice suit, subsequent to the death of her husband, on the grounds that she could not legally be the surviving spouse of another man.¹¹⁹ The court ruled that God

112. Keller, *supra* note 35, at 334.

113. In *Richards v. U.S. Tennis Ass'n*, 400 N.Y.S.2d 267 (1977), the claimant, a post-operative transsexual woman, filed a claim against the U.S. Tennis Association for excluding her eligibility to participate in the professional woman's tennis circuit due to a chromosomal test indicating that Richards possessed XY chromosomes.

114. Keller, *supra* note 35, at 334.

115. *Id.*

116. *Id.*

117. *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1087 (7th Cir. 1984).

118. *Littleton v. Prange*, 9 S.W.3d 223, 224 (Tex.App. 1999). For an in-depth discussion of this case, see Julie A. Greenberg, *When is a Man a Man, and When is a Woman a Woman?*, 52 FLA. L. REV. 745 (2000).

119. Ironically, gay and lesbian activists have added the *Littleton* decision to their arsenal in the fight for same-sex marriage. Christie Littleton and her deceased husband were legally married by Kentucky officials in 1989. *Littleton*, 9 S.W.3d at 225. Subsequent

created Christie Littleton as a man and that neither the law nor the medical community could change her into a woman.¹²⁰ The court held that sex, and correspondingly gender in their view, was “immutably fixed by our Creator at birth.”¹²¹

One of the more literal examples of the law's attempt to help avoid the cognitive dissonance that arises from gender ambiguity is the pre-Stonewall era sumptuary laws requiring that every individual must wear at least three pieces of clothing appropriate to his or her gender. In *Vested Interests* Garber recounts the tale of lesbian critic Joan Nestle's experience with the three piece law:

When the lesbian activist and critic Joan Nestle was living in New York in the fifties, she was careful, when preparing for a night out, to heed the warning of older lesbians: “Always wear three pieces of women's clothing,” they counseled, “so the vice squad can't bust you for transvestism.”¹²²

Although at first glance such a law seems almost comedic in its inanity (let alone its ability to be subverted or circumvented), in the 1950s and 1960s these laws were frequently used by police in gay bar raids to persecute those who seemed the “queerest.”¹²³ The perceived threat posed by gender uncertainty is readily apparent in the wording employed by many of these sumptuary laws. For example, the statute used to enforce gender conformity in the state of New York, by prohibiting impersonation of a female, defined a vagrant as one who has “his face painted, discolored, covered or concealed, or being otherwise disguised, in a manner calculated to prevent his being identified.”¹²⁴ Convictions under this law required neither a showing that the “disguise” was donned in an effort to commit some further crime, nor any proof that the “vagrant” individual was without visible means of support.¹²⁵ Chicago's city ordinance imposed a fine on “any person who shall appear in a public place . . . in a dress not belonging to his or her sex, *with intent to conceal his or her sex* (emphasis added).”¹²⁶

to the Texas Court of Appeals decision ruling that Littleton was, for the purposes of marriage, a man, those in favor of same sex marriage heralded the case as the first instance of same sex marriage in the United States. See Frye & Meiselman, *supra* note 109, for an in-depth discussion of this case.

120. *Littleton*, 9 S.W.3d at 231.

121. *Id.* at 224.

122. GARBER, *supra* note 7, at 140-41.

123. See Elvia R. Arriola, *Faeries, Marimachas, Queens, and Lezzies: The Construction of Homosexuality Before the 1969 Stonewall Riots*, 5 COLUM. J. GENDER & L. 33, 62 (1995); see also FEINBERG, *supra* note 1, at 8. Shockingly, in some cities these laws were still being enforced well into the 1980s. See *D.C. & M.S. v. City of St. Louis*, 795 F.2d 652 (8th Cir. 1986).

124. N.Y. CRIM. PROC. § 887(7) (Consol. 1958).

125. *People v. Archibald*, 296 N.Y.S.2d 834, 836 (N.Y. App. Term 1968), *aff'd*, 27 N.Y.2d (N.Y. 1970).

126. CHICAGO, ILL., MUNICIPAL CODE § 192-8 (1965) (amended 1980).

In countries such as the United States, Canada, and Britain, courts and legislatures are beginning to recognize the identity claims of some members of the transgender community in certain legal contexts. Although courts have tended to be less progressive in the family law context (likely for reasons relating to systemic homophobia),¹²⁷ with respect to issues such as identification documents, the provision of public health care, and employment discrimination, both courts and legislatures are slowly becoming somewhat more sympathetic to the identity claims of transsexual litigants. Transsexual individuals comprise only part of a much larger transgender community, however, and unfortunately the small legal victories and partial legal recognition achieved by transsexual litigants has not been attained by the broader trans community.

IV. STRATEGIES FOR REDUCING TRANS-PHOBIA

A. RECONCEPTUALIZING GENDER

If the relational interpretive processes through which gender identity is in part produced perpetuates the trans-phobia prevalent within our society, what can be done to combat this phenomenon? Gender identities and social understandings about gender will always be developed in part through relational processes. Many aspects of our identities are created in a relational manner. However, it is not the relational development of gendered meanings that perpetuates trans-phobia. The difficulty stems from the false construct of gender that our relational efforts have been socially programmed to try to maintain. Current conceptions of gender demand our relational processes affirm a certain and binary gender order that is not always reflective of reality and, as a result, gender transgressions of all sorts are often experienced as being disruptive. If the binary, static understanding of gender is problematic, then how should we conceptualize gender?

There is significant disagreement among theorists as to a more appropriate, or perhaps less problematic, manner of conceptualizing gender.¹²⁸ However, progress towards the reduction of trans-phobia does

127. SHARPE, *supra* note 54, at 60.

128. In examining typical responses to transvestism, Marjorie Garber discusses both the manner in which the possibility of a "third," as she describes it, challenges binary thinking, thus introducing a crisis, and the tendency to erase the "third" by assimilating it into "either the male or female pole of the hypothetical gender binarism . . ." GARBER, *supra* note 7, at 10. Garber describes this notion of the "third" in the following manner: "the 'third term' is *not* a *term*. Much less is it a *sex* . . . [t]he 'third' is a mode of articulation, a way of describing a space of possibility. Three puts in question the idea of one: of identity, self-sufficiency, self-knowledge." *Id.* at 11. Patrick Califia argues that a demarcating line between genders does exist, but that the boundary is unclear; Califia proposes that one's relationship to one's physical body ultimately determines the particular point on a bipolar gender continuum at which one is located. See Pat Califia, *Who Is My Sister? Powersurge and the Limits of Our Community*, VENUS INFERS, Summer 1993, at 4.

not necessitate the whole-hearted adoption of any one reconceptualization of gender; it is actually the process of re-conceptualizing itself that will do the subversive work needed. It is not necessary, or even desirable, that we settle upon some new dogma that instructs us upon how to understand gender. A more plausible approach involves a gradual evolution in understandings of gender identity. An understanding that, whatever gender is, it is not a dimorphic and static reality, would alleviate the cognitive dissonance experienced when one encounters gender expressions that cannot be reconciled with a binary understanding of gender (and consequently are disruptive to one's efforts to maintain the illusion of this static binary through the relational construction of one's own gender identity). Gender identity would continue to be produced, in part, relationally,¹²⁹ but gender ambiguity, illusory gender identities and gender transgressions would no longer pose such a threat to our self-understandings because we would not be troubled with striving to fit our perceptions into these very narrowly construed and restrictive categories. Support for this proposition may be found in the tolerance for gender

Califia's argument is discussed in Nan Alamilla Boyd's piece *Bodies in Motion: Lesbian and Transsexual Histories*. Nan Alamilla Boyd, *Bodies in Motion: Lesbian and Transsexual Histories*, in *A QUEER WORLD: THE CENTER FOR LESBIAN AND GAY STUDIES READER* 134, 143-45 (Martin Duberman ed., New York University Press 1997). In *Female Masculinity* Judith Halberstam advocates for the conceptualization of gender as a system of "gender preference" as opposed to compulsory gender binarism. *Halberstam, supra* note 34, at 370-71. She suggests that "[a] system of gender preference would allow for gender neutrality until such a time when the child or young adult announces his or her or its gender." *Id.* Halberstam's proposal is developed in response to Marjorie Garber's suggestion that transvestites and transsexuals demonstrate the fallacy of a binary system of gender by introducing the possibility of a "third space" that consequently destabilizes the binaries. *GARBER, supra* note 7, at 11; *see also* Halberstam, *supra* note 34, at 369. Halberstam questions the subversive potential of conceptualizing a "third space;" she argues that "[u]nfortunately, as in all attempts to break a binary by producing a third term, Garber's third space tends to stabilize the other two." *Id.* She further critiques the notion of a "third space" by suggesting that "thirdness" tends to homogenize many different gender variations under the banner of "other." *Id.* at 370-71. A counter-argument to Halberstam's critique of the subversive potential of incorporating the possibility of a "third" into concepts of gender, is found in Gilbert Herdt's suggestion as to what the "third" represents. Gilbert Herdt, *Third Genders, Third Sexes*, in *A QUEER WORLD: THE CENTER FOR LESBIAN AND GAY STUDIES READER* 100 (Martin Duberman ed., New York University Press 1997). He suggests "[t]he presence of only two categories, a dyad, creates an inherent relationship of duality of spirit and flesh, an inevitable oppositionality, an instability. When, however, a third category or class is introduced, a new dynamic develops between the dyadic agents." *Id.* at 105. Quoting German sociologist George Simmel, he argues "[t]he dyad represents both the first synthesis and unification, and the first separation and antithesis. The appearance of the third party indicates transition, conciliation, and the abandonment of absolute contrast." *Id.* Herdt's reference to the impact of introducing a "third" on the dynamic between dyadic agents is of particular interest when contemplating the suggestion that gender is produced, in part, through relational processes.

129. It may be, however, that our binary understanding of gender causes relational processes to play a larger role in the production of gender identity than might be the case if gender was understood in a more fluid sense. Inherent within the concept of the binary is a relational method of interpreting others.

diversity found in some other cultures that do reject binary systems by formally recognizing more than two sexes and/or genders.¹³⁰

One such example is that of the Two-Spirited individuals found within the traditional societies of numerous Native American nations. Several academics have documented the honored status enjoyed by Two-Spirited individuals in many Native American societies.¹³¹ In *Transgender Warriors*, Feinberg recounts a discussion she had with a Two-Spirited poet and writer named Chrystos. In discussing her community's understanding of gender, Chrystos commented:

The whole concept of gender is more fluid in traditional life. Those paths are not necessarily aligned with your sex, although they may be In traditional life a Two-Spirit person can be heterosexual or what we would call homosexual The gender fluidity is part of a larger concept, which I guess the most accurate English word for is 'tolerance.' It is a whole different way of conceiving how to be in the world with other people. We think about the world in terms of relationship, so each person is always in a matrix, rather than being seen only as an individual — which is a very different way of looking at things.¹³²

Scholars have also documented cultures in Papua, New Guinea that accept intersex individuals who, at birth, have female genitalia but at puberty experience a deepening of the voice and the descent of testes, as a third sex.¹³³ Among the Sambia people of New Guinea, these individuals are known as *kwolu-aatmwol*, which means "a person of transformation."¹³⁴ "For Sambia, the *kwolu-aatmwol* begins at birth with the sex assignment of the infant into a third category, and fans out in development to embrace origin myths and social practices."¹³⁵

These examples of cultures which recognize a third gender, or a third sex, are offered not to suggest that an understanding of gender as a system of three would be the preferred conceptualization in our culture, but rather as examples of the tolerance for gender diversity that arise within cultures that do not restrict themselves to strict binary models when thinking about

130. Herdt, *supra* note 128, at 105.

131. See KATZ, *supra* note 101, at 281; see also CALIFIA, *supra* note 72, at 124 (where he notes that the Gay American Indian History Project has identified over one hundred and thirty Native American tribes that had berdache-like roles for men). Several of these tribes also recognized gender variant roles for women. I note that Califia suggests that Katz's characterization of these figures places too much emphasis on their same-sex eroticism and not enough on the cross-gender identities these individuals maintained. *Id.* at 123. The controversy over co-opting historical trans figures by gay historians is referenced in SHARPE, *supra* note 54, at 19.

132. FEINBERG, *supra* note 1, at 27.

133. See, e.g. Herdt, *supra* note 128, at 101.

134. *Id.*

135. *Id.*

gender. So how can the law be used to instigate a re-conceptualization of gender in our society?

B. ELIMINATING UNNECESSARY GENDER DESIGNATIONS

Sex designation and distinction, and concomitantly gender designation and distinction, in our legal system are ubiquitous. The assumption that sex/gender must be designated in every legal context, and most social ones, reinforces the notion that gender is static and that it is comprised of only two categories. It also presumes, erroneously, that gender can always be ascertained. Both the process of re-evaluating the pervasive and unchallenged designation of gender, by creating a discourse in which we question the relevance of gender to a particular context, as well as the end result of such a re-evaluation, would contribute to a de-emphasis and corresponding re-conceptualization of gender. While there are contexts that may legitimately require sex and/or gender distinction, there are others in which it is unnecessary. The designations of both sex and gender should be critically challenged and in those contexts where their utility is questionable, such designations should be eliminated. This type of reform could be pursued through both legislative and legal processes.

Elizabeth Reilly offers one example of a legal sex distinction that is unnecessary. In Reilly's recent proposal, regarding the legal response to intersexuality, she suggests that the law's "wholesale acceptance of the deeply rooted assumption that sex identity is simple and binary . . . has unnecessarily made the legal system an active enforcer of differentiation that operates inexorably to exclude intersexuals from basic protections of the law."¹³⁶ Reilly argues that one insignificant change in current systems of legal record keeping, that of designating sex identification at birth on health data collection forms rather than on birth certificates, could remove a legal stumbling block that profoundly impacts intersex individuals. Concomitantly, such a shift would impact current understandings of sex and gender by disaggregating the concept of "'identification,' an external process, . . . with 'identity,' a subjective and internal process not susceptible to external assignment."¹³⁷ Reilly suggests that legal sex designation be delayed until such time as the child has "a more mature age, when the identity will show and define itself."¹³⁸ Reilly argues that by the time "sex identity" begins to matter for legal identification purposes, the vast majority of children will have a reasonably clear sense of their identity;¹³⁹ she suggests that delaying the designation of sex on the child's

136. Elizabeth Reilly, *Radical Tweak — Relocating the Power to Assign Sex: from Enforcer of Differentiation to Facilitator of Inclusiveness: Revising the Legal Response to Intersexuality*, 12 *CARDOZO J.L. & GENDER* 297, 299-300 (2005).

137. *Id.* at 312.

138. Reilly, *supra* note 136, at 316.

139. *Id.* For the vast majority, gender identity will correspond with anatomical sex, but as Reilly reports, a significant minority of children are born with intersex conditions. *Id.*

legal documents would allow the child's own preferences to prevail.¹⁴⁰ It would also permit many transfolks, who report having had an awareness of their transgenderism from the point of childhood or early adolescence,¹⁴¹ the possibility of avoiding many of the legal battles and denial of basic rights currently faced by members of the transgender community who are unable to obtain legal identification documents. Reilly notes that in most contexts, including some legal ones, we are already relied upon to self-identify our sex and gender.¹⁴² She also notes that in the context of adoption, birth certificates are often amended to "remove one set of indisputable biological facts in order to replace them with another set of social facts deemed to be of greater significance to the individual for identity purposes. . . . These changes are not required for legal purposes, as other documents . . . establish the legal reality."¹⁴³ A similar practice of amending legal documents to reflect social facts, rather than biological ones, occurs in some Canadian provinces, where the birth certificates of children born to lesbian and gay couples can now indicate, as the parents, the names of the biological mother and co-parent or biological father and co-parent.¹⁴⁴

Although Reilly's focus is on intersex individuals and her proposal focuses on sex assignment rather than gender assignment, what she suggests essentially is that sex identification for legal purposes be delayed until such time as the child has come to some self-understanding of their gender identity. In other words, sex identification should follow gender identification rather than the other way around. As Reilly and others have noted, precedent for such a process of self-identification already exists in the context of racial identification.¹⁴⁵ Race, which as critical race theorists

at 299.

140. Reilly, *supra* note 136, at 316.

141. JASON CROMWELL, *TRANSMEN AND FTMS: IDENTITIES, BODIES, GENDERS, AND SEXUALITIES 2* (University of Illinois Press 1999).

142. Reilly, *supra* note 136, at 315.

143. *Id.* at 299 n.5.

144. In British Columbia two lesbian couples, each of whom had babies with assisted insemination, successfully brought a human rights complaint arguing that the Vital Statistics Registrar had discriminated against them on the ground of sexual orientation by refusing to name both mothers on the birth certificate. *Gill and Maher, Murray and Popoff v. Ministry of Health*, [2001] BCHRT 34. Upon judicial review the court determined that the Human Rights Tribunal did not have jurisdiction to order a change to the Vital Statistics form. *Minister of Health Planning v. Human Rights Tribunal*, [2003] BCSC 1112. However, the Minister of Health has amended the form and it is now possible to record the names of both mothers or both fathers on the birth certificates of children born to gay couples. See British Columbia Ministry of Health Service, Registration of Live Birth, <http://www.vs.gov.bc.ca/forms/vsa404c.pdf> (last visited Mar. 9, 2007). Similar litigation is currently underway in Ontario. See *M.D.R. v. Ontario (Deputy Registrar General)* [2006] O.J. No. 2268. See also *A.A. v. B.B.*, [2007] O.C.J. No. 2 (in which the Ontario Court of Appeal granted legal status to three parents, a lesbian couple and the biological father).

145. Reilly, *supra* note 136, at 324-25; see also Greenberg, *supra* note 118, at 926, 939-40.

have argued is in part a social construction, is not designated on birth certificates because it is considered to be a critical aspect of self identity and it is “not ethical for anyone to exert power to define a feature of [another’s] core identity.”¹⁴⁶

The legal reform that Professor Reilly proposes is relatively simple, straightforward and minimal. However, the impact on the lives of many transgender individuals would be significant. In thirty-four American states, transsexuals, even those who have undergone sex reassignment surgery, are legally unable to change the sex designation on their birth certificates,¹⁴⁷ which means they also cannot change their driver’s licenses or passports.¹⁴⁸ For these individuals, because their physical appearance does not correspond with the sex indicated on their identification documents, activities such as driving a car or crossing a national border become difficult, if not impossible.

The reduction of unnecessary sex/gender designations or distinctions could also be achieved through a shift in the litigation strategies typically employed by those advocating on behalf of transsexual claimants. Justice and equality for transfolks is often pursued through efforts to achieve legal recognition of one’s gender identity (i.e., recognition of one’s “preferred” gender); often recognition is pursued through attempts to receive legal designation of the sex that normatively correlates with one’s gender identity. These efforts occur in many areas of law including family law (i.e., recognition of marital unions and parental rights), employment law (i.e., access to gendered workspaces such as office washrooms), and human rights and equality law (i.e., the treatment of transgender inmates). Although gains have been made through such efforts, the difficulties with this approach to reform are: (i) it endows the courts with the privilege of, and authority to, both define the categories of man and woman/male and female and then serve as the gatekeepers of those categories; (ii) it is a strategy that has often not been particularly successful in those cases where the dispute involves an adjudication between the rights and interests of transgender individuals and those of other groups such as “women;” and (iii) it concedes, rather than challenges, the appropriateness of designating gender in whatever context is at issue.

A review of transgender jurisprudence suggests that endowing the courts with the power to create a formula to ascertain the sex and/or gender of a transgender litigant, which is the predominate method employed by

146. Reilly, *supra* note 136, at 324.

147. *Id.* at 299 n.7 (citing Janine M. Demanda, *Our Transgressions: The Legal System’s Struggle with Providing Equal Protection to Transgender and Transsexual People*, 71 UMKC L. REV. 507, 522 (2002)).

148. That this is the case challenges the efficacy of indicating on legal documents “M” or “F” for purposes of identification, since for these individuals such an indication may actually be misleading. In New York, the driver’s license of a post-operative transsexual can be amended by leaving the sex designation blank. *Id.* at 313 n.64.

courts today to adjudicate gender identity claims, does not serve the interests of a great many members of the transgender community. Under the most progressive formula used by American courts, an individual's proclaimed gender identity will only be acknowledged if the court deems the individual to have attained what they have described as psychological and anatomical harmony.¹⁴⁹ In other words, while the court may sometimes recognize the post-surgical reality of a litigant who has undergone sex reassignment surgery, transgender litigants who are pre-operative, or non-operative are unlikely to receive legal recognition from the court. What is worse, in most American cases adjudicating transgender claims, particularly in the family law context, the courts have ascribed to a strictly biological approach to defining the categories of man and woman.¹⁵⁰ Following the British precedent established in *Corbett v. Corbett*,¹⁵¹ the courts apply a tripartite test that designates sex, and for the courts' purposes gender, based solely on the gonads, genitals, and/or chromosomes of the litigant. Under this analysis, the identity claims of even those transgender individuals who have undergone the very most to normatively reconcile their physical being with their gender identity, those being post-operative transsexuals will be denied.¹⁵²

Even in cases where the courts have ascribed to the more progressive psychological and anatomical harmony formula rather than a purely biological (gonadal, genital, chromosomal) test, the criteria the courts have selected to ascertain whether psychological and anatomical harmony has been achieved, has at times been trans-phobic, homophobic and/or sexist. For instance, in the marriage context, the determining factor was often the post-surgical capacity of MTF transwomen to be vaginally penetrated, thus ensuring their ability to fulfill their marital obligations.¹⁵³ In *M.T. v. J.T.*, the court held "for purposes of marriage under the circumstances of this case, it is the [post-operative] sexual capacity of the individual which must be scrutinized."¹⁵⁴ Sharpe suggests that some scholars continue to contend that post-operative transsexuals should be granted legal recognition,

149. The origins of this "test" can be traced back to cases in which the courts recognized the identity claims of the litigants because their anatomy had been brought into conformity with their psychological sex via sex reassignment surgery. See, e.g. In the Matter of Anonymous, 293 N.Y.S.2d 834, 837 (N.Y. Civ. Ct. 1968). See also *M.T. v. J.T.*, 355 A.2d 204, 210 (N.J. Super. Ct., App. Div. 1976).

150. *Littleton*, 9 S.W.3d at 223. For a general discussion of American jurisprudence on this point, see SHARPE, *supra* note 54, at 65.

151. *Corbett v. Corbett*, [1971] P. 83, 106 (Prob., Divorce & Adm. Div.).

152. And thus we have the devastating result in cases such as *Littleton*, where, even though at the time of marriage her gonads and genitals fit the court's definition for a woman, they *post facto* nullified the marriage of a grieving post operative trans woman because she had the wrong chromosomes. *Littleton*, 9 S.W.3d 223.

153. *M.T.*, 355 A.2d at 209. For a discussion of this jurisprudence, see SHARPE, *supra* note 54, at 61-65.

154. SHARPE, *supra* note 54, at 61-65.

provided they can fulfill the role of the sex in which they have been assigned.¹⁵⁵

Due to the complexity, nuance, and in particular, individuality of both sex and gender identity claims, not unlike racial and ethnic identity claims, where it is possible, litigants should develop legal arguments that remove from the courts the obligation and authority to define and gate keep the categories of man and woman/male and female. One tactic for removing from the courts this impossible task is to challenge the necessity and legality of the sex/gender designation itself. For example, in Canada, courts engaged in adjudicating the validity of a marital union will no longer be faced with the difficult task of delving into the gonads, chromosomes, or capacity for vaginal penetration of the litigants because it is no longer necessary to have a vagina to get married in Canada. With the advent of same-sex marriage, the need for sex/gender designations have been removed from this particular legal context.¹⁵⁶

Alternative attempts to have employers or governments accommodate individual claimants' own definitions of gender and particular identity claims, litigation strategies in some cases, particularly where the likelihood is that identity claims would be resolved within a balancing of rights analysis, should involve critically challenging the necessity or validity of the gender based designation at issue.

In *Goins v. West Group*, the Supreme Court of Minnesota ruled that Julienne Goins' employer did not violate the Minnesota Human Rights Act by refusing Goins, a transsexual woman, access to the women's washroom at work.¹⁵⁷ The Minnesota Human Rights Act provides protection against discrimination for individuals "having or being perceived as having a self-image or identity not traditionally associated with one's biological maleness or femaleness."¹⁵⁸ There was no dispute among the parties that Goins presented as, and conceived of herself as, a woman. Goins alleged that the employer had engaged in impermissible discrimination by designating the use of washrooms based on biological sex rather than based on gender identity. Neither Goins, her employer, nor the court, challenged the validity of enforcing a gender based designation for the use of bathrooms. The dispute in this case, not unlike in *Nixon* and in many other cases,¹⁵⁹ was over whose definition of gender should govern: Was Goins woman enough to use the women's washroom? When a case follows this course, courts tend towards a balancing of interests analysis — weighing

155. SHARPE, *supra* note 54, at 61.

156. Marriage for Civil Purposes Act, 2005 S.C., ch. 33 (Can.).

157. *Goins v. West Group*, 635 N.W.2d 717 (Minn. 2001).

158. *Id.* at 722.

159. *See, e.g. Goins*, 635 N.W.2d at 722; *see also* *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1087 (7th Cir. 1984), *Richards v. U.S. Tennis Ass'n*, 400 N.Y.S.2d 267 (1977).

the interests of female born women with those of transwomen — and unfortunately, under this analysis, the transsexual litigants tend to lose.

In *Goins*, the court accepted, without any critical analysis, the assumption that “where financially feasible, the *traditional and accepted practice* in the employment setting is to provide restroom facilities that reflect the *cultural preference* for restroom designation based on biological gender.”¹⁶⁰ Imagine the reaction were this sort of “status quo reasoning” unquestioningly utilized in the context of other types of discrimination or equality claims. That said, in many jurisdictions this is the social climate in which these cases are currently being adjudicated and this must be kept in mind in order to develop effective litigation strategies.

Finally, this type of litigation concedes the validity of making these gender designations in the first place and as a result the subversive impact of this type of litigation does little, if any, work for those transpeople whose gender identity either varies significantly over time or place or simply does not fall neatly within one of the two categories currently used to designate gender. In *M.T. v. J.T.*, the court, quoting the trial judge, stated, “if the psychological choice of a person is medically sound, *not a mere whim*, and *irreversible* sex reassignment surgery has been performed, society has no right to prohibit the transsexual from leading a *normal life*.”¹⁶¹ Rather than promote a more fluid and nuanced conception of gender, cases that result in reasoning such as this only serve to validate, if not the reality then certainly the desirability, of a static and binary gender order.

V. CONCLUSION

Gender transgression creates uncertainty because of both the relational, interpretive processes through which gender identity is produced and the gendered nature of many of the social scripts that instruct our interpersonal interactions. This uncertainty is experienced as disruptive because it conflicts with the predominate understanding of gender that our relational, interpretive efforts have been socialized to maintain. While legal reforms can do little to change the relational interpretive processes through which we come to understand ourselves and others, they can gradually change the way we think about gender. How could this be achieved? Through incremental legal reforms, such as the one suggested by Professor Reilly, to deemphasize gender distinction in contexts where it is not necessary.

There are spaces within our society where gender distinction serves little utility yet has been sustained regardless; breaking down gender as a signifying system in these arenas could instigate the proliferation of alternative understandings of gender in other locations. Discourse has

160. *Goins*, 635 N.W.2d at 723 (emphasis added).

161. *M.T.*, 355 A.2d at 207 (emphasis added).

already commenced in which the relevance of gender designation to a particular legal context is critically considered and reconceptualized. Such a reconceptualization would serve two functions. First, an overall de-emphasis of gender as such a predominate social signifier would require us to rewrite many of our social scripts. If we no longer subconsciously relied on gender to determine who opens the door for whom, who breaks eye contact with whom first, and how firm a particular handshake should be, but rather, developed a social episteme that did not rely on ascertaining the gender of those with whom we interact, then we would not feel as uncertain about how to act when confronted with gender ambiguity and/or transgression.

Secondly, an acknowledgement that gender is dynamic and relational in nature would lead to an understanding that whatever gender is, it is not always a static, biologically determined binary. Under such an understanding of gender, the relational processes through which we come to understand ourselves would no longer be burdened with the task of affirming the mythical gender binary; this would serve to reduce the cognitive dissonance currently experienced when presented with gender ambiguity or transgression. The advantage of approaching the reduction of trans-phobia in this manner is that, inherent to this approach is not simply legal acceptance through the granting of a right or other legal recognition — although that too is an important by-product of this strategy — but also the production of tolerance towards others through the promotion of greater self-understanding.

Finally, on a very practical level, perhaps such legal measures would do something to help a community of people who, in navigating even the most mundane aspects of their lives, face barriers on a daily basis because of their gender identity and/or expression. An expression that does not fit neatly within the heavily policed norms delineated by a population, which relies upon them in order to avoid the discomfort of arriving at a truer understanding of what it means to be masculine or feminine or masculine and feminine or feminine and masculine or neither.