NOTES

SELF-DETERMINATION IN A GENDER FUNDAMENTALIST STATE: TOWARD LEGAL LIBERATION OF TRANSGENDER IDENTITIES

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I. INTRODUCTION

Transgender people face pervasive hostility in multiple arenas of their lives. Physical, psychological, and economic violence is leveled upon those whose identities and actions challenge the stability of the male/female binary.[1] In numerous jurisdictions, it is legal to fire someone who transitions on the job, or deny a student or employee access to restrooms according to his or her gender identity. It may be difficult to find respectful healthcare providers, and hormones and sex reassignment surgery may be unobtainable.[2] One's gender identity may be denied by a legal regime which vigilantly polices the brutal boundaries of male and female.[3]

In regulating gender diacritically, the state dramatically curtails individuals' bodily and spiritual autonomy and the opportunity to self-actualize. To fully realize the Fourteenth Amendment's promise of liberty, people must be able to determine gender for themselves. This article attempts to build a foundation for positing a right to gender self-determination rooted in the Due Process Clause of the Fourteenth Amendment.

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1. Jamison Green, *Introduction* to PAISLEY CURRAH & SHANNON MINTER, TRANSGENDER EQUALITY: A HANDBOOK FOR ACTIVISTS AND POLICYMAKERS 1, 10-11 (2000).

2. *Id.* at 11.

3. *See, e.g.*, Taylor Flynn, *Protecting Transgender Families: Strategies for Advocates*, 30 SUM HUM. RTS. 11, 13 (2003); Green, *supra* note 1, at 10-11.

Articulating a right to gender self-determination serves both realist and revolutionary aims.[4] Asserting this right acknowledges that current social and self understanding requires a significant element of gendered thought.[5] Indeed, it is arguable that given the importance of gender in our culture, identification of one's gender as male or female is a prerequisite to one's legibility as human;[6] gender nonconforming people may be treated as less than human by both society and a legal regime that perceives many transgender claimants as invisible.[7]

The content of the self-determination claim simultaneously reveals its libratory potential. Claiming that all people have a right to determine their genders destabilizes the male/female binary upon which numerous social spaces and legal rights, entitlements and documents depend. Such action does not necessitate a destruction of the categories "male" and "female," but it does permit their transformation and the addition of infinite new classifications of individuals' genders within and outside of the gender categories society currently comprehends.[8]

This article does not hypothesize a particular outcome of the state's allowance of gender self-determination. At its most conservative, gender self-determination could mean only that people may self-identify as male or female. But given the discussion that follows, this result appears insufficient. Alternatively, the state could create numerous gender categories (e.g. male, female, genderqueer, bi-gendered, two-spirit) into which people may self-identify, recognize everyone's gender self-identification whether or not that identification is within a gender category already acknowledged by the state, or refuse to take any cognizance of gender. The project of analyzing the implications and administrative feasibility of these and other approaches is crucial, but it is a separate undertaking for another day.

Here, I attempt to demonstrate some of the many reasons why permitting gender self-determination is a logical and humanitarian imperative, and to lay the groundwork for claiming that the liberty guarantee of the Fourteenth Amendment's Due Process Clause protects this right. Part II defines the gender-related terminology utilized herein and discusses the inadequacy of "male" and "female" to accurately capture the diversity of existing gender identities. Part III briefly presents divergent medical ideologies regarding gender and then argues that law, rather than reflecting genders as they exist naturally, actually plays a substantial role in creating gender as understood in our society.

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4. *Cf.* JUDITH BUTLER, *Beside Oneself: On the Limits of Sexual Autonomy*, *in* UNDOING GENDER 37, 38 (2004).

5. *Id.* at 37.

6. JUDITH BUTLER, *Gender Regulations*, *in* UNDOING GENDER 52 (2004); JUDITH HALBERSTAM, *An Introduction to Female Masculinity*, *in* FEMALE MASCULINITY 23 (1998).

7. JUDITH BUTLER, *Doing Justice to Someone: Sex Reassignment and Allegories of Transsexuality*, *in* UNDOING GENDER 58 (2004).

8. BUTLER, *supra* note 4, at 38.

Finally, Part IV provides the foundations for articulating a right to gender self-determination as an element of the Due Process Clause's liberty guarantee. This section tracks the Court's move from a narrow understanding of a right to privacy toward a broader notion of a right to liberty, and discusses the value placed by the Court on autonomy and self-actualization as elements of this liberty guarantee. I employ the emerging awareness analysis of liberty interests used in *Planned Parenthood of Southeastern Pennsylvania v. Casey*[9] and *Lawrence v. Texas*[10] to posit an emerging awareness of the rights of transgender people and the complexity of individuals' gender identities as manifested in both statutory and case law.

II. TRANSCENDING THE BINARY: THE DIVERSITY AND FLUIDITY OF GENDER IDENTITIES

Many pieces of writing about gender nonconforming people begin by defining the myriad of terms used to describe the diverse gender identities of such individuals.[11] The discussion of terms and identities below is intended, in part, to give the reader an understanding of the meanings attached to them throughout this article.[12] Yet its primary purpose is to provide a brief (and by no means exhaustive) survey of the complexity of existent gender identities. By understanding the richness of the diversity of genders within this society, and thus the humanitarian and legal unworkability of operating exclusively within a male/female binary defined and regulated by the state, the need for a right to gender self-determination becomes clear.

Throughout this article, "transgender" (or "trans") is used to refer to all people who challenge traditional notions of how women and men should appear and behave, whether or not they self-identify as trans.[13] The term thus includes androgynous and genderqueer people, drag queens and drag kings, transsexual people, and those who identify as bi-

9. 505 U.S. 833 (1992).

10. 539 U.S. 558 (2003).

11. *See, e.g.*, Taylor Flynn, *Transforming the Debate: Why We Need to Include Transgender Rights in the Struggles for Sex and Sexual Orientation Equality*, 101 COLUM. L. REV. 392 (2001); Paisley Currah & Shannon Minter, *Unprincipled Exclusions: The Struggle to Achieve Judicial and Legislative Equality for Transgender People*, 7 WM. & MARY J. OF WOMEN & L. 37, n.1 (2000); Shannon Minter, *Do Transsexuals Dream of Gay Rights? Getting Real About Transgender Inclusion in the Gay Rights Movement*, 17 N.Y.L. SCH. J. HUM. RTS. 589, n.4 (2000).

12. For succinct definitions of many terms relating to transgender identities, *see* LISA MOTTET & JOHN M. OHLE, TRANSITIONING OUR SHELTERS: A GUIDE TO MAKING HOMELESS SHELTERS SAFE FOR TRANSGENDER PEOPLE 10 (2003).

13. Flynn, *supra* note 11. *See also* Lie v. Sky Publishing Corp., 15 Mass. L. Rep. 412 (Super. Ct. 2002), at **2-3 (defining transgender as "a distinct umbrella term used to describe all individuals who exhibit a gender identity that does not conform to societal expectations, including transsexuals, transvestites, and others who engage in a gender expression that is different from that associated with their biological sex.").

gendered, third gender or two-spirit. "Gender identity" refers to one's inner sense of being female, male, or some other gender.[14] Transsexual individuals are those whose gender identities are different from the gender assigned to them at birth, and include pre-operative, post-operative, and non-operative people.[15]

The ever-increasing number of terms used to self-identify and describe others' genders indicates the semantic inadequacy of "male" and "female" or "man" and "woman" to articulate this fundamental element of personhood. Indeed, when used to categorically describe a group of people, even all of the terms mentioned above may be insufficient. Just as people's identities contain other signifiers—such as those referring directly to race, nationality, sexual orientation, class, and religion—individuals may identify as any combination of gender identity referents simultaneously or identify differently in different contexts or communities. Furthermore, two individuals may deploy the same signifier to identify themselves or their communities, but mean very different things by the descriptor they choose. And various individuals may view one person's gender differently and thus deploy different gender signifiers to refer to that individual.

In her work on female masculinities, Judith Halberstam discusses how "butch" has become "a master signifier for lesbian masculinity," while noting that the diversity of butch lesbian gender identities and sexualities includes hard butches, soft butches, diesels, daggers and studs.[16] Halberstam proposes a conception of "the transgender butch that [does] not presume transsexuality as its epistemological frame."[17] This is not to deny the existence of shared elements of experience and oppression common between these two groups. But, understanding the existence of multiple female masculinities, as well as the genders of female-to-male transsexual individuals (FTMs) who may identify as such before, during, and/or after transition, and trans men who identify as men rather than FTMs, provides an opportunity to recognize that numerous genders inhabit the trajectories that deviate from female and male as traditionally conceptualized. If we accept that diacritical gender categories are insufficient and recognize that it may be impossible to capture one's gender in a singular term, it is evident that employing a male/female binary as the solitary framework from which others' genders are understood is bound to produce misidentifications.

Reliance on a gender binary not only produces gender

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14. Green, *supra* note 1, at 3.

15. *Id.* Transsexual people may always identify as transgender or transsexual, may do so only for a finite time such as before or during their transition, or may never identify as transgender or transsexual.

16. JUDITH HALBERSTAM, *Lesbian Masculinity: Even Stone Butches Get the Blues*, *in* FEMALE MASCULINITY 120-121 (1998).

17. JUDITH HALBERSTAM, *Transgender Butch: Butch/FTM Border Wars*, *in* FEMALE MASCULINITY 146 (1998).

misidentifications of people both within and outside the binary's narrow line; it may also tacitly—through gendered social norms such as those governing dress, behavior, and the sex-segregation of some public spaces, and through gendered legal entitlements and classifications—coerce the transgender person's actions and permit punishment for those refusing to conform. For example, a transsexual woman may be told she cannot marry a man, or the legal validity of her heterosexual marriage may be denied.[18] And trans people may decide not to use public restrooms at their schools or places of work in order to avoid being told they are in the "wrong" restroom and disciplined—formally or via assault—for this transgression.[19]

When the paradigm for conceptualizing gender is itself radically shifted, much of the violence committed upon transgender bodies and souls may be eradicated.[20] Social forces will always play a role in drawing the parameters and, derivatively, in identifying the membership within any gender category. But the state's power in this regard constitutes a damaging invocation of natural law in order to administer identity by endorsing majoritarian social forces to the detriment of those who cannot or chose not to conform.

III. SO WHAT IS GENDER?

A. THE RELEVANCE OF MEDICAL AND LEGAL THOUGHT

The reader is right to problematize a framework for understanding gender which posits the question "what is gender?" and then invites a narrative of medical and legal discourses that govern the production and regulation of the gendered subject within our society. Indeed, reliance upon often elitist professional renderings of gender seems counter to libratory aims in this regard. Framing arguments for gender liberation in terms that imply an acceptance of gender's medicalization risks reifying the normative model that the very claim seeks to deconstruct.

Of course, the impersonal "expert" opinions of jurists, doctors and psychologists should not have the power to define people's genders and coerce them into recitation of particular narratives in order to access the

18. *E.g.*, *In re* Estate of Gardiner, 42 P.3d 120 (Kan. 2002)

19. *See* www.pissr.org (last updated Dec. 14, 2004); Chess et al., *Calling All Restroom Revolutionaries!*, *in* THAT'S REVOLTING! QUEER STRATEGIES FOR RESISTING ASSIMILATION 189 (Matt B. Sycamore ed., 2004).

20. Though I do not devote a specific section of this article to an analysis of the physical, psychological and economic harms wrought by transphobia and the regulation of gender, a variety of these harms are mentioned when discussing particular cases throughout the article. For more on hate crimes, *see infra* note 34.

hormones, surgeries and legal protections they require.[21] But under the current paradigm, understanding, manipulating and exploding these regulatory entities is prerequisite to obtaining the maximum gender self-determining agency possible for any transgender individual. Courts often rely upon medical thought about what constitutes one's sex and evidence of medical or psychological interventions because of gender nonconformity when called upon to justify legal regulations regarding gender. This is true both of courts that fail to respect the gender identities of transgender people[22] and those that are cognizant of trans people's rights to protection under law.[23] Medical opinions thus warrant brief discussion to at least aver that the lack of consensus amongst doctors and psychologists regarding the determinants of sex and the primacy to be afforded to gender identity indicates flaws in the law's frequent employment of the essentialist notion that people are immutably either male or female.

Rather than relying upon more simplistic notions, some psychologists, doctors and scientists now believe that eight factors must be considered when determining one's sex.[24] Of these, the primary determinant of sex is recognized to be gender identity.[25] Considering the

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21. For a thorough discussion of the "contentious and oppressive relationship between the medical establishment and gender transgressive persons," see Dean Spade, *Resisting Medicine, Re/modeling Gender*, 18 BERKELEY WOMEN'S L.J. 15, 18 (2003); *see also* JUDITH BUTLER, *Doing Justice to Someone: Sex Reassignment and Allegories of Transsexuality*, *in* UNDOING GENDER 58 (2004). Even in light of this critique, it warrants noting that it is possible to deploy medicalized understandings of gender identity in the courtroom in order to advance the claims of transgender litigants. This is particularly true when averring that discrimination against transgender individuals violates state statutory prohibitions on disability discrimination. *See* Jennifer L. Levi, *Clothes Don't Make the Man (or Woman), But Gender Identity Might*, 15 COLUM. J. GENDER & L. 90 (2006). "By incorporating a medical claim associated with one's gender identity or gender expression, courts can distance themselves from the particular facts and circumstances of a case and take seriously the dysphoria experienced by a plaintiff's forced conformity to a gender norm." *Id.* at 104.

22. *See, e.g.*, *In re* Heilig, 816 A.2d 68, 71-79 (Md. 2003) (discussing "medical aspects" of "transsexualism" at length and acknowledging statutory recognition in Maryland that gender can be changed, but ultimately denying petitioner's request for legal gender change in part because of absence of evidence that petitioner had undergone sex reassignment surgery); *In re* Estate of Gardiner, 42 P.3d 120, 122-125, 132 (Kan. 2002) (referencing Stedman Medical Dictionary's definition of transsexuality, "intersex conditions," and medical procedures employed in transsexual woman's transition, but finding her to be "male for purposes of marriage").

23. *See, e.g.*, Manago v. Barnhart, 321 F.Supp. 2d 559, 563-565, 570 (E.D.N.Y. 2004) (citing psychotherapists' descriptions of Gender Identity Disorder and claimant's history of treatment for depression related to GID, and ordering remand to calculate amount of disability benefits to which claimant is entitled); Smith v. City of Salem, Ohio, 378 F.3d 566, 568 (6th Cir. 2004) (stating that plaintiff "has been diagnosed with Gender Identity Disorder ('GID')" and providing the DSM-IV description of GID, and holding that she articulated a cognizable Title VII sex discrimination claim); Schwenk v. Hartford, 204 F.3d 1187, 1193, 1205 (9th Cir. 2000) (noting that while transsexual female plaintiff "never received any medical or psychiatric treatment for gender dysphoria," she identified as a woman from a young age, "used illegally-obtained female hormones prior to incarceration," and provided an expert declaration based on her "medical, psychiatric, and correctional records" that she has a female gender identity, and holding in part that the Gender Motivated Violence Act protects transsexual people.)

24. Janine M. deManda, *Our Transgressions: The Legal System's Struggle with Providing Equal Protection to Transgender and Transsexual People*, 71 UMKC L. REV. 507, 512 (2002).

25. Flynn, *supra* note 11, at 394.

diversity in composition of these factors both in intersex people and those not labeled intersex, some scientists believe that at least five sexes exist.[26] I am not suggesting that these evolutions in medical discourse regarding sex and gender identity should necessarily be dispositive for courts and other factions of the regulatory regime when determining sex for legal purposes. Nonetheless, understanding that some practitioners emphasize the importance of gender identity when determining one's sex for medical purposes has powerful implications given the law's frequent reliance upon medical norms when determining one's legal sex.[27]

In contrast to the understandings of sex which give great weight to gender self-identification, the traditional social and legal view "produces a narrative in which biological sex is immutable, is limited to two categories, and is determined by the body – and in which gender, although socially constructed, is produced in a predictable relation to sex."[28] This model maintains that one's sex may be determined at birth simply by a quick check of an infant's genitals.[29] The genital check becomes the locus from which the child's legibility is read. Before the child can cultivate and express gender for himself, the clothes he wears and the name he is given will announce his gender to the world, and this in turn will allow people to read and characterize his feelings and needs. If the child is labeled a boy, he will presumably display masculine traits. Most importantly, he will *feel* and *know* himself to be a boy and to be masculine; when he feels he is slipping from this masculine norm, he will know that he is deviating. Under this rubric, the genital check is not only an adequate determinant of the child's sex; it is also sufficient to determine the child's gender identity.[30] When sex differences are essentialized in this way, rather than recognized as largely constructed, the law is not responsible for such differences[31] or the categorizations that seem to flow naturally from them, and differential legal treatment based upon allegedly "real differences" is easily rationalized.[32] The implications of the genital check and writing of M or F on the birth certificate are thus enormous.

As we have seen, normative assumptions about sex and gender rest on two primary misconceptions. The first is that sex is wholly immutable. The second is that sex is determined by genitalia rather than by gender identity. Based upon these premises, transsexual people are

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26. deManda, *supra* note 24, at 511; Patricia A. Cain, *Stories from the Gender Garden: Transsexuals and Anti-Discrimination Law*, 75 DENV. U. L. REV. 1321, 1355-56 (1998).

27. *See id.*

28. Paisley Currah, *Defending Genders: Sex and Gender Non-Conformity in the Civil Rights Strategies of Sexual Minorities*, 48 HASTINGS L.J. 1363, 1371 (1997).

29. *Id.*; Flynn, *supra* note 11, at 394.

30. Currah, *supra* note 28.

31. Mary Jo Frug, *A Postmodern Feminist Legal Manifesto (An Unfinished Draft)*, *in* AFTER IDENTITY 7, 11 (Dan Danielsen & Karen Engle eds., 1995).

32. *See, e.g.* Nguyen v. INS, 533 U.S. 53, 68 (2001); Parham v. Hughes, 441 U.S. 347, 354-55 (1979).

pathologized,[33] violently discriminated against,[34] denied legal and social recognition of their gender identities and refused affordable access to hormones and sex reassignment surgery.[35] Conceptually, trans men and women are distinguished from "real" men and women. Though the depth of analytical thinking by some courts regarding transsexual plaintiffs has evolved since the Seventh Circuit's disposition in *Ulane v. Eastern Airlines* in 1984, the court's final words about the transsexual plaintiff illustrate the ways our culture privileges biological determinism over constructionist conceptions of gender. After denying Ms. Ulane's Title VII claim of sex discrimination, the court stated:

> [E]ven if one believes that a woman can be so easily created from what remains of a man, that does not decide this case...[I]f Eastern did discriminate against Ulane, it was not because she is female, but because Ulane is a transsexual – a biological male who takes female hormones, cross-dresses, and has surgically altered parts of her body to make it appear to be female.[36]

The narrow understanding of gender produced by the privileging of biological factors over gender identity is dangerous not only because it

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33. Gender Identity Disorder (GID) is listed in the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV). *See* AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. 1994). Under the Harry Benjamin International Gender Dysphoria Association standards of care for the treatment of transsexual people, one must obtain a GID diagnosis prior to receiving sex reassignment surgery. See THE HARRY BENJAMIN INTERNATIONAL GENDER DYSPHORIA ASSOCICATION'S STANDARS OF CARE FOR GENDER IDENTITY DISORDERS, SIXTH VERSION (2001), http://www.hbigda.org/Documents2/socv6.pdf.

34. There is currently no comprehensive national data collection of hate crimes committed against transgender people in the United States. The National Coalition of Anti-Violence Programs (NCAVP) provides the most thorough annual reporting of such hate crimes and uses data reported by eleven city- or state-based NCAVP member organizations from across the country. The NCAVP reports 195 hate crimes against self-identified transgender people in 2002, and 247 such crimes in 2003. Clarence Patton, ANTI-LESBIAN, GAY, BISEXUAL AND TRANSGENDER VIOLENCE IN 2003 71, 76, *available at* http://www.avp.org (last visited Mar. 21, 2005). It warrants noting that the NCAVP's data collection forms list gender identity categories as "Female, Intersex, Male, Transgender F-M [and] Transgender M-F" and leave room for an individual to self-identify. *Id.* at 68. Such categorizations might fail to capture transgender individuals who identify as male, female or gender queer rather than FTM or MTF.

35. Procedures associated with sex reassignment surgeries are extremely expensive, often costing tens of thousands of dollars. Insurance providers rarely cover these costs, meaning that the vast majority of people who want hormones or SRS must pay out of pocket. For many people, these financial barriers are insurmountable. *See In re* Heilig, 816 A.2d 68, 78 (Md. 2003) (noting that "[a]s most health insurance companies currently exclude coverage for transsexual treatment, the out-of-pocket cost is often prohibitively expensive"). *See also* HUMAN RIGHTS CAMPAIGN, TRANSGENDER ISSUES IN THE WORKPLACE 20, 25 (2004), http://nmmstream.net/hrc/downloads/publications/tgtool.pdf.

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

permits courts to dismiss trans complainants in such a flippant and demeaning manner. This privileging also provides a rationale for drawing a naturalized corollary between physical anatomy and gender identity and expression such that an individual's gender nonconformity is always understood as a disconnect between her body and her psyche. Transgender people are thus understood not only as socially deviant; their deviations are read as abnormal and unnatural. Theoretically—putting aside for a moment the privileging of biological determinism—a gender conforming post-operative transsexual person can become whole, normal, and natural by transitioning so that the individual's physical body is in accord with his or her gender identity. But the non-transsexual gender nonconforming person can never be "normal" and simultaneously live a life which manifests her gender identity. The genderqueer body does not move to a place of legibility.

Many state actors continue to hold that sex is immutable and determined entirely by a doctor's check of the newborn's genitals, or, at best, that full sex reassignment surgery is required before a transsexual individual's gender identity will be legally recognized.[37] The interplay between the medical and legal regimes' regulation of transsexual bodies should caution against articulating rights-based arguments that rely on medical determinations of an individual's gender identity.[38] Nonetheless, understanding the relationship between law and medicine in the arena of gender illustrates the extent to which legal renderings of gender ignore individuals' realities.

B. GENDER AS A LEGAL CREATION

There is little consistency amongst courts and regulatory regimes with regard to the method by which they determine a party's gender when it is at issue.[39] A person who in one state is deemed legally male will be considered legally female in another jurisdiction. Such state-based variance in legal gender constructions is evidenced in jurisdictions' differing treatment of marriages involving transsexual people.[40] While the majority of courts confronting the issue hold that marriages between a transsexual person and an individual of the opposite sex are invalid same-sex marriages,[41] a very small minority of courts are

37. Flynn, *supra* note 3, at 13.

38. *See generally* Spade, *supra* note 21.

39. *See* David B. Cruz, *Disestablishing Sex and Gender*, 90 CALIF. L. REV. 997, 1054-55 (2002) (discussing various factors courts and other social entities look to when considering what differentiates men from women).

40. *See generally* Flynn, *supra* note 3, at 11-13.

41. *See, e.g.*, *In re* Marriage of Simmons, 825 N.E.2d 303 (Ill. App. Ct. 2005); Kantaras v. Kantaras, 884 So.2d 155 (Fl. Dist. Ct. App. 2004); *In re* Marriage License for Nash, 2003 WL 23097095 (Ohio. Ct. App. 2003); *In re* Estate of Gardiner, 42 P.3d 120, 135, 137 (Kan. 2002); Littleton v. Prange, 9 S.W.3d 223, 231 (Tex. App. 1999).

beginning to recognize such marriages as legally valid.[42] State department of motor vehicle policies for changing the gender designation on one's driver's license[43] illustrate the ways in which gender is inconsistently but forcefully regulated by the state, and the ways this regulation medicalizes gender.[44]

1. THE DRIVER'S LICENSE EXAMPLE

In order to change the gender designation on one's driver's license, the majority of jurisdictions require a letter from a physician testifying that the individual's gender reassignment is complete.[45] Some such policies explicitly require that the applicant has undergone full sex reassignment surgery, while seven states[46] clearly do not require any surgery prior to granting a gender designation change. A minority of states require people to obtain amended birth certificates and/or court ordered gender changes before a corrected driver's license will be issued,[47] and both of these legal requirements mandate evidence of sex reassignment surgery prior to their issuance.[48] Furthermore, a minority of states prohibit transsexual people from ever obtaining a corrected birth certificate.[49]

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42. *See, e.g.*, SHANNON MINTER, NATIONAL CENTER FOR LESBIAN RIGHTS, TRANSGENDERED PERSONS AND MARRIAGE: THE IMPORTANCE OF LEGAL PLANNING (2002), http://www.nclrights.org/publications/pubs/tgmarriage.pdf (noting that "in 1998, a trial court in Orange County, California affirmed the validity of a marriage involving a transsexual man"); M.T. v. J.T. 355 A.2d 204 (N.J. Sup. Ct. 1976).

43. It warrants noting that while such policies are shaped in large part by law and policy regarding legal gender changes, they do not constitute such changes themselves.

44. Much of the information about driver's license policies that follows was gathered while working with the Transgender Civil Rights Project of the National Gay and Lesbian Task Force. Lisa Mottet is largely responsible for the collection of such data.

45. On file with the Transgender Civil Rights Project of the National Gay and Lesbian Task Force.

46. Those states are California, Connecticut, Indiana, New York, Oregon, Vermont, and Washington. On file with the Transgender Civil Rights Project of the National Gay and Lesbian Task Force.

47. On file with the Transgender Civil Rights Project of the National Gay and Lesbian Task Force.

48. *E.g.*, ALA. CODE § 22-9A-19(d) (2005); ARIZ. REV. STAT. ANN. § 36-337(A)(3) (2005); ARK. CODE ANN. § 20-18-307(d) (2005); CAL. HEALTH & SAFETY CODE § 103425 (2005); COLO. REV. STAT. § 25-2-115(4) (2005); CONN. GEN. STAT. § 19a-42 (2005); D.C. CODE § 7-217(d) (2005); GA. CODE ANN. § 31-10-23(e) (2005); HAW. REV. STAT. § 338-17.7 (2004); 410 ILL. COMP. STAT. 535/17(1)(d) (2005); IOWA CODE § 144.23(3) (2005); KAN. STAT. ANN. § 28-17-20(b)(1)(A)(i) (2005); KY. REV. STAT. ANN. § 213.121(5) (West 2005); MD. CODE ANN. [HEALTH-GEN.] § 4-214(b)(5) (2005); MASS. GEN. LAWS ch. 46, § 13(e) (2005); MO. REV. STAT. § 193.215(9) (2005); NEB. REV. STAT. § 71-604.01 (2005); N.J. STAT. ANN. § 26:8-40.12 (West 2005); N.M. STAT. ANN. § 24-14-25(D) (West 2005); UTAH CODE ANN. § 26-2-11(2005); WIS. STAT. § 69.15 (2005). *See also* LAMBDA LEGAL DEFENSE AND EDUCATION FUND, SOURCES OF AUTHORITY TO AMEND SEX DESIGNATION ON BIRTH CERTIFICATES FOLLOWING CORRECTIVE SURGERY (2004), http://www.lambdalegal.org/cgi-bin/iowa/news/resources.html?record=1627.

49. *E.g.*, TENN. CODE ANN. § 68-3-203(d) (2005); *In re* Ladrach, 513 N.E.2d 828, 830 (Ohio Prob. Ct. 1987) (the typesof corrections allowed pursuant to Ohio's birth certificate correction statute do not include altering one's gender designation after sex reassignment surgery.).

Thus, policies such as that in Massachusetts requiring an amended birth certificate before issuing a new driver's license[50] prevent individuals born in states such as Tennessee (which statutorily prohibits gender changes on birth certificates) from ever possessing a license that reflects their gender identity. Simultaneously, people born in a state that permits birth certificate amendments will be able to change the gender designation on their Massachusetts licenses. Such legal idiosyncrasies produce inconsistent results even within one jurisdiction. In Massachusetts, for example, two individuals who were assigned male at birth but identify as women and have undergone identical modes of transition will have different gender markers on their licenses depending on what state they were born in. Given the immense value placed on gender as a method of describing and classifying people in this society, and the numerous ways one uses his or her license on a regular basis,[51] the human implications of this jurisdictional inconsistency may be profound.

2. FACT-FIND MY GENDER! – WHY JURIES AND JURISTS CAN'T GET THE JOB DONE

Is gender a factual issue or a matter of law? Simply posing this question serves as yet another indicia of gender's social construction and the absurdity of state authority to define and regulate it. But some courts do indeed treat gender as an issue of fact, while others analyze it as a matter of law. These analyses in themselves divulge the instability of gender as a legal category and the attempts by law to render fixed and finite that which is so complex and personal that it cannot be determined without understanding the party's gender identity.

In *In re Estate of Gardiner*, the Supreme Court of Kansas acknowledged this categorical inconsistency in legal analyses of transsexual people's genders.[52] The court stated that "the essential difference" between cases that deny the validity of heterosexual marriages involving a transsexual spouse and those that uphold the validity of such marriages is that "the former treats a person's sex as a

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50. The website of the Massachusetts Transgender Political Coalition states that, *inter alia*, an "[a]mended birth certificate" is required in order for a transgender person to change the gender designation on his or her driver's license. *See* http://www.masstpc.org/projects/rmv-changes.shtml (last visited Nov. 29, 2009). *See also* GAY & LESBIAN ADVOCATES & DEFENDERS, TRANSGENDER LEGAL ISSUES IN NEW ENGLAND 33 (2005), http://www.glad.org/rights/Transgender_Legal_Issues.PDF.

51. For example, in addition to their relevance in the law enforcement context, driver's licenses are regularly used as proof of age when purchasing alcoholic beverages and seeking admittance to bars and other age-regulated venues, and as a form of identification when proving eligibility to work or passing through airport security.

52. 42 P.3d 120 (Kan. 2002).

matter of law and the latter treats a person's sex as a matter of fact."[53] Those cases cited in *Gardiner* for the proposition that gender is a factual issue recognize the individual's gender self-identification and dispose of the matter in a way that is favorable to the transgender party.[54] It should not be surprising that considering the factual reality of how people identify and experience their gender appears to steer courts towards a juridical acceptance of that gender. By contrast, when judges allow their normative presumptions to interpolate a factual record which presents the transgender party's gender identity as clear but non-normative, gender is declared a matter of law and trans people's realities become legally illegible.[55]

Amongst courts that treat gender determinations as a factual matter, identifying the determinants of gender is more important to the state in cases determining gender for marriage or document change purposes, rather than in the context of nondiscrimination claims. This is because the question in the marriage and document contexts is precisely identifying a person's gender. With the exception of Massachusetts,[56] all jurisdictions disburse marriage privileges only to opposite-sex couples. The question in the nondiscrimination arena is broader, interrogating whether transgender people are protected by statutory prohibitions on sex discrimination, regardless of their sex.

Central amongst these legally-articulated factual standards for determining gender is the presence or absence of medical interventions, mainly via sex reassignment surgery. In *M.T. v. J.T.*, the New Jersey Superior Court deemed the plaintiff female because she "has become physically and psychologically unified and fully capable of sexual activity consistent with her reconciled sexual attributes of gender and anatomy."[57] Similarly, when determining whether to grant a petitioner a legal gender change, the Court of Appeals of Maryland engaged in extensive review of "the medical literature" regarding transsexual and intersex people.[58] Based on this review, the court stated that gender identity "has received recognition as one of the determinants of gender and plays a powerful role in the person's psychic makeup" and acknowledged the "deep personal, social, and economic interest in having the official designation of his or her gender match what, in fact, it always was or possibly has become."[59] Yet despite its awareness that "the out-of-pocket cost [of SRS] is often prohibitively expensive,"[60] the

53. *Id.* at 132-33.
54. *Id.* at 132-34.
55. *Id.* at 135-36; Ulane v. Eastern Airlines, Inc., 742 F.2d 1081, 1086 (7th Cir. 1984).
56. *See* Goodridge v. Dept. of Public Health, 440 Mass. 309 (2003).
57. 355 A.2d 204, 211 (N.J. Sup. Ct. 1976).
58. *In re* Heilig, 816 A.2d 68, 71-79 (Md. 2003).
59. *Id.* at 79.
60. *Id.* at 78.

court held, pursuant to state statutory law, that sex reassignment surgery is a prerequisite to a legal gender change.[61]

This lack of consistency between jurisdictions in their understanding of people's legal gender suggests law's role in the production of gendered subjects and the arbitrary nature of categorizations based on gender. This revelation is important because many opponents of trans rights rely on arguments of biological fixity to aver that laws which uphold a gender binary are simply codifying and expressing through legal means what exists naturally. Recognizing that jurists, legislators, and policymakers choose amongst biological determinants when defining gender has significant implications for gender self-determination arguments. If any biological and medical factors are excluded from the law's calculus of gender, legal gender is revealed as its own entity rather than a simple codification of that which is biologically recognized. Those arguing that biological determinism precludes the possibility of transsexuality as anything other than an abnormality or perversion must reconcile their allegedly scientific arguments with courts' conscious decisions to ignore some of what is scientifically recognized.

All of these inconsistencies across jurisdictions and gaps in logic in particular cases provide further support for the proposition that gender as we conceptualize it is, in part, a legally-created category rather than only a legal iteration of a biological certainty. Combined with an understanding of the harms posed by rigid and immutable gender categories, this critique of the state's role in creating and upholding our society's understandings of gender shows the need and legal logic of a right to gender self-determination.

III. ARTICULATING THE RIGHT TO GENDER SELF-DETERMINATION: A FOUNDATIONAL PRAXIS FOR GENDER LIBERATION

The inconsistencies displayed by state actors when choosing between determinants of sex for legal purposes indicates both a lack of coherence in how sex is understood, and the ways in which increased scientific understanding (particularly regarding primacy of gender identity) influences legal conceptions of gender. Yet, despite a lack of clarity as to what exactly signifies or constitutes a male or female body, the state maintains a coercive power to create the gender-related legal categories into which one must fit and to determine who is correctly within or outside one category or another. In this way, the legal regime's definitional and categorizing actions constitute a "profoundly powerful

61. *Id.* at 86.

social function" that must be scrutinized.[62] In the preceding sections, I engaged in the beginnings of this critical project by discussing some logical inconsistencies pervasive in state regulations of gender, as well as some of the very real resulting harms. Genuine recognition of the painful denials of liberty caused by gender's regulation and an understanding that the law does not simply manifest natural or biological realities of gender—but rather plays a role in *producing* the male/female binary—provides a strong basis for averring that state power should not be deployed to coerce and regulate gender.

Articulating a fundamental right to gender self-determination, rooted in the Due Process Clause of the Fourteenth Amendment, is one legal vehicle for extracting the power of gender definition from the state. The jurisprudential approach to substantive due process claims employed by a majority of the Court in *Lawrence v. Texas*[63] makes clear that notions of liberty are temporally contingent. In order to give the Fourteenth Amendment Due Process Clause its full effect, courts must therefore take cognizance of the law's—and society's—evolving understandings of normative justice. This comparatively broad, evolving analysis renders possible the assertion of a right to self-determine one's gender as an element of the Due Process Clause's liberty guarantee.

A. FRAMING THE LIBERTY RIGHT

The Supreme Court has long recognized that individual liberty interests protected by the Due Process Clause are not limited to those conceptualized by the men who ratified the Fourteenth Amendment.[64] Thus, constitutional protections of liberty include the rights to influence the education of one's children,[65] use birth control,[66] obtain an abortion[67]

62. Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 3 (1995).

63. 539 U.S. 558 (2003). My frequent reliance on *Lawrence* in the following argument is not explicated by the petitioners' identities as gay men. I make this point explicitly in part to warn against the tendency to conceptually conflate gay identities and gender nonconforming identities. There is certainly a relationship between gender nonconformity and homosexuality given that the latter challenges notions of who men and women should sexually desire. However, gay and lesbian identities, like straight identities (and as distinguished from queer identities) presume a stable relationship between one's sex and their sexual desires that reifies the gender binary model. As one author noted when critiquing the Court's reasoning in *Lawrence*, "if the police officer was not authorized by the state in the exercise of his power to make legally meaningful distinctions based on the category of sex, there would never have been a Lawrence v. Texas, nor a Bowers v. Hardwick seventeen years earlier." Paisley Currah, *Responses to Lawrence v. Texas: The Other "Sex" in Lawrence v. Texas*, 10 CARDOZO WOMEN'S L.J. 321, 322-23 (2004). *Lawrence* is relevant to the instant discussion not because of the conduct or presumed status of its appellants, but because of the jurisprudential approach to substantive due process analysis articulated by Justice Kennedy in the majority opinion.

64. Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 848 (1992).

65. Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

and engage in private sexual activities with another consenting adult of any sex.[68] But the Court's paths to recognizing these rights have varied significantly,[69] and the analysis employed can certainly dictate the success of a claimant's assertion.

1. FROM PRIVACY TO LIBERTY – LETTING FREEDOM OUT OF THE CLOSET

While the Court has located the constitutional basis for all of the rights noted above within the liberty guarantee of the Fourteenth Amendment Due Process Clause, such rights are often understood to rest within a more specific right to privacy protected by the right to liberty. Recently, however, the Court has moved away from its reliance on a right to privacy and acknowledged the powerful protection for individual rights afforded by a right to liberty that does not explicitly require private conduct. This broadening recognition of liberty's "manifold possibilities" [70] creates room for the assertion of an expansive claim to gender self-determination.

Many Due Process fundamental rights cases contain references to privacy rather than liberty. In *Griswold v. Connecticut*, Justice Douglas located the right of married couples to use birth control within a "zone of privacy" visible in the "penumbras" and "emanations" of the Bill of Rights.[71] The Court employed *Griswold's* privacy doctrine when identifying a fundamental right to abortion in *Roe v. Wade*.[72] While the petitioner averred that this right could be found either in the Fourteenth Amendment's liberty guarantee "or in personal, marital, familial, and sexual privacy said to be protected by the Bill of Rights or its penumbras,"[73] the Court clearly held abortion to fall within a right of privacy rather than a notion of liberty more broadly.[74]

Given jurisprudential categorizations of privacy as a narrower subset of liberty, interrogating the availability of constitutional protection for an asserted right within a privacy framework will produce less libratory results than will a similar interrogation under the broader rubric of liberty.[75] It may also fail to address the more public dimensions of the

66. Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965).

67. *Casey*, 505 U.S. 833; Roe v. Wade, 410 U.S. 113 (1973).

68. Lawrence v. Texas, 539 U.S. 558 (2003).

69. *Compare, e.g.*, Washington v. Glucksberg, 521 U.S. 702, 720-21, 23 (1997) *with Lawrence*, 539 U.S. at 571-72, *and Casey*, 505 U.S. at 851.

70. *Lawrence*, 539 U.S. at 578.

71. 381 U.S. at 484-85.

72. *Roe*, 410 U.S. at 153.

73. *Id.* at 129.

74. *Id.* at 153.

75. Randy E. Barnett, *Kennedy's Libertarian Revolution:* Lawrence*'s Reach*, NATIONAL REVIEW ONLINE, July 10, 2003, http://www.nationalreview.com/comment/comment-

interest at stake and deny recognition of rights for claimants who acknowledge the extent to which identities and actions transcend the boundaries of the public/private distinction. Indeed, broad liberty claims may have the beneficial ancillary effect of revealing the public/private paradigm as a false dichotomy.[76] These considerations indicate the importance of positing a claim to gender self-determination under the rubric of liberty rather than privacy.[77] Gender is at once immensely personal and profoundly public. To avoid denying the reality of gender's centrality in both personal and social life, it is imperative that a right to gender self-determination be framed within a right to liberty rather than within the parameters of the privacy doctrine. The Court's evolving interpretation of the Due Process Clause's liberty guarantee can benefit claimants averring the existence of rights that are not distinctly private.

The plurality opinion in *Planned Parenthood v. Casey* indicates the Court's move away from the confines of privacy rights and toward the broader recognition of liberty rights articulated in *Lawrence v. Texas*.[78] Near the beginning of *Casey*, the plurality explicitly notes that "the controlling word in the cases before us is liberty."[79] Departing from the penumbra and emanation rationale of *Griswold* and *Roe*, the plurality states that "[n]either the Bill of Rights nor the specific practices of states at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects."[80] Indeed, it is liberty itself, rather than a right to privacy, that protects the petitioners in *Lawrence*.[81] "Liberty" is the first word of Justice Kennedy's majority opinion and it becomes the doctrinal basis for the Court's holding.[82] The concept of privacy is invoked not to label the right at issue, but to describe the place where the petitioners were having sex when arrested.[83]

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barnett071003.asp ("The more specifically you define the liberty at issue ... the more difficult a burden this is to meet – and the more easily the rights claim can be ridiculed.").

76. *See generally* Kendall Thomas, *Beyond the Privacy Principle*, *in* AFTER IDENTITY 277-290 (Dan Danielsen & Karen Engle eds., 1995) (arguing that labeling *Bowers v. Hardwick* as a privacy case fails to acknowledge the very public components of homophobia that led to Michael Hardwick's arrest and stating that "[w]e must, in short, force privacy to go public.").

77. Labeling the right discussed here as that to gender self-determination rather than liberty could thus hinder the claimant's likelihood of success given the narrowness of the claim. Nonetheless, given the didactic and pragmatic necessity of making clear the exact subject at issue, MAX H. KIRSCH, QUEER THEORY AND SOCIAL CHANGE 8 (2000), my analysis herein continues to employ the more specific terminology while remaining cognizant that the formal articulation of such a claim in litigation will appear quite differently in the post-*Lawrence* world.

78. Lawrence v. Texas, 539 U.S. 558 (2003); Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992).

79. *Casey*., 505 U.S. at 846 (internal quotations omitted).

80. *Id.* at 848. *See* Barnett, *supra* note 75, at 3 (citing this passage as evidence that "Justice Kennedy refused to rest abortion rights on a right to privacy") (internal quotations omitted).

81. In *Lawrence*, the Court overruled *Bowers v. Hardwick*, which upheld the constitutionality of statutes criminalizing same-sex sodomy. *Lawrence*, 539 U.S. 558 (2003); Bowers v. Hardwick, 478 U.S. 186, 190 (1986).

82. *Lawrence*, 539 U.S. at 562, 578-79.

83. *Id.* at 564.

2. LEAVING THE SHADOW – THE NECESSITY OF A BROAD RIGHT TO GENDER SELF-DETERMINATION

Asserting a right to gender self-determination disestablishes the state's power to define the categories of male and female, determine who falls within and outside these labels, and classify people on the basis of gender only within the categories of male and female. Given this culture's essentialized understandings of gender and the extent to which gender is used to describe, read and categorize people, there can be no doubt that mandating the disestablishment of gender from the state is a substantial claim. At least in the beginnings of a discourse about the need for this fundamental right, the significance of the claim should not be masked.

In *Lawrence*, the Court explicitly discussed the importance of understanding the magnitude of the right at issue and thus the way in which the right must be articulated for subsequent analytical purposes.[84] Writing for the majority in *Bowers*, Justice White asked "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy."[85] When critiquing this framing of the issue in *Lawrence*, Justice Kennedy noted both the *Bowers* Court's failure to apprehend the centrality of sexuality and its expression to personhood, and the extent to which the criminalization of sodomy creates a stigma impacting familial, professional and other elements of gay and lesbian people's lives.[86]

Justice Kennedy's reasoning in *Lawrence* may be imported to the gender self-determination context. Conceptualizing the right at issue as that to self-determine gender acknowledges the pervasive effects of state regulation of gender throughout one's life. A more circumscribed claim would fail to apprehend the importance of gender to one's self-identity, as well as the state's role in saturating individual identity and social order with a particularly essentialized gender dogma. If the claim is framed only in terms of the right to "change" genders, use the restrooms of one's choice or dress in accordance with one's gender identity, it denies the breadth of harm caused by gendered regulations and "fail[s] to appreciate the extent of the liberty at stake."[87] Such a narrow positing of the right thus "demeans the claim the individual put forward."[88]

84. *Id.* at 566-67.
85. *Bowers*, 478 U.S. at 190.
86. *Lawrence*, 539 U.S. at 566-67, 575-76.
87. *Id.* at 558, 567.
88. *Id.* at 567.

The Court's broad conceptualization of the liberty right at issue in *Lawrence v. Texas*[89] may ease concerns that rights claims must be posited very narrowly in order to prevail. Such claims must certainly demonstrate precedential support and avoid expansion into arenas where the government may legitimately regulate to protect the public interest. But "refer[ing] to the most specific level at which ... the asserted right can be identified"[90] may fail to capture the extent of the liberty infringement.

The Court acknowledged this point years prior to its disposition in *Lawrence*. In *Moore v. City of East Cleveland*, appellant Inez Moore challenged the constitutionality of a city housing ordinance limiting occupancy in any residence to members of the same family.[91] Mrs. Moore was charged for violating the ordinance because her household—which included her son, and two grandsons who were first cousins—fell outside the limited definition of "family" in the ordinance.[92] The Court dismissed East Cleveland's argument that fundamental family rights are limited to the nuclear family[93] and found a much broader liberty right in "the choice of relatives in this degree of kinship to live together."[94] Writing for the majority, Justice Powell quoted at length Justice Harlan's description of substantive due process provided in his dissent in *Poe v. Ullman*.[95] The view espoused by the Court is traditionally-rooted yet expansive; liberty "is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints."[96]

Recognizing the arbitrary nature of legislative and judicial regulations of gender—and acknowledging the extensive needless harm caused by the state's fundamentalist policing of gender boundaries—illuminates the contingency of liberty upon the state's deregulation of gender. Presenting a liberty claim regarding gender self-determination which permits the state to maintain some of its current ability to define genders and label people as male or female "misapprehend[s]" the depth of the liberty claim that must be made.[97]

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89. I describe the right at issue in *Lawrence* as "broad" in comparison to that articulated by the Court in *Bowers*. The holding of *Lawrence* may also be understood as relatively narrow given that it decriminalizes same-sex acts only between adults and only when done in private. *See, e.g.*, Katherine Franke, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399, 1400 (2004) ("[I]n Lawrence the Court relies on a narrow version of liberty that is both geographized and domesticated ... Lawrence both echoes and reinforces a pull toward domesticity in current gay and lesbian organizing.").

90. Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989) (Justices Kennedy and O'Connor did not join this part of this footnote in the majority opinion).

91. Moore v. City of East Cleveland, Ohio, 431 U.S. 494, 495-97 (1977).

92. *Id.* at 496-97.

93. *Id.* at 500-01.

94. *Id.* at 505-06.

95. *Id.* at 501-02.

96. *Id.* at 502 (internal quotations and citations omitted).

97. Lawrence v. Texas, 539 U.S. 558, 567 (2003).

B. AN EMERGING AWARENESS OF GENDER SELF-DETERMINATION RIGHTS

Lawrence is significant not only given the potential for broad articulations of liberty rights it creates, but also because of the analysis the Court undertakes to determine whether the posited right is indeed protected under the Due Process Clause. In *Lawrence*, the Court solidifies the emerging awareness doctrine employed in *Casey*[98] and in so doing departs from the methodology articulated by Justice Scalia in footnote six of *Michael H. v. Gerald D.*[99] and more recently by former Chief Justice Rehnquist in *Washington v. Glucksberg.*[100] In *Glucksberg*, the Court stated that fundamental rights must be "deeply rooted in this Nation's history and tradition."[101] Dashing away from the *Glucksberg* analysis, the Court in *Lawrence* recognizes that substantive liberty rights are an evolving concept rather than a static declaration of the status quo.[102] This recognition creates realistic space for the articulation of a right to gender self-determination. Moreover, Kennedy's emerging awareness doctrine encourages an evaluation of the social and legal gains made by transgender people over the last half century.

After levying criticism at the *Bowers* majority's misarticulation of the right at issue in that case and the Court's incorrect historical survey of anti-sodomy laws in England and the United States, Justice Kennedy posits that specifically same-sex sodomy prohibitions are of a far more recent vintage.[103] Importantly, Justice Kennedy's independent historical survey is not employed simply to reverse *Bowers* because it misunderstood the history of Western civilization's legal and social condemnation of homosexual acts. Rather than simply stating that the Court in *Bowers* misunderstood the genesis of anti-gay sodomy

98. *Id.* at 571-72; Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 847-50 (1992).

99. 491 U.S. 110, 127 (1989) ("a rule of law that binds neither by text nor by any particular, identifiable tradition is no rule of law at all"). While Justices Rehnquist, O'Connor and Kennedy joined Justice Scalia's majority opinion, O'Connor and Kennedy did not join footnote six. Justice O'Connor's brief concurring opinion, in which she is joined by Justice Kennedy, states that Justice Scalia's articulation of the role of history in determining liberty interests is not in accord with the Court's prior substantive fundamental rights jurisprudence. Foreshadowing Justice Kennedy's clear articulation of an evolving notion of liberty, she ends her concurrence by stating "I would not foreclose the unanticipated by the prior imposition of a single mode of historical analysis." 491 U.S. at 111-12 (O'Connor, J., concurring).

100. 521 U.S. 702, 720-21 (1997). *But see* Wilson Huhn, *The Jurisprudential Revolution: Unlocking Human Potential in* Grutter *and* Lawrence, 12 WM. & MARY BILL RTS. J. 65, 71-73 (2003) (noting that Justice Souter's and Justice Stevens' separate concurrences, as well as Justice O'Connor's concurrence joined by Justices Breyer and Ginsberg, "deprived the Chief Justice of a majority on the question of how the fundamental right ought to be defined").

101. 521 U.S. at 720-21.

102. *Lawrence*, 539 U.S. at 571-72.

103. *Id.* at 570.

prohibitions, Justice Kennedy articulates that "our laws and traditions in the past half century are of most relevance here. These references show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex."[104]

This emerging awareness approach to determinations of substantive due process protection is a dramatic departure from the retrospective analysis suggested in *Glucksberg*.[105] Former Chief Justice Rehnquist rested his determination of a freedom's existence upon its engrained presence in "the traditions and conscience of our people" and "this Nation's history and tradition."[106] Using such a standard, the collective mind of the majority dictates the presence or absence of constitutionally-protected rights; the Due Process Clause cannot protect people from a tyranny of the majority. By contrast, employing the analysis set forth by Justice Kennedy allows the Court to look beyond the limited ideologies sanctioned by history and tradition. Indeed, society's emerging awareness may warrant constitutional protection for human rights that are just appearing on the ever-evolving horizon of liberty. Justice Kennedy concludes the majority opinion in *Lawrence* by returning to this powerful notion of liberty's evolution:

> Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew that times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.[107]

If binary notions of gender have blinded social and legal thought regarding the diversity of existent genders, perhaps an evaluation of recent evolution in social and legal understanding of gender is warranted. I began such an evaluation in the previous sections when discussing the complexity of individuals' gender identities, the terms employed to describe these identities, medical recognition that more than two sexes exist and that gender identity is the primary determinant of one's sex,

104. *Id.* at 571-72.
105. *Id.*; *Glucksberg*, 521 U.S. at 720-21.
106. *Glucksberg*, 521 U.S. at 721 (internal quotations omitted).
107. *Lawrence*, 539 U.S. at 578-79.

and the law's cognizance of gender non-conforming people, specifically transsexual individuals. Other factors demand consideration as well.[108]

One major indicator of society's emerging awareness of both the existence of gender diversity and the need to protect this diversity are recent developments in non-discrimination law regarding transgender people.[109] These developments may be roughly divided into the arenas of statutory and common law protections. While they do not evince a support for gender self-determination equivalent to the support for overturning *Bowers* evidenced by the continually decreasing number of anti-sodomy laws in the United States, the growing number of explicitly transgender-protective statutes and court decisions is certainly noteworthy. As one judge noted in a 2004 opinion, "legal protections for transsexuals are being expanded."[110]

Today, over 25 percent of the American population lives in a jurisdiction whose nondiscrimination laws explicitly prohibit discrimination on the basis of gender identity or expression.[111] Elected officials in nine states[112] and over 80 cities and counties[113] from geographically diverse regions of the United States have successfully codified protections for those who are gender nonconforming. The vast

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108. One such factor considered by the Court in *Lawrence* is the legal attitude of other nations towards the liberty interest being put forward. *Id.* at 572-73, 576-77. While this investigation is extremely important and provocative, its demands place it beyond the scope of this article. Though no nations have disestablished the state's authority to define and regulate gender or moved beyond the male/female binary, there are federal-level legislative and policy developments worth exploring. For example, the United Kingdom's Gender Recognition Act 2004 permits transsexual people to "make an application for a gender recognition certificate on the basis of (a) living in the other gender, or (b) having changed gender under the law of a country or territory outside the United Kingdom." Gender Recognition Act 2004, c. 7, § 1 (Eng.), *available at* http://www.opsi.gov.uk/acts/acts2004/20040007.htm. "Where a full gender recognition certificate is issued to a person, the person's gender becomes for all purposes the acquired gender ...." Gender Recognition Act 2004, c. 7, § 9(1) (Eng.). *See also* Gender Recognition Panel, *A Guide for Users: Gender Recognition Act 2004* at 2 (2006), http://www.grp.gov.uk/forms_guidance/documents/explanatory_leaflet_05.pdf. Additionally, it is worth noting that some cultures, including some indigenous populations in the United States, recognize the existence of two-spirit, bi-gendered, and other people who are understood as not simply male or female.

109. *Cf. Lawrence*, 539 U.S. at 575 (noting the interrelationship between equal protection and substantive due process rights); Laurence H. Tribe, Lawrence v. Texas*: The "Fundamental Right" that Dare Not Speak its Name*, 117 HARV. L. REV. 1893, 1898 (2004) ("due process and equal protection, far from having separate missions and entailing different inquiries, are profoundly interlocked in a legal double helix. It is a single, unfolding tale of equal liberty and increasingly universal dignity.").

110. Manago v. Barnhart, 321 F. Supp. 2d 559, 561 (2004).

111. Sean Cahill, *Glass Half Full*, NATIONAL GAY AND LESBIAN TASK FORCE, Jan. 25, 2005, http://www.thetaskforce.org/downloads/GlassHalfFull.pdf.

112. CAL. GOV'T CODE § 12940 (West 2005); CAL. PENAL CODE § 422.56 (West 2005); CAL. WELF. & INST. §§ 16003, 16013 (West 2005); HAW. REV. STAT. §§ 489-2 – 3, 515-2 – 7 (2006); 775 ILL. COMP. STAT. 5/1-101 (2005); ME. REV. STAT. ANN. tit. 5, § 4551 (2005); MINN. STAT. § 363A.01 (2005); N.J. STAT. ANN. §§ 10:2-1, 10:5-1 (2006); N.M. STAT. § 28-1-1 (2005); R.I. GEN. LAWS §§ 11-24-2, 28-5-2, 34-37-1 (2004); WASH. REV. CODE § 49.60.010 (2006).

113. TRANSGENDER LAW & POLICY INSTITUTE, U.S. JURISDICTIONS WITH LAWS PROHIBITING DISCRIMINATION ON THE BASIS OF GENDER IDENTITY OR EXPRESSION (2003), http://www.transgenderlaw.org/ndlaws/index.htm.

majority of these statutes and ordinances were enacted in the past decade, with five of the nine state laws passing in the last two years.[114] While such laws do not explicitly challenge the male/female binary or the state's power to determine individuals' genders and classify them on this basis, they do recognize the existence of transgender people and the harms caused by hegemonic gender norms. This recognition of transgender identities and injuries resulting from coerced gender conformity lays a foundation for positing an emerging awareness of the right to determine gender for oneself.

In addition to the growing prevalence of laws that protect people from discrimination on the basis of gender identity or expression, some courts are finding increased rights for individuals who challenge gender norms even in the absence of explicitly transgender-inclusive statutory authority. Some of these cases involve plaintiffs who do not self-identify as transgender but whose ambitions, passions and actions defy gendered social expectations. Consider for example the Massachusetts Supreme Judicial Court's holding in *Goodridge v. Department of Public Health* that same-sex couples have the right to marry,[115] or Justice Ginsburg's statement in *United States v. Virginia* that "generalizations about 'the way women are,' estimates of what is appropriate for *most women*, no longer justify denying opportunity to women whose talent and capacity place them outside the average description."[116]

Perhaps most influential to courts' positive treatment of gender nonconforming individuals is the U.S. Supreme Court's holding in *Price Waterhouse v. Hopkins* that sex-stereotyping constitutes sex discrimination under Title VII.[117] Following the Court's holding in *Price Waterhouse*, lower federal courts have held that discrimination against transgender people is sex discrimination under the Equal Credit Opportunity Act and Title VII.[118] State courts and administrative

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114. HAW. REV. STAT. §§ 489-2 – 3, 515-2 – 7 (2006); 775 ILL. COMP. STAT. 5/1-101 (2005); ME. REV. STAT. ANN. tit. 5, § 4551 (2005); N.J. STAT. ANN. §§ 10:2-1, 10:5-1 (2006); WASH. REV. CODE § 49.60.010 (2006).

115. 798 N.E.2d 941 (2003).

116. 518 U.S. 515, 550 (1996).

117. 490 U.S. 228, 251 (1989).

118. *E.g.*, Rosa v. Park West Bank & Trust Co., 214 F.3d 213, 214 (1st Cir. 2000) (reversing the district court's grant of the defendant bank's motion to dismiss ECOA sex discrimination claim of "a biological male ... dressed in traditionally feminine attire" who was told he would not be given loan application until he "went home and changed") (internal quotations omitted); Barnes v. City of Cincinnati, 2005 U.S. App. LEXIS 4607 (6th Cir.) (transsexual woman who presented as male while working as a Cincinnati police officer but lived as a woman when not working articulated Title VII sex discrimination claim after being demoted from sergeant); Smith v. City of Salem, Ohio, 378 F.3d 566, 575 (6th Cir. 2004) (transsexual female firefighter who was suspended after beginning to transition articulated Title VII sex discrimination claim. "Sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior."); Nichols v. Azteca Restaurant Enterprises, Inc., 256 F.3d 864 (9th Cir. 2001) (effeminate man subjected to repeated verbal harassment at work because of his gender nonconformity presented a cognizable Title VII claim). *See also* NATIONAL CENTER FOR LESBIAN RIGHTS, FEDERAL CASES RECOGNIZING THAT DISCRIMINATION ON THE BASIS OF GENDER

agencies have similarly found protection for transgender people under state law prohibitions on sex discrimination.[119] There is thus evidence that courts are gradually becoming aware of the pervasive discrimination faced by trans people. As one Massachusetts court stated, "[i]t cannot be gainsaid that transsexuals have a classically stigmatizing condition that sometimes elicits reactions based solely on prejudices, stereotypes, or unfounded fear."[120]

Taken together, cases like those noted above demonstrate the depth of sexism, transphobia and homophobia's interrelationship.[121] Indeed, they indicate increased judicial and social awareness of the extent to which much sex discrimination occurs not per se because the victim is female or male, but rather because she or he challenges socially constructed notions of how women and men should appear and behave. This explanation evokes, almost verbatim, the definition of "transgender" employed throughout this article. Transsexual people, understood within the gender nonconformity rubric, are no less entitled to protection than other people who defy gender norms. To a great extent, permitting gender self-determination allows this protection and respect for their autonomy.

Interpretations of state and federal laws to prohibit discrimination on the basis of gender nonconformity, and the burgeoning of explicitly transgender-inclusive nondiscrimination law throughout the country, are but two indicia of the law and society's emerging awareness that rigid gender norms produce real harms. To the extent the law generates and codifies these norms, the state is implicated in the denial of liberty to those who traverse and transcend the gender binary. Removing the state's power to define and regulate gender is thus a prerequisite to the realization of liberty as guaranteed by the Due Process Clause of the Fourteenth Amendment.

C. PRECEDENT SUPPORTS A FUNDAMENTAL RIGHT TO DETERMINE ONE'S GENDER

Most notably in *Casey* and *Lawrence*, the Court has articulated an expansive, forward-looking understanding of the liberty interests protected by the Due Process Clause. Justice Kennedy began the

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NON-CONFORMITY AND/OR TRANSGENDER STATUS IS A FORM OF DISCRIMINATION ON THE BASIS OF SEX (2004), http://www.nclrights.org/publications/pubs/fed_gender_nonconformity.pdf.

119. *E.g.*, Lie v. Sky Publ'g Corp., 15 Mass. L. Rep. 412 (Super. Ct. 2002); Doe v. Yunits, 2000 WL 33162199 (Mass. Super. Ct. 2000), *aff'd sub nom*, Doe v. Brockton Sch. Comm., 2000 WL 33342399 (Mass. App. Ct. 2000); Enriquez v. W. Jersey Health Sys., 342 N.J. Super. 501 (2001), *cert. denied*, 170 N.J. 211 (2001); Jette v. Honey Farms Mini Market, 2001 WL 1602799 (Mass. Comm'n Against Discrimination).

120. *Lie*, 15 Mass. L. Rep. 412 at *20-21.

121. *Cf.* Flynn, *supra* note 11, at 393.

majority opinion in *Lawrence* by declaring that "[f]reedom extends beyond spatial bounds. Liberty presumes an autonomy of the self that includes freedom of thought, belief, expression and certain intimate conduct."[122] Relatedly, both *Lawrence* and *Casey* stand for the proposition that rights to intimate relationships and bodily integrity are fundamental elements of liberty precisely because autonomy and the possibility of self-discovery are contingent upon the existence of these rights.[123] This recognition of autonomy's implicit presence within the constitutionally protected right to liberty provides a solid theoretical basis for asserting a right to gender self-determination.

The cases relied upon as a foundation for the right posited herein, including those finding a liberty interest in obtaining birth control and having sex with someone of the same gender, may seem distinguishable from a gender self-determination claim given their relational component. Both gay and lesbian sex and potentially procreative heterosexual sex (implicating use of birth control when pregnancy is undesired) may involve two or more people. Yet the intimate associational rights identified in the Court's due process jurisprudence are protected not only because of the central role of romantic relationships or family in American culture.[124] Indeed, when protected within familial and romantic contexts, the Court explicates application of the liberty right largely by way of the crucial role of intimate relationships in forming and defining the individual's sense of self.[125] Intimate associational rights, while clearly social, are therefore recognized as individual rights rather than "couples' rights" or "family rights."[126]

When the Court protects these rights by limiting state intrusion,[127] it does so largely because such invasions may cause deep and lasting injuries to the individual's innermost sense of self. If gender "fundamentally affect[s] a person"[128] given its importance to both self-

122. Lawrence v. Texas, 539 U.S. 558, 562 (2003).

123. *Cf.* Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 857 (1992).

124. Protecting these rights in order to uphold conventional notions of family or romance would require the Court to view sex as an act only engaged in within familial or romantic parameters. While this notion as an ideal is visible in the Court's jurisprudence, it is not mandated. In *Lawrence*, the Court stated that sex "*can* be but one element in a personal bond that is more enduring." 539 U.S. at 567 (emphasis added). Its holding, however, is not so narrowed as to say that gay and lesbian sex will no longer be at risk of criminalization only when the bonds between partners will last longer than the sex they are having.

125. *See, e.g. Lawrence*, 539 U.S. at 567; Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

126. *Lawrence*, 539 U.S. at 566 ("Both *Eisenstadt* and *Casey*, as well as the holding and rationale in *Roe*, confirmed that the reasoning of *Griswold* could not be confined to the protection of rights of married adults"). *Eisenstadt*, 405 U.S. at 453 ("[T]he marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted government intrusion into matters so fundamentally affecting a person") (emphasis in original).

127. *Cf.* Bowers v. Hardwick, 478 U.S. 186, 199 (1986) (Blackmun, J., dissenting) (citing *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

128. Planned Parenthood of Southeaster Pa. v. Casey, 505 U.S. 833, 851 (1992); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

identity and social legibility, protection from direct state coercion of gender's definition and its ascriptions flows logically from precedent acknowledging the importance of autonomy from state action in arenas so central to the self. Gender self-determination thus exists within the "realm of personal liberty which the government may not enter."[129]

State regulation of gender denies liberty, autonomy, and dignity

Underlying the plurality's discussion in *Casey* is a notion of the importance of individual choice regarding child bearing to personal autonomy and self-determination. Acknowledging the substantial value placed by the Court upon individuals' rights to make choices and exercise autonomy in arenas fundamental to personhood reveals a jurisprudential basis for permitting individuals to determine gender for themselves.

The assertion of a right to determine gender seems preposterous to some in part because gender is traditionally understood as so naturally predetermined and easily identified that there is simply no space for its self-determination. In such a conceptual paradigm, gender self-determination is equivalent to playing with nature or God's law.[130] Yet if gender identity plays a substantial role in determining one's gender, employing such predeterminist reasoning mandates respecting the individual's asserted gender. Furthermore, if we acknowledge the multiple variables—some biological and others social—that constitute and influence gender, the individual may be understood to possess agency in determining how to identify, present and negotiate the social production of his or her gender. If gender is fundamental to legibility as human,[131] granting the individual freedom to identify as male, female, genderqueer or something else entirely is "central to personal dignity and autonomy."[132] When the state interferes with this process of self-definition, or prevents gender self-determination entirely, it violates the constitutionally based right to liberty because of the dramatic extent to which personhood is abused by institutionalized denials of the opportunity to self-actualize.

The Court in *Roe* took cognizance of the extensive harms wrought by the state's denial of autonomy's realization as manifested in the absence of access to legal abortions.[133] In addition to "direct harms" caused by pregnancy, the Court noted the prospect of "a distressful life and future" for the woman who cannot obtain an abortion and the prospect of "psychological harm" and threats to "mental and physical

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129. *Casey*, 505 U.S. at 847.

130 *E.g.* TRADITIONAL VALUES COALITION, A GENDER IDENTITY DISORDER GOES MAINSTREAM (2005), http://www.traditionalvalues.org/pdf_files/TVCSpecialRptTransgenders1234.PDF.

131. BUTLER, *supra* note 6, at 52; HALBERSTAM, *supra* note 6, at 23.

132. *Casey*, 505 U.S. at 851.

133. Roe v. Wade, 410 U.S. 113, 153 (1973).

health."[134] The harms produced by the state's regulation of the gender binary are certainly as devastating. These harms include those directly resulting from state action as well as injuries whose causes follow a more attenuated but still clear path from the state's sanctioning of a static, diacritical view of gender. For example, surgery requirements or total prohibitions on changing documents to reflect one's true gender may result in physical assault when the inconsistency between the gender designation on one's documents and her gender expression inadvertently outs the individual to a law enforcement officer, customs agent, or bouncer at a bar. And laws and policies that define gender and grant entitlements on the basis thereof may deny the legal validity of a romantic relationship and thus refuse to grant custody to a transgender parent after divorce[135] or to allow inheritance for a surviving spouse.[136]

The autonomous individual, protected by the Due Process Clause of the Fourteenth Amendment, must be able to control how her gender is defined and represented.[137] If the state cannot "insist ... upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture," perhaps it also cannot mandate its vision of who is a woman or a man.[138] The infringements on individual autonomy are simply too profound for law to remain embroiled in defining and regulating gender.

1. COMPLEXITY OF THE ISSUE NEED NOT PREVENT JUDICIAL REVIEW

In evaluating the existence of due process protections for abortion in *Roe* and *Casey*, the Court wrestled with the question of when human life begins. Possible answers are laden with religious, scientific, cultural and moral opinions, the confluence of which allows no clear or objective answer.[139] In this culture, a dialogue about what determines an individual's gender is similarly complicated. While this need not be so, the legal regime's failure to broadly accept gender identity as the primary determinant of gender leads to the types of inconsistencies and harms discussed previously. As the holdings of *Roe* and *Casey* make clear, the contentiousness or complexity of a question need not prevent the

134. *Id.*

135. *Cf.* Kantaras v. Kantaras, 884 So.2d 155 (Fla. App. Ct. 2004); Flynn, *supra* note 3, at 11-12.

136. *E.g. In re* Gardiner, 273 Kan. 191 (2002).

137. *Cf.* Kelley v. Johnson, 425 U.S. 238, 250-51 (1976) (Marshall, J., dissenting) ("[T]he right in one's personal appearance is inextricably bound up with the historically recognized right of every individual to the possession and control of his own person") (internal quotations omitted).

138. Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 852 (1992).

139. *Cf. Roe*, 410 U.S. at 116 (noting the "sensitive and emotional nature of the abortion controversy ... One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusions about abortion").

protection of individual liberties. Given the centrality of gender to personhood, the Court must recognize the individual's right to gender self-determination in order to remain true to the Fourteenth Amendment's liberty guarantee.

The Court should take cognizance of the social, medical, and legal factors discussed throughout this article and recognize that state regulation of gender implicates serious autonomy and liberty concerns. Based upon this knowledge, it may then choose to accept the assertions of transgender people and medical experts and recognize that gender identity is the primary determinant of gender. Credence must then be given to everyone's gender identity, including the identities of transsexual people and individuals who do not identify as male or female. Alternatively, the Court can recognize the liberty interest at stake (as in option one) but pass no judgment as to what determines gender and instead decide as it did in *Roe* that decisions of such magnitude for the individual should not be left to the state.[140]

Lack of consensus or certainty as to what determines identity as male, female or some other gender must not preempt the attainment of liberty as it relates to gender. As the plurality stated in *Casey*, "[l]iberty must not be extinguished for want of a line that is clear."[141] Though the plurality drew a line at fetal viability in an effort to balance women's rights to autonomy and the state's interest in protecting "potential life,"[142] neither the courts nor any other instrumentality of the state need to, and indeed should not, sketch the parameters of male and female gender. As discussed below, there is no state interest even close to the life-protecting interest noted in *Casey* that could warrant such arbitrary state action.

D. STATE INTERESTS IN UPHOLDING THE GENDER BINARY

The state's deprivation of individuals' liberty via the refusal to allow gender self-identification may not be acknowledged precisely because gender is so *fundamental* to the self that if one does not feel his gender to be denied, he cannot recognize its social construction, nor its deprivation when denied to others. Congruence between gender identity and genitalia, gender identity and gender expression and gender identity and the gender designation on one's passport and driver's license are taken for granted because socialization naturalizes these relations so that if there is gender deviance, the subject rather than the gender system is

140. *Id.* at 159 ("[w]hen those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary ... is not in a position to speculate as to the answer.").

141. *Casey*, 505 U.S. at 869.

142. *Id.* at 870-71.

deemed responsible. Further, because most people do not experience incongruence between any of these factors at a level that directly perpetuates emotional, physical, or economic violence, they fail to recognize not only that the gender system is constructed, but also that it is broken.

It is only when gender binarism is threatened that gender's utter importance is recognized by majoritarian society, and then only to defend the state's gender-regulatory authority in an essentialized way. Rationales for allowing the state to define gender categories and determine the categories' inhabitants are often premised upon what may be lumped together as natural law/religious/morality-laden ideals. The Court's reasoning in *Casey* and particularly *Lawrence* may dismiss such rationales with surprisingly relative ease. More compelling are the state's interests in identifying people and maintaining records about them, and the need to take cognizance of gender in order to see and remedy discrimination that is catalyzed by gender bias. Yet, while these interests require that gender be visible to the state, they do not necessitate leaving definitional and categorizing powers within its control.

Some supporters of moralistic/natural law ideologies may maintain that the law's reliance on gender to describe and classify people (and to allocate disbursements of entitlements) is simply a codification of what exists naturally.[143] Yet nature-based rationales must somehow recognize the reality of transgender people's existence. To the extent such recognition is produced only in conjunction with the averment that gender nonconforming people are a perversion of God's will or nature's law, this article will not engage the painfully patronizing assertion. The Court in *Lawrence* declared that morality alone is an insufficient state interest to justify existence of a criminal statute that so severely infringes liberty interests, [144] and this reasoning may be extended to challenge regulations of gender that create pervasive harms. Moving beyond the empty argument of perversity, scientific evidence—particularly the power of gender identity in determining one's gender—warrants consideration. Reliance upon science, however, is not necessary. Transgender people are a reality in societies around the world. By giving everyone the space and autonomy to develop and declare gender free from direct state interference, society can acknowledge scientific and social realities without violating the liberty interests of others.

Indeed, given its centrality to both self and social understandings, gender is a matter that should not be "formed under the compulsion of the state."[145] In *Lawrence*, Justice Kennedy employs this declaration

143. *See, e.g.* TRADITIONAL VALUES COALITION, A GENDER IDENTITY DISORDER GOES MAINSTREAM (2005), http://www.traditionalvalues.org/pdf_files/TVCSpecialRptTransgenders1234.PDF ("Maleness and femaleness are in the DNA and are unchangeable").

144. Lawrence v. Texas, 539 U.S. 558, 571, 578 (2003).

145. *Casey*, 505 U.S at 851.

from *Casey* to state that people in gay or lesbian relationships are entitled to autonomy in order to enjoy the liberty right of self-actualization eloquently described therein.[146] He does so after acknowledging the great extent of moral and religious condemnations of same-sex acts.[147] If gender is fundamental to personhood and "[t]he child is not the mere creature of the state,"[148] perhaps the Due Process Clause's liberty guarantee prevents the "standardiz[ation]"[149] of individuals into the narrow roles of male and female.

A prohibition on state control of gender does not necessarily require that the state refrain from utilizing gender to identify individuals. So long as people are identified based upon the gender they assign themselves, liberty interests are not infringed. Similarly, employing a First Amendment analysis, David Cruz argues that while the state cannot label someone on identification documents with a gender other than that with which they identify, it may be able to maintain internal records that contain the state's belief about one's gender so long as it has a legitimate reason for doing so.[150] Though this may be true, it is difficult to see what use this would have for the state. Permitting gender self-identification on all documents, internal and external, may allow more accurate identification of individuals.

Some may argue that the categories of male and female will become less meaningful, and identifying people as either of these genders more difficult, if gender self-determination is permitted. But those who would self-identify as a gender other than that assigned to them at birth already exist. To the extent they do not conform to stereotypes associated with their assigned sex at birth, forcing them to identify to the state as male or female already creates inaccuracies that hinder identification goals. Gender nonconforming people who do identify with the sex assigned to them at birth pose similar identification challenges. A woman with very short hair and a relatively flat chest who wears stereotypically male clothing may pass as a man in many contexts. Thus, investigating the argument that the state needs to identify people based on the gender it assigns to them in fact reveals that many current attempts to do so not only produce harm for the gender nonconforming individual, but also fail to provide assistance in identifying people. If the utility of the state's interest in categorizing people on the basis of gender is shown to be weak, the legitimacy of this interest is especially questionable when gender self-determination is understood to implicate constitutional liberty protections.

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146. *Lawrence*, 539 U.S. at 574. *See also* Moore v. City of East Cleveland, Ohio, 431 U.S. 494, 506 (1977) ("[T]he Constitution prevents East Cleveland from standardizing its children and its adults by forcing all to live in certain narrowly defined family patterns.").

147. *Lawrence*, 539 U.S. at 571.

148. Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925).

149. *Id.*

150. Cruz, *supra* note 39, at 1056.

Of course it is also possible that if the state halts gender coercion, the number of existent genders will explode beyond the easily-managed two party system of male and female (consider androgynous, gender queer, bi-gendered and two-spirit genders to name just a few). But the existence of more gender categories may provide the ability to identify people more accurately. To the extent it does not, it is the state rather than the individual that must bear the burden of developing appropriate systems for identifying people according to the gender with which they self-identify. Perhaps the lack of usefulness in identifying people based on gender will indicate to the state that it need not develop more complex gender-management processes in order to allow gender designations on government documents and records consistent with the mandates of the Due Process Clause. Perhaps these documents need not display a gender marker at all.

Finally, there is the more sophisticated concern that permitting gender self-determination would force the state to be gender-blind, thereby preventing it from recognizing and remedying gender-based inequities. Indeed, if gender is so important to selfhood, would not a constitutional mandate of gender-blindness[151] prohibit state actors from seeing people in a way they *want* to be read? Yet it is possible for the "government [to] remain empowered to work against social divisions while abstaining from reinforcement of the ... male/female dichotomy of 'sex.'"[152] The state can see gender without producing and coercing its own view.

Gender discrimination claims do not require that the victim or perpetrator be of a particular gender, but rather that the action at issue occurred because of the victim's gender.[153] For fact finding purposes, it is reasonable for the state to require the individual complainant to articulate his or her self-identified gender to the state truthfully and in good faith. If gender is understood broadly to include all people's genders and gender transitions, discrimination against transgender people because of their gender nonconformity or transition will more easily be viewed by courts as impermissible under gender nondiscrimination laws. In this way, a principle of gender self-determination may allow greater recognition of the complexities and depths of gender-related inequities and therefore provide a more solid basis for gender-related autonomy and equality projects. The state's legitimate (though at times questionably disingenuous) interest in gender equity would therefore be aided by allowing gender self-determination.

151. *See id.* at 1026.
152. *Id.* at 1027.
153. *See, e.g.*, Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 79-80 (1998).

IV. CONCLUSION

Lawrence and *Casey* stand for the proposition that rights to intimate relationships and bodily integrity are fundamental elements of liberty precisely because autonomy and the possibility of self-discovery are contingent upon the existence of these rights.[154] This recognition of autonomy's implicit presence within the right to liberty provides a solid theoretical basis for asserting a right to gender self-determination. Such a right is imperative in order to protect the dignity and autonomy of all gender nonconforming people. Excavating and eradicating gendered state action from bodies, bathrooms, marriages, and legal documents is clearly a massive project. It is a project that many gender nonconforming individuals, as well as some doctors, jurists and legislators, have already commenced. Over time, there can be no doubt that it will change the way society understands gender and treats gender differences.

154. *See* Lawrence v. Texas, 539 U.S. 558 (2003); Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 857 (1992).