ESSAY

*TRANS*FORMING THE DEBATE: WHY WE NEED TO INCLUDE TRANSGENDER RIGHTS IN THE STRUGGLES FOR SEX AND SEXUAL ORIENTATION EQUALITY

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In this Essay, Taylor Flynn observes that sex and sexual orientation equality jurisprudence is premised upon the traditional understanding of "sex" as determined by anatomy at birth. The presumption typically following from this reduction of sex to anatomy is the notion that certain gendered attributes are inherent in biological male- or femaleness. Professor Flynn asserts that these erroneous and unduly narrow views significantly hamper courts' ability to address the core of sex and sexual orientation discrimination—hostility based on failure to conform to conventional gender norms. Surveying workplace, public accommodation, asylum, marriage, and custody cases, Flynn explains how conventional jurisprudence fails a wide array of persons. Looking to the burgeoning transgender case law, Professor Flynn demonstrates how individuals ranging from working women, gay men and lesbians, and stay-at-home dads can benefit from a jurisprudence that adopts more accurate and multifaceted understandings of sex and gender.

INTRODUCTION

The phrase "gay, lesbian, or bisexual"[1] has in recent years been joined by another descriptor, "transgender."[2] "Transgender" is an umbrella term that, in fact, includes gay men, lesbians, and bisexuals within its scope: It applies to persons whose appearance, behavior, or other personal characteristics differ from traditional gender norms.[3] The term

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1. I use this phrase to identify persons for whom a component of our lives includes same-sex love, attraction, or intimacy. For simplicity, this Essay at times refers to people with a same-sex orientation as "gay." Because this usage may contribute to a discourse that renders lesbians and bisexuals invisible, this Essay also uses the term "les/bi/gay."

2. See Jamison Green, Introduction to Paisley Currah & Shannon Minter, Transgender Equality: A Handbook for Activists and Policymakers 1 (2000). Other synonyms for transgender that are also used in this Essay include "gender variant," "gender non-conforming," and "trans." I also use the term "sexual minorities" to refer collectively to lesbian, gay, bisexual, and transgendered individuals.

3. An increasing number of gay men and lesbians are identifying themselves as transgendered, whether because of a nonconforming gender presentation or in

* Indicates page numbering from journal of original publication — 101 Colum. L. Rev. 392 (2001).

represents more than a linguistic shift. It reflects an increasing recognition that acts of discrimination against a wide variety of groups are often pieces of the same quilt, with intolerance of gender nonconformity as its thread. The concept of transgenderism recognizes that discrimination against women, gay persons, and transsexual individuals,[4] as well as other groups that are typically perceived as independent from one another,[5] springs from the same source, the privileging of the masculine and subordination of the feminine.[6] As with discrimination to which women and gay persons are subject, transgender discrimination permeates every aspect of daily life, whether on the job (such as workplace harassment, the denial of a promotion, or termination of employment), in the heightened risk of violence (such as rape), or in the home (such as the potential for discriminatory implementation of marriage laws and custody determinations).

Transgender rights cases are thus important in themselves, in their attempt to redress the serious harms inflicted on individuals' lives and to deter future discrimination. Trans litigation further addresses a rather astonishing gap in sex and sexual orientation equality jurisprudence: The failure to remedy much of the discrimination experienced by women

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recognition of the fact that we violate gender norms simply by virtue of our same-sex orientation, since homo- and bisexuality confound the male-female dyad in which women traditionally have been subordinated to men. Green, supra note 2, at 5.

4. For transsexual persons, their gender identity (internal sense of being a man or woman) conflicts with their anatomical sex at birth. C.M. Cole et al., Treatment of Gender Dysphoria, 90 Tex. Med. 68–72 (1994). Female-to-male transsexual people are born with female bodies and have a masculine gender identity. Male-to-female transsexual people are born with male bodies and have a feminine gender identity. Id. Transsexual individuals may or may not undergo medical treatment through hormone therapy and sex reassignment surgeries to bring their physical sex into alignment with their gender identity: They may be pre-, post-, or nonoperative. Id. As with nontranssexual individuals, transsexual people may be gay, lesbian, bisexual, or heterosexual. Green, supra note 2, at 79.

5. For example, the term "transgender" also includes masculine-appearing women, effeminate men, cross-dressers, and intersexed individuals. Green, supra note 2, at 3–4. Intersexed persons, who account for approximately one of every 2000 children, are born with sexual anatomy that combines male and female characteristics or who undergo hormonal changes usually associated with the other sex. Id. at 5–6.

6. See, e.g., Mary Anne C. Case, Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence, 105 Yale L.J. 1, 18–36 (1995) (arguing for a reconceptualization of the law, including cases concerning sexual harassment, single-sex education, sexual orientation, and transsexuality, under the rubric of gender); Katherine M. Franke, The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender, 144 U. Pa. L. Rev. 1, 3 (1995) (arguing that by defining sex in biological terms, the law has failed to distinguish sex from gender, and sexual differentiation from sex discrimination); Francisco Valdes, Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society, 83 Cal. L. Rev. 1, 25 (1995) (demonstrating the existence, in law and society, of a conflation of sex, gender, and sexual orientation that reinforces sex/gender hierarchies to the detriment of women and sexual minorities).

and sexual minorities, specifically that discrimination based on gender nonconformity. This failure is premised on a prevalent juridical assumption that the law should target discrimination based on sex (i.e., whether a person is anatomically male or female), rather than gender (i.e., whether a person has qualities that society considers masculine or feminine).[7] In both law and life, though, conceptions of sex and gender are so firmly cemented together that courts' frequent refusals to address gender-based inequalities mean that much discrimination against women and sexual minorities goes unremedied.[8]

Unlike feminist and les/bi/gay rights cases, only trans litigation challenges the sex system. By "sex system," I mean the law's categorization and regulation of persons as male or female based primarily on their genitalia at birth. While the women's and gay rights movements challenge, in their own ways, the gender roles assigned to males and females, neither contests the categorization of certain persons as "male" and others as "female." Transgender rights cases, however, challenge the sex system by presenting the court with people for whom gender and anatomical birth sex in some way diverge. The typical conceptualization of sex, a doctor's peek at a newborn's genitals, is simply a form of shorthand that adequately describes sex in most cases. It is, though, an oversimplification that fails to capture the multitude of factors that constitute sex. Most crucially, this shorthand overlooks a person's gender identification, one's internal sense of being male or female.[9] This oversight is critical because gender identification is generally accepted within the medical and psychological professions as more integral to a person's sex than anatomical birth sex.[10]

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7. See, e.g., Franke, supra note 6, at 4 (stating that "the wrong of sex discrimination" is the law's disaggregation of sex from gender, which leaves gender discrimination unaddressed).

8. For an extensive discussion of the conflation of sex, gender, and sexual orientation, and the ways in which this conflation hinders equality jurisprudence, see Valdes, supra note 6, at 12–20.

9. While the methods vary for categorizing the components of sex, the medical and psychological communities typically define sex by relying upon a number of markers, including external genitalia, internal reproductive organs, chromosomes, hormones, secondary sex characteristics, and psychological identification as male or female. While these factors usually "line up" to correspond either to a "male" or "female" sex designation, there may be disjunctions between two or more sex markers, or there may be disjunctions within a marker. Transsexual persons, for example, have a disjunction between markers: These individuals typically have the anatomical markers of one sex and a psychological identification as the other sex. Some intersexed persons have disjunctions within a marker, such as a chromosomal variation. For example, a man who has XXY chromosomes is generally indistinguishable from other men, except that he is infertile. Julie A. Greenberg, Defining Male and Female: Intersexuality and the Collision between Law and Biology, 41 Ariz. L. Rev. 266, 271–92 (1999).

10. When a person is in distress because her physical anatomy differs from her gender identity, health care practitioners respond with the only known treatment: facilitating her psychological and often her hormonal and anatomical transition to her identified sex. Gerald Mallon, Practice with Transgendered Children, *in* Social Services with

In contrast to commentary that has focused on transgender rights cases as peripheral examples demonstrating principles that can inform mainstream sex and sexual orientation jurisprudence, I argue that trans litigation should be considered an integral component of feminist and gay rights advocacy.[11] Transgender rights cases are significant not only in their demand for equal dignity for trans individuals, but also because we may not be able to achieve full legal and social equality for women and gay persons unless we challenge the shorthand view of sex. Even though transgender litigation may never be able to present a definitive understanding of what sex is, its greatest potential is its ability to draw attention to manifestations of gender discrimination that otherwise would be difficult, if not impossible, to address. This Essay focuses on two arenas in which discrimination based on sex, gender, and sexual orientation severely impact a person's day-to-day life: transactions generally considered public, such as discrimination in the workplace or other public accommodations, and the law's regulation of the private realm of marriage and family. Looking at three recent federal circuit court opinions arising in divergent contexts, Part I considers discrimination within the public sphere. Part II examines the private domain of family life by focusing primarily on several trans marriage and custody decisions.

Transgender rights litigation presents an opportunity to broaden judicial understandings of sex by helping courts comprehend that gender identity, rather than anatomy, is the primary determinant of sex. This conceptual framework, in turn, has the potential to expand the law's approach to sex and sexual orientation discrimination claims to include instances of gender-based discrimination that often are viewed as nonactionable or that even may be actively perpetuated by some courts. Given that conceptions of gender and sex are so firmly affixed, this Essay argues, we are unlikely to eradicate gender stereotyping of that which is masculine or feminine without also confronting the system that categorizes us as male or female. It is also my hope that trans litigation—by explaining that self-identification is the central component of sex—ultimately may effect change by encouraging courts and society to conclude

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Transgendered Youth 49, 55–58 (Gerald Mallon ed., 1999). The generally accepted view among the medical and psychological professions is that efforts to alter a person's core gender identity are futile and unethical. Id. Formerly, some health care practitioners had attempted to "cure" transsexual people through aversion therapies and other techniques intended to alter cross-gender identification. M.G. Gelder & I.M. Marks, Aversion Treatment in Transvestism and Transsexualism, *in* Transsexualism and Sex Reassignment (Richard Green & John Money eds., 1969). Not only were these efforts unsuccessful, but they also caused severe psychological and in some cases physical damage. Mallon, supra, at 55–58.

11. See, e.g., Franke, supra note 6, at 7–8 (looking to transgender rights claims, characterized as those "at the margins," and demonstrating that these insights "apply with equal force to the more difficult cases of sexual identity and discrimination at the center").

that the determination of one's sex should rest with the individual and not the state.[12]

I. Discrimination in Public Life

A. *Obstacles in Combating Gender-Based Employment Discrimination*

Women, gay men and lesbians, and those who are gender nonconforming face continual threats in employment, such as discrimination in hiring or promotion, workplace harassment, and outright termination.[13] A substantial impediment to remedying such discrimination has been the reasoning of many lower courts that Title VII of the Civil Rights Act of 1964 applies to discrimination based on anatomical sex, but not gender.[14] Many lower courts have continued to follow this line of reasoning despite the Supreme Court's decision in *Price Waterhouse v. Hopkins*.[15] In *Price Waterhouse*, the Court held that an employer violated Title VII when, in its evaluation of a female executive, the employer relied on gender role stereotypes of how a woman is supposed to present herself.[16] In an effort to urge lower courts to extend its application of *Price Waterhouse* to gender discrimination, this Essay looks to several recent transgender rights cases and argues that they may provide a useful mode of analysis for combating discrimination based on gender.

When Ann Hopkins, a senior manager at an accounting firm, was denied partnership, she sued her employer for sex discrimination under Title VII.[17] Evidence submitted at trial included comments from the

12. For a provocative exploration of the necessity of halting the power of the state to define sex, see Paisley Currah, Defending Genders: Sex and Gender Non-Conformity in the Civil Rights Strategies of Sexual Minorities, 48 Hastings L.J. 1363, 1363–68 (1997).

13. This essay focuses on federal remedies for employment discrimination under Title VII, a statute that courts have held does not apply to sexual orientation discrimination. See, e.g., DeSantis v. Pac. Tel. & Tel. Co., 608 F.2d 327, 329–32 (9th Cir. 1979). Sexual orientation issues arise in Title VII litigation in same-sex harassment cases where, for example, plaintiffs may have been subject to anti-gay slurs. To the extent that the discrimination is because of sex, rather than sexual orientation, Title VII applies to same-sex harassment. See infra notes 51–56 and accompanying text (discussing Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998)).

14. See 42 U.S.C. § 2000e-2(a) (1994) (forbidding an employer from depriving a person of employment opportunities or otherwise adversely affecting that person's status as an employee because of that person's sex). This issue arises perhaps most pointedly in claims by transgendered plaintiffs, which courts traditionally have denied on the ground that Title VII prohibits discrimination on the basis of sex, but not gender. See, e.g., Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1084–85 (7th Cir. 1984) (construing "sex" in Title VII narrowly to mean only anatomical sex and not gender); Holloway v. Arthur Andersen & Co., 566 F.2d 659, 661–63 (9th Cir. 1977) (refusing to extend protection of Title VII to transsexuals because such discrimination is on the basis of "gender" rather than "sex").

15. 490 U.S. 228 (1989).

16. Id. at 256.

17. Id. at 231–32.

firm's partners stating that Ann[18] was "macho," should take "a course at charm school," and should "walk more femininely, talk more femininely, dress more femininely, wear make-up [and] have her hair styled . . . ."[19] The Supreme Court held that comments such as these constituted evidence of impermissible gender role stereotyping and that the employer could avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision based on a legitimate reason.[20] The Court stated, "[i]n the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender."[21] The Court expressly refuted the notion that Title VII did not apply to an employer's presumptions about how men and women are supposed to act:

> [W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for "[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."[22]

Referring to the partner's comment that Ann should "walk . . . [and] talk more femininely," the Court suggested that the connection between gender role stereotyping and sex discrimination is undeniable: "[It does not] require expertise in psychology to know that, if an employee's flawed 'interpersonal skills' can be corrected by a soft-hued suit or a new shade of lipstick, perhaps it is the employee's sex and not her interpersonal skills that has drawn the criticism."[23]

Prior to *Price Waterhouse*, a number of circuit courts had held that Title VII applied solely to discrimination based on sex and not to gender discrimination.[24] Lower courts also had affirmatively invoked gender-role stereotypes as defenses to Title VII claims. One example is the "lack of interest defense," in which an employer's reliance on gender-role stereotypes to justify the underrepresentation of women in traditionally male-dominated fields exonerates an employer's disproportionate hiring of male employees. In the infamous case of *EEOC v. Sears, Roebuck & Co.*, for instance, the Equal Employment Opportunity Commission (EEOC) produced evidence demonstrating that similarly qualified women who had applied for Sears' higher-paying commission sales jobs were significantly less likely to be hired than their male counterparts.[25] The EEOC

18. In an effort to counter some of the depersonalization that results from discrimination, this Essay refers to the parties involved by their first names.

19. *Price Waterhouse*, 490 U.S. at 235.

20. Id. at 258.

21. Id. at 250.

22. Id. at 251 (internal citations omitted).

23. Id. at 256.

24. See supra note 14.

25. 839 F.2d 302, 312 (7th Cir. 1988).

also introduced evidence that Sears had crafted its positions with men in mind. As evidence of Sears' preference for male employees, Sears asked job applicants whether they played football or spoke in a low-pitched voice.[26] The Seventh Circuit rejected the claim of sex discrimination by presuming that certain gendered preferences follow from one's sex: It accepted the proposition—not supported by any evidence in the record—that women are naturally less competitive than men and therefore shy away from the "'dog-eat-dog' competition" of the higher paying jobs in favor of the "more enjoyable and friendly" noncommission jobs.[27] Following *Price Waterhouse*, commentators cogently argued that the Supreme Court's analysis in that case rejected *Sears*' limited view of Title VII as applying only to discrimination based on anatomical sex by extending Title VII's prohibition to reliance on gender role stereotypes.[28] Based on the Court's focus on gender role stereotyping in *Price Waterhouse*, scholars noted that although the "lack of interest" defense presumably should not have survived *Price Waterhouse*, its vitality appears to continue undiminished.[29]

Another example of gender-role discrimination condoned by courts prior to *Price Waterhouse* is the reasoning that Title VII provides no cause of action for male employees discriminated against because the employer perceived them as too feminine. While Ann Hopkins was protected for being deemed "too masculine," courts have held that men discriminated against for having mannerisms viewed as effeminate or for wearing attire considered feminine, such as an earring, do not have a cause of action under Title VII.[30] Like cases relying on the lack of interest defense, opinions rejecting Title VII's applicability to effeminate men have yet to be explicitly overturned, although they recently have begun to be eroded.[31] In an additional variation on Title VII's applicability to gender role stereotyping, it remains unclear whether a woman following in Ann Hopkins'

26. Id. at 332; see also Vicki Schultz & Stephen Petterson, Race, Gender, Work, and Choice: An Empirical Study of the Lack of Interest Defense in Title VII Cases Challenging Job Segregation, 59 U. Chi. L. Rev. 1073, 1077 n.12 (1992) (discussing EEOC brief before the Seventh Circuit).

27. EEOC v. Sears, Roebuck & Co., 628 F. Supp. 1264, 1307 (N.D. Ill. 1986), aff'd, 839 F.2d 302 (7th Cir. 1988).

28. See, e.g., Case, supra note 6, at 40–46 (discussing Supreme Court's focus on gender role stereotyping in the *Price Waterhouse* decision).

29. See, e.g., Case, supra note 6, at 73–74 (reviewing critiques of the lack of interest defense); Ann C. McGinley, Viva La Evolucion!: Recognizing Unconscious Motive in Title VII, 9 Cornell J.L. & Pub. Pol'y 415, 467–72 (discussing the continuing success, in the context of race and sex discrimination, of the lack of interest defense to Title VII claims).

30. See, e.g., DeSantis v. Pac. Tel. & Tel. Co., 608 F.2d 327, 331–32 (9th Cir. 1979) (rejecting, among other claims, a Title VII claim by male employee who was fired for wearing an earring); Smith v. Liberty Mut. Ins. Co., 569 F.2d 325, 326–27 (5th Cir. 1978) (holding that male employee fired for effeminacy had no cause of action under Title VII).

31. See infra notes 35–71 and accompanying text (discussing Schwenk v. Hartford, 204 F.3d 1187 (9th Cir. 2000), and Rosa v. Park W. Bank & Trust Co., 214 F.3d 213 (1st Cir. 2000)).

shoes would be protected if the firm had refused her partnership for being "too feminine" in the aggressive world of corporate finance.[32]

B. *Transgender Rights Litigation: Potential for Change*

The failure of many courts to fully implement *Price Waterhouse* reflects a broader dysfunction that exists across sex and sexual orientation equality jurisprudence, "the continuing devaluation," as Mary Anne Case describes it, "of qualities deemed feminine."[33] Case urges a challenge to this devaluation in part by bringing workplace claims on behalf of effeminate men, reasoning that "the world will not be safe for women in frilly pink dresses . . . until it is made safe for men in dresses as well."[34] Building on Case's claim, I argue that women are unlikely to be viewed as equal to men until the law recognizes that some women have penises and some men have vaginas. In an important recent shift, three federal circuit opinions considered discrimination claims by gender nonconforming plaintiffs. Rather than adopt the discordant approach of permitting recovery solely for discrimination based on anatomical sex, these appellate opinions acknowledge the profound harms that flow from discrimination due to failure to conform to gender roles, and, in particular, from the devaluation of femininity. In each case, the court recognized that the plaintiffs—who were born anatomically male and have a feminine identity or characteristics—were targeted not only for their gender nonconformity, but also for their identification with the subordinate role of the feminine. Examining these cases provides possible direction for sex equality jurisprudence and demonstrates how trans litigants may help pave the way for women and gay individuals to realize more comprehensive legal protections.

1. Schwenk v. Hartford. — The Ninth Circuit's decision in *Schwenk v. Hartford* is the first circuit opinion to state, albeit in dicta, that Title VII's protections extend to persons deemed inappropriately feminine.[35] In *Schwenk*, the court considered a claim under the Eighth Amendment and the Gender Motivated Violence Act (GMVA)[36] by a male-to-female transsexual prisoner, Crystal Marie Schwenk, based on her assertion that a prison guard, Robert Mitchell, had attempted to rape her.[37] In analyz-

32. See Case, supra note 6, at 3, 44–46.

33. Id. at 3.

34. Id. at 7.

35. 204 F.3d at 1201–02.

36. 42 U.S.C. § 13981 (1994). Shortly after the Ninth Circuit's decision in *Schwenk*, the Supreme Court struck down section 13981 of the Gender Motivated Violence Act on the ground that Congress lacked the authority to enact it under either the Commerce or Equal Protection Clauses of the Constitution. United States v. Morrison, 120 S. Ct. 1740, 1744–45 (2000).

37. Crystal Marie, who is anatomically male, was incarcerated in a men's prison, although she had configured her life from a young age to conform to that of her gender identity. *Schwenk*, 204 F.3d at 1193. Consistent with current professional health care standards, this Essay attempts to respect the dignity and autonomy of transgender people

ing Crystal Marie's claim under the Gender Motivated Violence Act, the Ninth Circuit looked to the approach that federal courts have taken in Title VII sex discrimination cases.[38] Although not binding, the Ninth Circuit's reasoning sets forth a framework that may, and I argue should, be influential in future Title VII jurisprudence.

The *Schwenk* defendant argued that the attack on Crystal Marie was motivated not by gender, but by her transsexuality, which he claimed was not an element of actionable gender-based animus.[39] To determine what was meant by "gender," the Ninth Circuit noted that federal courts for years had interpreted Title VII as applying only to discrimination on the basis of sex and as inapplicable to discrimination based on gender.[40] Under this view, the Ninth Circuit explained, persons such as Crystal Marie who are anatomically male but "whose outward behavior and inward identity did not meet social definitions of masculinity" were denied protection under Title VII on the ground that "they were the victims of gender, rather than sex, discrimination."[41] In a striking departure from this line of reasoning, the Ninth Circuit concluded that these opinions have been "overruled by the logic and language of *Price Waterhouse*."[42] The *Schwenk* court explained that after *Price Waterhouse*, Title VII "barred not just discrimination based on the fact that Hopkins was a woman, but also discrimination based on the fact that she failed 'to act like a woman'—that is, to conform to socially-constructed gender expectations."[43] The Ninth Circuit concluded that *Price Waterhouse* expanded the interpretation of Title VII to include "[d]iscrimination because one fails to act in the way expected of a man or woman."[44] Because the defendant's assault, as alleged, stemmed from Robert Mitchell's belief "that the victim was a

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by acknowledging her or his self-designated gender identification. See, e.g., Gianna E. Israel & Donald E. Tarver II, Transgender Care: Recommended Guidelines, Practical Information, and Personal Accounts 7 (1997) ("[O]ne should refer to transgender individuals on the basis of their current presentation or their specified pronoun preference."); B.R. Beemer, Gender Dysphoria Update, 34 J. Psychosocial Nursing & Mental Health Services 12, 18 (1996) ("[C]aregivers have a responsibility to acknowledge the self-chosen identity of their clients."). The Ninth Circuit in *Schwenk* takes this approach as well, see *Schwenk*, 204 F.3d at 1192 n.1. Deferring to a person's chosen gender identity is consistent with the approach of other courts. See, e.g., Murray v. United States Bureau of Prisons, No. 95-5204, 1997 U.S. App. LEXIS 1716, at *1 n.1 (6th Cir. Jan. 28, 1997) (per curiam) (referring to a transgender individual's sex by the person's self-identification); Meriwether v. Faulkner, 821 F.2d 408, 409 n.1 (7th Cir. 1987) (same); Smith v. Rasmussen, 57 F. Supp. 2d 736, 740 n.2 (N.D. Iowa 1999) (same).

38. *Schwenk*, 204 F.3d at 1200–02.

39. Id. at 1200.

40. Id. at 1201. For examples of federal circuit court opinions that had ruled that Title VII applied only to sex-based and not to gender-based discrimination, see supra note 14.

41. *Schwenk*, 204 F.3d at 1201.

42. Id.

43. Id. at 1201–02.

44. Id. at 1202. The Ninth Circuit applied this interpretation to the Gender Motivated Violence Act, 42 U.S.C. § 13981 (1994), as the statute's legislative history

man who 'failed to act like' one;" the Ninth Circuit held that the attack constituted gender-based violence under the GMVA.[45]

The analysis in *Schwenk* is significant in a number of respects. First, the Ninth Circuit is able to recognize two seemingly opposing views of Crystal Marie's sex. The appellate court understood that Robert Mitchell attacked the plaintiff because he viewed Crystal Marie as "a man who 'failed to act like' one;" the court also acknowledged Crystal Marie's self-identity as female, and, in a manner respectful of that identity, referred to the plaintiff using feminine pronouns.[46] The Ninth Circuit's opinion is able to encompass this apparent incongruity because the court's view of "sex" incorporates the notion of "gender" as well. The terms "'sex' and 'gender,'" the court reasoned, "have become interchangeable."[47] Recognizing sex as more than anatomy is important not only to transgender rights advocates,[48] but to women's rights advocates as well. By effectively adopting the argument that sex discrimination jurisprudence has wrongly disaggregated sex from gender,[49] the Ninth Circuit diminishes many of the obstacles that have long stymied feminists. Recall the "lack of interest" defense put forward in *EEOC v. Sears*—the notion that fewer women applied for the higher-paying commission sales jobs because women are predisposed to be less competitive than men.[50] The defendant's invocation of this gender-role stereotype (particularly when coupled with evidence that Sears had created the sales position with deep-voiced, football-playing applicants in mind) provides strong support for the conclusion that Sears had structured the job and the application process based on its gendered notions of how men and women are supposed to act—precisely what the partners were prohibited from doing in *Price Waterhouse*. The *Schwenk* court's application of Title VII to cases in which the plaintiff was discriminated against for nonconformity with expected gender roles may provide useful precedent for remeding the law's devaluation of things deemed feminine. For instance, a male employee fired for wearing an earring should have a claim under Title VII because he was discriminated against for failing to conform to the masculine gender role expectation that men do not accessorize.

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convinced the court that Congress intended the GMVA to have the same reach as Title VII. *Schwenk*, 204 F.3d at 1201–02.

45. 204 F.3d at 1202.

46. Id. at 1192 n.1.

47. Id. at 1202.

48. This recognition is particularly important for transgender rights advocates because it suggests that conceptions of gender may be able to act on and affect understandings of sex. By referring to Crystal Marie as "she," the Ninth Circuit recognizes, at least linguistically, that a person born anatomically male can be female.

49. See, e.g., Franke, supra note 6, at 4 ("Ultimately, there is no principled way to distinguish sex from gender, and concomitantly, sexual differentiation from sexual discrimination.").

50. See supra notes 25–27 (discussing *EEOC v. Sears Roebuck*).

The reasoning in *Schwenk* also may help lesbian and gay rights advocates in Title VII harassment and discrimination claims brought by masculine-appearing women or effeminately-perceived men. Employers have attempted to escape liability by arguing that they were engaged not in sex discrimination, but in (often permitted) sexual orientation discrimination. The Supreme Court's decision in *Oncale v. Sundowner Offshore Services, Inc.* suggests one such example.[51] In *Oncale*, the Court held that Joseph Oncale's sexual harassment suit against his male coworkers could go forward and remanded it for a determination of whether the harassment he suffered was "because of . . . sex" under Title VII.[52] Joseph's male coworkers had repeatedly harassed him by grabbing his crotch, subjecting him to anti-gay slurs, and engaging in a mock rape.[53] If this case had gone back to trial, a district court that did not include gender in its understanding of sex might conclude that the harassment was not because of sex, but rather was because of sexual orientation, a form of discrimination prohibited neither under Title VII nor by Texas law. Such a ruling would have missed the point: There is no evidence that Joseph was harassed because his coworkers actually believed he was gay.[54] Instead, the evidence suggested that Joseph was targeted because his slight build presumably was deemed to be more feminine than the physiques of his fellow coworkers.[55] If a trier of fact were to apply *Schwenk*'s rationale on remand, a court would have ample grounds on which to find that Joseph's assaults stemmed from the perpetrators' belief "that the victim was a man who 'failed to act [or look] like' one," an actionable form of sex discrimination.[56]

2. Rosa v. Park West Bank & Trust Co. — The First Circuit recently recognized Title VII's applicability to discrimination based on nonconformity with gender roles in *Rosa v. Park West Bank & Trust Co.*[57] In *Rosa*, the appellate court rejected a defendant bank's claim that discrimination against a man because of his feminine attire could not constitute sex discrimination.[58] An employee of Park West Bank told Lucas Rosa, who is anatomically male, that she "would not provide him with a loan application until he 'went home and changed [the dress he was wearing].'"[59] In response to Lucas' sex discrimination claim under the Equal Credit Op-

51. 523 U.S. 75 (1998).

52. Id. at 79.

53. Id. at 77.

54. To the contrary, the only evidence concerning Oncale's sexual orientation was his marriage to a woman. Chris Bull, Same-Sex Harassment, The Advocate, Nov. 25, 1997, at 30.

55. Morning Edition: Supreme Court and Same-Sex Harassment (National Public Radio broadcast, Dec. 3, 1997, transcript # 97120313-210).

56. Schwenk v. Hartford, 204 F.3d 1187, 1202 (9th Cir. 2000).

57. 214 F.3d 213 (1st Cir. 2000).

58. Id. at 214.

59. Id.

portunity Act (ECOA),[60] the district court had granted the bank's motion to dismiss, stating:

> The issue in this case is not [Lucas'] sex, but rather how he chose to dress when applying for a loan. Because the [ECOA] does not prohibit discrimination based on the manner in which someone dresses, Park West's requirement that [Lucas] change his clothes does not give rise to claims of illegal discrimination.[61]

The district court's opinion was consistent with the line of cases ruling that an employer may make hiring or termination decisions on the ground that a male applicant or employee dressed in a manner or displayed traits typically deemed feminine.[62] The First Circuit's reversal of the district court's decision breaks free from courts' past unwillingness to apply *Price Waterhouse* to persons who are considered inappropriately feminine. Looking to Title VII to help interpret the Equal Credit Opportunity Act, the First Circuit rejected the district court's assertion that *Price Waterhouse* was inapposite.[63] Instead, it quoted the Supreme Court's statement in *Price Waterhouse* that "stereotyped remarks [including statements about dressing more 'femininely'] can certainly be *evidence* that gender played a part [in a discriminatory act]."[64] In contrast to the district court's more cramped reading of mode of dress as nothing more than behavior, the First Circuit focused on the larger question of whether gender stereotypes are at issue. The appellate court explained:

> It is reasonable to infer that [the bank employee] told [Lucas] to go home and change because she thought that [his] attire did not accord with his male gender: in other words, that . . . the Bank [had treated] a woman who dresses like a man differently than a man who dresses like a woman.[65]

The appellate court subsequently remanded the case for the lower court to determine whether sex discrimination was at issue.[66]

Rosa is significant in its protection for those who are gender nonconforming, including not only cross-dressers such as Lucas, but also for transsexual persons (for whom dressing as their identified gender typically is a prerequisite for sex reassignment surgery),[67] and for masculine-appearing women or effeminate men.[68] The First Circuit's focus on gen-

60. 15 U.S.C. § 1691 (1994).

61. *Rosa*, 214 F.3d. at 214.

62. See supra note 14. For an in-depth critique of these and similar cases, see Case, supra note 6, at 46–56.

63. *Rosa*, 214 F.3d at 214–15.

64. Id. at 216 (quoting Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1988)).

65. Id. at 215–16.

66. Id. at 216.

67. See Israel & Tarver, supra note 37, at 10–12 (describing the "real-life test" that requires a transgender person to live as a member of the opposite sex before obtaining sex reassignment surgery).

68. In fact, the Connecticut Human Rights Commission ("Commission") recently invoked both *Rosa* and *Schwenk* in interpreting the state's sex discrimination statute to

der stereotyping also may set the stage for claims by gender-typical women who are denied employment despite their qualifications based on the employer's view that feminine characteristics are not appropriate for the job. Additionally, lesbian and gay rights advocates may rely on *Rosa*.[69] Despite the appellate court's conclusion that the ECOA would not apply if the bank employee had thought Lucas was gay, the First Circuit emphasized the actionability of discrimination based on gender-variance.[70] Some gay men and lesbians are likely to be subject to discrimination based both on their gender nonconformity and sexual orientation. In such a circumstance, plaintiffs could set forth a cause of action for sex and, where applicable, sexual orientation discrimination. In other cases, gay men and lesbians may be able to demonstrate that they were discriminated against not because of their sexual orientation, but because of their nonconforming gender presentation.[71]

3. Hernandez-Montiel v. INS. — While *Hernandez-Montiel v. INS* addresses a claim for political asylum, it promises to provide a useful mode of analysis in a wide range of sex- and sexual orientation-based claims, including those concerning employment discrimination, domestic vio-

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prohibit discrimination against transgendered individuals. Connecticut Comm'n on Human Rights and Opportunities, Declaratory Ruling on Behalf of John/Jane Doe (Nov. 9, 2000) (on file with the *Columbia Law Review*). While noting that older federal cases such as *Holloway* and *Ulane* had interpreted Title VII's prohibition against sex discrimination to exclude transgendered persons, the Commission rejected the rationale of these cases. Id. at 4–10. Instead, the Commission invoked the reasoning of the Supreme Court's ruling in *Price Waterhouse*, which, the Commission stated, made clear that "having specific expectations that a person will manifest certain behavior based upon his or her gender is not only conceptually outmoded sexual stereotyping, but also an unlawful form of sex discrimination." Id. at 5. The Commission further noted that the Supreme Court's decision in *Oncale*, holding that male-on-male sexual harassment can be actionable under Title VII, reveals a shift away from traditional notions of sex discrimination. Id. at 6.

In another recent ruling, the Massachusetts Superior Court issued an order allowing a transgender student, who identifies as female and who is anatomically male, to attend school in traditionally female attire. Doe v. Yunits, CIV No. 00-1060-A (Mass. Sup. Ct. filed Oct. 11, 2000) (on file with the *Columbia Law Review*).

69. In fact, this case provides an example of women's and les/bi/gay rights advocates' increasing awareness of the interrelationships among sex, gender, and sexual orientation discrimination: Two feminist organizations, the National Organization for Women and the Equal Rights Advocates, filed an amicus brief in support of Lucas Rosa, and he was represented by the Gay & Lesbian Advocates & Defenders. *Rosa*, 214 F.3d at 213.

70. *Rosa*, 214 F.3d at 216 & n.1 (noting that while the Equal Credit Opportunity Act does not prohibit sexual orientation discrimination, Massachusetts state law does).

71. Plaintiffs who have suffered discrimination on multiple bases find themselves peculiarly disadvantaged in the law, which may require a plaintiff to effectively "choose" one basis for the discriminatory acts to the exclusion of the others. For a thought-provoking account of this intersectionality bind, applied in the context of women of color who are subject to violence, see Kimberle Crenshaw, Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color, 43 Stanford L. Rev. 1241 (1991).

lence and rape, and violations of equal protection.[72] Geovanni Hernandez-Montiel, who from a young age had realized he was gay and who displayed a feminine manner and mode of dress, was a minor who fled his Mexican homeland at age fifteen.[73] In testimony that the immigration judge found "credible," "sincere," and "forthright," Geovanni described being permanently expelled from the Mexican public school system at the age of ten, forcibly institutionalized by his family, and raped twice within a span of two weeks by the Mexican police when he was fourteen.[74] He fled to the United States shortly thereafter.[75] Because Geovanni had been abused based on his homosexuality, *Hernandez-Montiel* could be viewed as a gay rights case; given that he was also abused for transgressing gender norms, it could be viewed as a trans rights case.[76] Regardless of the assigned label, the fact that Geovanni's persecution stemmed in large part from his gender nonconformity required the Ninth Circuit to analyze gender oppression in a way that demonstrates the interconnections among acts of discrimination based on sex, gender nonconformity, and sexual orientation. While neither the immigration judge nor the Board of Immigration Appeals (BIA) doubted that Geovanni had been persecuted, both ruled that he was not eligible for asylum because he was not a member of a "particular social group" as required by the Immigration and Nationality Act (INA).[77] Although precedent determined that sexual orientation may constitute a "particular social group" under the INA,[78] the immigration judge and BIA con-

72. 225 F.3d 1084 (9th Cir. 2000). In the interest of full disclosure, while Director of the Lesbian, Gay, Bisexual, and Transgender Rights Project of the ACLU Foundation of Southern California (ACLU), I served as co-counsel for amicus curiae on behalf of the petitioner, Geovanni Hernandez-Montiel. The views expressed in this Essay are mine alone and do not necessarily reflect those of the ACLU, the litigants, or other amici.

73. Id. at 1088.

74. Id. at 1088–89.

75. Id. (discussing Geovanni's attempts to enter the United States).

76. There is the possibility that Geovanni could be described as "transsexual" because his female gender identity and use of female hormones are suggestive of transsexuality. The Ninth Circuit noted this and determined that it had no bearing on the "particular social group" inquiry in this case. Id. at 1095 n.7. The "particular social group" inquiry looks to whether the applicant is viewed—within the society from which she or he is fleeing persecution—as a member of a social group subject to oppression. Geovanni identified as a member of a recognized social group within Mexico, that of gay men with female sexual identities, and he was persecuted on that basis. Id. at 1088. The Ninth Circuit thus reserved the question whether transsexuals constitute a particular social group under the Immigration and Nationality Act. Id. at 1095–96. Given that, as discussed immediately below, the court's holding is grounded in large part on Geovanni's persecution due to gender nonconformity, it seems likely that under the Ninth Circuit's reasoning, transsexuals would constitute a particular social group for asylum purposes.

77. Under the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42)(A) (1994), an applicant may establish refugee status if she demonstrates past persecution or a well-founded fear of future persecution based on, inter alia, her membership in a particular social group. *Hernandez-Montiel*, 225 F.3d at 1091–93.

78. This interpretation was adopted nationwide in an order issued by the Attorney General in 1994. Id. at 1094 (discussing Attorney General Order No. 1895-94 (June 19,

cluded that Geovanni had been abused not because of his sexual orientation, but because of the way he dressed.[79] Based on the uncontested expert evidence of the heightened vulnerability to persecution that gay men with effeminate mannerisms or characteristics face,[80] the Ninth Circuit reversed. The court concluded that gay men with female sexual identities constitute "a separate social entity within Latin American society," that its members are "heavily persecuted," and that Geovanni, a member of this group, had been subjected to such persecution.[81]

The Ninth Circuit's more encompassing view of sex may be particularly helpful for women's rights advocates. The Ninth Circuit examined the issue of subordination by men of women and feminized men through sexual activity. In concluding that Geovanni was subject to persecution, the Ninth Circuit relied on expert testimony that abuse of gay men in Mexico stems less from the fact of same-sex sexual activity per se[82] and more from the devaluation of men who are viewed as having "lowered" themselves into the subjugated position of women: "[G]ay men with female sexual identities," the court determined, "are singled out for persecution because they are perceived to assume the stereotypical 'female,' i.e., passive, role in gay relationships."[83] The court's acknowledgment that sexual activity can in some contexts be an expression of domination over persons deemed feminine could prove useful in some Title VII claims. For instance, such analysis may provide support for a plaintiff's claim that a co-worker's repeated comments about or depictions of sexual activity created a hostile work environment. *Hernandez-Montiel*'s discussion of sexual subordination may also be useful in cases concerning domestic violence and rape. The BIA had ruled that "[Geovanni's] rape by the policemen and the attack by a mob of gay bashers are not necessarily persecution" because "[his] mistreatment arose from his conduct."[84] The Ninth Circuit replied that if "the BIA was referring to Geovanni's effeminate dress or his sexual orientation . . . as a justification [for violence]," such reasoning amounted to no more than the discredited and offensive "'you asked for it' excuse for rape."[85] In rape cases, women faced with such a defense—for example, that a rapist should be exoner-

1994), that designated the BIA's decision in *Toboso-Alfonoso*, 20 I. & N. Dec. 819, 820–23 (BIA 1990), as precedent).

79. Id. at 1089–90. The BIA had described Geovanni's manner of dress as that of "a male prostitute," even though there was no evidence that Geovanni had ever been a prostitute or had been involved in any criminal activity. The Ninth Circuit responded rather dryly that it did "not venture to guess the non-record basis of the BIA's assumption of how a male prostitute dresses." Id. at 1095.

80. Id. at 1094–95.

81. Id. at 1094 (quoting expert testimony).

82. Id. at 1089 (discussing expert testimony that same-sex sexual activity between men, before marriage at least, may be socially acceptable in Mexico as long as a man "performs the role of the man" sexually).

83. Id. at 1089.

84. Id. at 1098.

85. Id. at 1098.

ated because the victim was dressed "provocatively"—could invoke the Ninth Circuit's rejection of such arguments as nothing more than impermissible gender-based stereotyping that revictimizes the victim.[86]

The analysis in *Hernandez-Montiel* may be of further use in statutory and constitutional sexual orientation discrimination challenges. Like the bank in *Rosa*, the immigration judge and BIA had characterized Geovanni's gender presentation as an unprotected form of conduct: "If he wears typical female clothing sometimes and typical male clothing other times," the immigration judge reasoned, Geovanni "cannot characterize his assumed female persona as immutable or fundamental to his identity."[87] The Ninth Circuit, in contrast, relied upon the expert testimony and determined that "Geovanni manifests his sexual orientation by adopting [feminine] gendered traits."[88]

Defendants in sexual orientation discrimination cases often make an argument similar to this "not-sex-but-clothes" reasoning. Invoking *Bowers v. Hardwick*, which upheld against a due process challenge the criminalization of sodomy,[89] many defendants argue "not-homosexuality-but-conduct" by claiming that the adverse action they took against the plaintiffs was not on account of the plaintiffs' sexual orientation, but was in response to their presumed conduct: participation in the crime of sodomy.[90] Similarly, in equal protection claims, the state often argues that heightened constitutional scrutiny does not apply to classifications based on sexual orientation, reasoning that gay persons are effectively indistinguishable from the class of persons engaging in sodomy.[91] To counter

86. See, e.g., Barbara Fromm, Sexual Battery: Mixed-Signal Legislation Reveals Need for Further Reform, 18 Fla. St. U. L. Rev. 579, 591–93 (1991) (detailing statements from Florida jury that acquitted a defendant charged with rape because of the manner in which the complainant had been dressed).

87. *Hernandez-Montiel*, 225 F.3d at 1089. In so ruling, the immigration judge and BIA effectively negated Geovanni's claim: One factor that a court looks at in making the "particular social group" determination is whether the group is united by a characteristic that the members cannot or should not be required to change. Id. at 1093.

88. Id. at 1095.

89. 478 U.S. 186, 186 (1986). In fact, the BIA in *Hernandez-Montiel* invoked *Hardwick* for the proposition that "anti-sodomy laws are not persecution." 225 F.3d at 1098. The Ninth Circuit rejected this reasoning, which it called "convoluted, inapposite, and irrelevant," on the ground that Geovanni had not claimed persecution based on sodomy laws but was instead raped by police officers who had forced him to engage in sodomy. Id.

90. See, e.g., Shahar v. Bowers, 114 F.3d 1097, 1104–05 (11th Cir. 1997) (en banc) (upholding lesbian attorney's termination from state attorney general's office on ground of conflict with state sodomy statute); Bottoms v. Bottoms, 457 S.E.2d 102, 108 (Va. 1995) (transferring custody from lesbian mother to grandmother and stating that existence of state sodomy statute is an "important consideration" in gay or lesbian custody determinations).

91. See, e.g., Padula v. Webster, 822 F.2d 97, 103 (D.C. Cir. 1987) (rejecting heightened scrutiny for gay persons on the ground that "there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal"); Baker v. Wade, 769 F.2d 289, 292 (5th Cir. 1985) (rejecting heightened scrutiny for gay persons based on similar reasoning).

such arguments, plaintiffs making statutory or constitutional discrimination claims could invoke the *Hernandez-Montiel* court's analysis. Based on expert testimony that Geovanni's gender presentation constituted a fundamental aspect of his identity,[92] the Ninth Circuit concluded that "[just] because Geovanni can change his clothes [does not mean that] he can change his identity . . . . This case is about sexual identity, not fashion."[93] The Ninth Circuit's refusal to equate status with conduct may provide a useful model in sexual orientation, transgender, and sex discrimination claims. Whether the defendant asserts that the disparate treatment was in response to a lesbian's presumed sodomitic conduct (rather than her sexual orientation), a transsexual woman's transition from anatomic male to female (rather than her sex), or a man's decision to wear an earring (rather than his gender nonconformity), the Ninth Circuit's approach in *Hernandez-Montiel* recognizes the integral nature of sexual identity and rejects the attempt to characterize such identities as nonessential and behavior-based.

II. Discrimination in the Private Realm

Transgender marriage and custody cases offer the potential to undercut entrenched notions of gender that impede unbiased evaluation in many family law cases involving gay men and lesbians, as well as single mothers. Both single mothers and gay parents face the claim that their families are deficient because the children are "fatherless," and that this purported lack is responsible for widespread social deterioration: "Separation of children from their fathers is 'the leading cause of declining child well-being in our society . . . . [and is] the engine driving our most urgent social problems, from crimes to adolescent pregnancy to child abuse to domestic violence.'"[94] The premise of the emphasis on fathers

92. *Hernandez-Montiel*, 225 F.3d at 1095.

93. Id. at 1096. In dicta, the Ninth Circuit goes on to distinguish Geovanni from a cross-dresser, which the court states is someone "who dresses in clothing of the opposite sex for psychological reasons." Id. The court's suggestion that cross-dressers may not constitute a particular social group for asylum purposes is inconsistent with the rest of its opinion: If undertaken "for psychological reasons," it is difficult to imagine why cross-dressing would not be fundamental to one's identity. As discussed above, a different ground for protecting cross-dressers from discrimination, which also can have beneficial ramifications for women's and gay rights advocates, is that discrimination against a person for gender nonconforming dress constitutes impermissible sex role stereotyping. See supra notes 57–71 and accompanying text.

94. Lynn D. Wardle, The Potential Impact of Homosexual Parenting on Children, 1997 U. Ill. L. Rev. 833, 859 (quoting David Blankenhorn, Fatherless America: Confronting Our Most Urgent Social Problem 1 (1995)). In his discussion of "father-absent" families, Wardle discusses as equivalent, for purposes of a child's psycho-social development, a child raised by two women or two men with a family in which one parent has died, id. at 863–64, which arguably accounts (at the expense of negating one parent in each gay couple) for the melding of lesbian-headed and single mother families into one category. It remains unclear why proponents of the "fatheriessness" theory characterize families headed by gay fathers as "fatherless." One explanation, not directly put forward by

is that women and men, by virtue of their sex, have a different and defined set of gendered skills that they bring to parenting. Based on the belief that gender attributes follow ineluctably from anatomical sex, opponents of single- or gay-parenthood argue that children need to be raised by one parent of each sex to receive the full complement of parenting skills and to develop a "normal" gender identity themselves.[95] Opinions in custody cases often reflect this anxiety about gender, which tends to be expressed differently for gay parents (where the concern typically centers on the child's gender role development) than for single mothers (where the focus tends to be on the mother's deviation from cultural expectations of motherhood). If, in contrast, a court is able to recognize that anatomy is not necessarily tied to sex, then the perceived naturalness of gender roles, whether assigned to the children or the parents, may be undercut as well.

A. *Obstacles Facing Les/Bi/Gay and Women's Rights Advocates*

1. *Lesbian and Gay Parents.* — Some courts have taken drastic measures when faced with the prospect of a child who fails to conform to gender roles, particularly when the child's parents are lesbian or gay. In *Ward v. Ward*, for example, a state appellate court affirmed a change of custody from the child's lesbian mother, who had been the primary caretaker, to her father, who had been convicted of murdering his first wife.[96] Claiming that it was "not suggesting that the sexual orientation of the custodial parent by itself justifies a custody change,"[97] the state court nonetheless proceeded to weigh the father's admitted commission of murder against his accusations concerning the mother's child-raising abilities. All of the father's accusations correlate quite neatly with anti-lesbian stereotypes: First (perhaps drawing on the notion that gay people are hyper-sexual), the father claimed that the eleven-year-old daughter had made lewd sexual references to her stepmother; second (echoing the notion of lesbians as unkempt, unfeminine women), he claimed that the child had bad grooming habits and table manners; and third, the father testified that the daughter had a preference for men's cologne (apparently implying that the child was influenced by her lesbian mother's presumably mannish ways).[98]

Significantly, the *Ward* court acknowledged that the evidence concerning the father's first two allegations could be interpreted in ways which did not reflect negatively on the mother's child-rearing abilities.[99]

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the theory's proponents, is that gay men, because gendered as feminine by society, are not viewed as "real men" and hence cannot be "real" fathers.

95. Wardle, supra note 94, at 857–58.

96. 742 So.2d 250, 252 (Fla. Dist. Ct. App. 1996).

97. Id. at 254.

98. Id. at 252–53.

99. Id. at 252–54 (stating that lack of good grooming habits and table manners are not necessarily unusual for an eleven-year-old, and observing that the child's claimed

The only piece of evidence that the court did not view as equivocal was the girl's preference for men's cologne. Without elaborating on how the child's preference could be attributable to her mother or why her aroma preference would be detrimental to her, the court transferred custody of the daughter to the father.[100] Given the absence of other evidence justifying the court's ruling, it seems that the appellate court was acting based on unsubstantiated presumptions that the mother's lesbianism was somehow masculinizing her daughter and that this was an outcome to be avoided at almost any cost.[101]

Even some courts presented with a multitude of studies demonstrating that children of gay parents are just as developmentally healthy as those raised by non-gay parents[102] have presumed that heterosexuality is

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sexual statements were "equally susceptible to an interpretation that has no particular sexual reference").

100. In an apparent attempt to downplay the potential harm to the child from being placed in the custody of a parent who had been convicted of murder—particularly of a family member—the *Ward* court noted that the father showed remorse by stating at the custody trial that the murder was the result of "stupidity, jealousy, and anger." Id. at 252. No appeal was taken from this decision because, sadly, the child's mother died of a heart attack shortly after custody was transferred. Gady A. Epstein, Death Ends Lesbian Mom's Custody Case, Tampa Trib., Jan. 23, 1997, at B6.

101. Some opponents of gay-parenting attempt to lend an air of legitimacy to fears of gender nonconformity in children by invoking Gender Identity Disorder of Childhood (GIDC), a diagnosis of mental illness that applies to children who pervasively reject many of the gender roles that the feminist movement has been fighting for years. American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 533 (4th ed. 1994) (manifestations in boys include an interest in "[s]tereotypical female-type dolls, such as Barbie . . . and . . . little interest in cars and trucks" and in girls include having "intense negative reactions to . . . wear[ing] dresses or other feminine attire" and identifying with "powerful male figures, such as Batman or Superman"). It is possible that a court such as that in *Ward* could point to the mere existence of GIDC as a mental illness in an attempt to buttress a determination that custody decisions may be based in part on an estimation of which parent is more likely to "encourage" a child's development in conformity with traditional gender roles.

A GIDC diagnosis is distinct from a diagnosis of Gender Identity Disorder (GID) in adults. Adults diagnosed with GID generally are transsexual and must receive the diagnosis to gain access to hormone therapy or sex reassignment surgery. Shannon Minter, Diagnosis and Treatment of Gender Identity Disorder in Children, *in* Sissies & Tomboys: Gender Nonconformity & Homosexual Childhood 9, 11 (Matthew Rottnek ed., 1999). In contrast, few children diagnosed with GIDC are transsexual as adults, while the vast majority of these children grow up to be gay or lesbian. Id. In fact, it appears that the former labeling of adult homosexuality as a mental illness has simply been reconfigured as a childhood disorder: In addition to the fact that most children diagnosed with GIDC grow up to be gay or lesbian, GIDC was added as a mental illness to the *Diagnostic and Statistical Manual* in the edition immediately following the removal of homosexuality from the manual. Id. at 12. Indeed, some researchers point to the existence of GIDC to support calls to reclassify homosexuality as a mental illness. Id. at 13.

102. See, e.g., American Psychological Association, Lesbian and Gay Parenting: A Resource for Psychologists 8 (1995) (stating that "[n]ot a single study has found children of gay or lesbian parents to be disadvantaged in any significant respect relative to children of heterosexual parents"); Charlotte J. Patterson & Richard E. Redding, Lesbian and Gay Families with Children: Implications of Social Science Research for Policy, 52 J. Soc. Issues

somehow a "known" quantity and hence represents a more prudent custodial choice. For example, in *Ex Parte J.M.F.*, the Supreme Court of Alabama acknowledged that the mother's expert had reviewed at least fifty studies, all subject to peer review, which consistently found that children of lesbian and gay parents are no more likely to be gender nonconforming or gay than those raised by heterosexual parents.[103] The state court also noted that the court-appointed psychologist had recommended that custody "be determined on . . . individual character and parenting skills" rather than on sexual orientation[104] and that experts indicated that the child was thriving in her mother's care.[105] The state court, however, affirmed that the lower court did not abuse its discretion in concluding that the harm to children from gay parenting is uncertain.[106] The higher court substantiated its finding by pointing to a handful of claims that children are adversely affected by same-sex parenting—claims that have been rejected by mainstream health care researchers.[107] The state court then presumed, without pointing to any evidence, that the father's marriage was "successful" and that the "developmental benefit" to children of heterosexual marriage was "undisputed."[108] The state court also criticized the mother's explanation to her daughter that same-sex relationships are "the social and moral equivalent of a heterosexual marriage"[109] and it repeatedly noted with disapproval the daughter's statement that "girls could marry girls and boys could marry boys."[110] Rejecting the overwhelming multitude of social science studies before it, the Alabama Supreme Court relied instead on its own notions of how men and women (and boys and girls) are meant to relate to one another in determining which parent is best suited to raise their child.

The argument that children require one parent of each sex for "normal" gender-role development also has served as the basis for states de-

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29, 41 (1996) (summarizing studies involving over three hundred children of gay and lesbian parents and concluding that these children are as developmentally healthy as those raised by heterosexual parents).

103. 730 So.2d 1190, 1193 (Ala. 1998). Although beyond the scope of this Essay, an essential claim for feminist and gay rights advocates to make is the normative assertion that gender nonconformity and homosexuality are a moral good. Under this approach, advocates would assert that these qualities are an equally desirable developmental outcome as heterosexuality and conformity with gender roles. For an excellent discussion of this issue concerning sexual orientation, see generally Chai R. Feldblum, Sexual Orientation, Morality and the Law: Devlin Revisited, 57 U. Pitt. L. Rev. 237, 241 (1996) (setting out argument that same-sex love embodies the same moral goods as does heterosexual love).

104. *Ex Parte J.M.F.*, 730 So.2d at 1192.

105. Id. For example, the child's therapist recommended that custody remain with the mother, and even the court-appointed guardian ad litem, who recommended a change in custody based on a conflict among claims about the development of children of gay parents, testified that the child was thriving and had a strong bond with her mother. Id.

106. Id. at 1195–96.

107. Id.

108. Id. at 1196.

109. Id. at 1195.

110. Id. at 1192–95.

fending their restriction of marriage to different-sex couples.[111] In its case against same-sex marriage, Vermont argued that children need to experience the "innate and unique" qualities and skills "that each sex possesses,"[112] an argument similar to that made by Hawaii.[113] While the Hawaii trial court flatly rejected the state's argument,[114] the Vermont court's response was more ambivalent. In *Baker v. Vermont*, the court rejected the state's argument based not on the substance of the claim, but because the court did not believe that this was the actual state interest motivating the marriage ban: Vermont had recently passed legislation that provided significant legal protections to lesbian- and gay-parented families, a position that the court ruled was "diametrically at odds" with the state's purported opposition to gay parenting.[115] Concerning the substance of the claim that children require male and female role models for optimal development, the Vermont court was more equivocal, stating that the "experts disagree" and describing "the answer" as "decidedly uncertain."[116] Even in *Baker*—a momentous opinion requiring Vermont to provide same-sex couples who desire to marry public benefits and protections equivalent to those that married heterosexual couples receive[117]—if the outcome had turned on conclusions to be drawn from claims about the gender roles provided by same-sex parents, a favorable outcome for plaintiffs would not have been assured.[118] Reliance on social science data, then, while crucial, may not in itself be sufficient to refute claims

111. See Baehr v. Lewin, 852 P.2d 44, 56 (Haw. 1993), rev'd sub nom., 994 P.2d 566 (Haw. 1999); Baker v. Vermont, 744 A.2d 864, 881 (Vt. 1999).

112. See Mary Bonauto et al., The Freedom to Marry for Same-Sex Couples: The Opening Appellate Brief of Plaintiffs Stan Baker et al. in Baker et al. v. State of Vermont, 5 Mich. J. Gender & L. 409, 446 (1999).

113. See id. at 444 n.133 (listing the scientific reports used by the Hawaii court to reject the claim that the well-being of children will be harmed by same-sex marriage).

114. See Baehr v. Miike, Civ. No. 91-1394, 1996 WL 694235, at *22 (Haw. Cir. Ct. Dec. 3, 1996), rev'd and remanded, 994 P.2d 566 (Haw. 1999). After the trial court held that Hawaii failed to meet its constitutional burden and that the state's ban on same-sex marriage violated the state constitution's guarantee of equal protection, id., the Hawaii Constitution was amended to give the state legislature the power to "reserve marriage to opposite-sex couples." *Baehr*, 994 P.2d at 567 (quoting article I, section 23 of the Hawaii Constitution). As part of a political compromise to ensure successful amendment of the state constitution, the first statewide domestic partnership bill was passed, although it ultimately failed to provide health care benefits or parenting rights usually awarded to married heterosexual couples. All Things Considered: Hawaii Same-Sex Ruling (National Public Radio broadcast, Apr. 8, 1998, transcript # 98040812-212).

115. *Baker*, 744 A.2d at 884.

116. Id.

117. Id. at 886.

118. See id. In response to the supreme court's ruling, the Vermont legislature enacted "civil union" legislation, which provides all of the legal benefits and protections afforded by marriage in the state of Vermont. Brian MacQuarrie, VT House Approves Bill Allowing Same-Sex Unions, Boston Globe, Apr. 26, 2000, at A1. While the civil union legislation is an unprecedented victory for les/bi/gay rights advocates, a Vermont "civil union" remains legally distinct from "marriage." That the Vermont legislature refused to simply revise the existing marriage statute and instead created an entirely new system of

that children are best off if raised by one male and one female parent. By bringing transgender marriage and custody claims, lesbian and gay rights advocates directly require the court to confront the notion that gender's legitimacy comes from its congruence with anatomical sex.

2. *Single and Working Mothers.* — Transgender rights cases have the potential to loosen the fixity of gender-role stereotypes that courts continue to apply to women in custody disputes, particularly to single and working mothers. Gender bias surveys undertaken in various states suggest that, in contested cases,[119] state courts tend to apply more exacting parenting standards to mothers than to fathers. Findings in surveys conducted in Colorado, Massachusetts, and New York, for example, suggest that voluntary relinquishment of custody by women is viewed with greater disapproval than voluntary relinquishment by men.[120] The studies also have found that women's long-term sexual relationships tend to count against them, whereas men's relationships often are viewed favorably, and that working mothers tend to be judged in a more critical light than working fathers.[121] In addition, studies suggest that a woman may be especially vulnerable to losing custody if the father has established a traditional household by remarrying.[122] These findings are often reflected in court opinions. In the 1998 decision of *Black v. Black*, for instance, a state appellate court invoked the mother's voluntary and temporary transfer of custody and her intimate relationship as factors to justify its denial of custody.[123] The mother in *Black* had allowed the child to live with her ex-husband for nine months during a time when she had begun to cohabitate with the man whom she ultimately married. The court portrayed her as selfish and unmotherly, concluding that she had made "a calculated decision . . . in favor of her relationship . . . and against having her daughter with her."[124] The court further based its decision to grant the father

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recognition for gay men and lesbians suggests that while "separate" may be "equivalent," it is not necessarily "equal."

119. Approximately ninety percent of custody disputes are resolved without resort to the courts and their resolution unsurprisingly mirrors the paradigm of woman-as-caretaker: In nearly all privately determined custody arrangements, the mother is selected as the custodial parent. Lisa Genasci, Increasingly, Working Mothers Lose in Custody Fights, L.A. Times, Jan. 20, 1995, at D8. For the remaining contested cases, the outcome is significantly different: It is estimated that fathers are awarded joint or sole custody nearly seventy percent of the time. Id.

120. Susan Chira, Custody Case Stirs Debate on Bias Against Working Women, N.Y. Times, July 31, 1994, at A31 (discussing gender bias surveys conducted in Colorado and New York); Genasci, supra note 119, at D8 (discussing Massachusetts gender bias survey that found that women separated from their children were more likely than absent fathers to lose custody and that mothers' new intimate relationships were judged critically, whereas fathers' new relationships were often seen as a sign of stability).

121. Genasci, supra note 119, at D8.

122. Chira, supra note 120, at A31.

123. Black v. Black, No. 01A01-9801-CV-00056, 1998 Tenn. App. LEXIS 429, at *4 (Tenn. Ct. App. July 1, 1998).

124. Id. at *6.

custody on the mother's "inconstancy" and her "willingness to give her own convenience and satisfaction a higher priority."[125] Similarly, in *Lowery v. Lowery*, a state appellate court affirmed a change of custody to the father on the ground that the father had remarried, painting the picture of a traditional family headed by the father, contrasting it against the less affluent, single-mother household.[126]

Case law suggests that another double-bind faced by mothers in contested custody disputes is that the scope of permissible variation within "acceptable" limits for work outside the home appears to be narrower for women than men. A job outside the home, the cases suggest, is generally appropriate, but working long or the "wrong" hours is not. Public awareness of this quandary spiked in the wake of custody battles involving high profile women with demanding careers, such as O.J. Simpson prosecutor Marcia Clark and Senate judiciary aide Sharon Prost.[127] Women similarly have been denied custody on the ground that they worked nontraditional hours, such as weekends or nights, even if these schedules permitted more time overall with the children. In *Gann v. Bryowsky*, for example, the trial court granted custody to the mother, a night nurse who worked either three or four night shifts per week.[128] The court of appeals overturned this decision as an abuse of discretion, holding that it was clear error for the lower court to have granted custody to the mother when the father could spend all evenings (but fewer full days) with the child.[129] Custody litigation further suggests that fathers frequently are judged by the availability of child-care provided by persons other than themselves, while many mothers are judged by their own personal ability to care for the child.[130] Some courts have also conditioned a custodial award to the mother on the ground that she stay home with a young child, even

125. Id. at *9. The court also focused fixedly on the mother's nonmarital cohabitation and was dismissive of her subsequent marriage, intimating that the marriage might be little more than a litigation tactic. Id. at *5–*6 (stating that "[o]nly after this litigation was filed" did mother and stepfather "make the commitment to marriage," and that mother "gave up" custody to pursue a relationship "which only resulted in marriage just before depositions were taken in this case").

126. Lowery v. Lowery, No. CA 85-235, 1985 Ark. App. LEXIS 2262, at *2 (Ark. Ct. App. Dec. 11, 1985) (stating that "the [father] had remarried . . . was purchasing a home rather than living in an apartment . . . [and that he and] his wife were expecting a new baby").

127. Alice Steinbach, Career vs. Children: Women Face Difficult Choice, Baltimore Sun, Mar. 13, 1995, at 1D (discussing Marcia Clark custody dispute); Genasci, supra note 119, at D8 (discussing denial of custody to Sharon Prost).

128. 676 So.2d 1317, 1319 (Ala. Civ. App. 1995).

129. Id. at 1321. In a similar situation, a mother who was a flight attendant purposefully arranged her schedule to work some weekend days and nights in order to have part of each day with her daughter, as well as three full days free during the week. She lost custody to her ex-husband, who worked a "day-job" five days a week. Steinbach, supra note 127, at 1D.

130. Linda Feldmann & Gloria Goodale, Custody Cases Test Attitudes of Judges, Christian Sci. Monitor, Mar. 15, 1995, at 1A.

though an award to the father would have resulted in day-care.[131] In each of these cases, women are running up against the idealized archetype of woman-as-nurturer. When other aspects of a woman's life surface, such as work or an intimate relationship, she is viewed as falling short of the mark of a "good mother," a mark for which there is no male equivalent. Because transgender custody cases may enlarge a court's understanding of "woman" to include some persons born anatomically male, such a paradigmic shift promises to loosen much of the force behind the division of women and men into the respective gender roles of "nurturer" and "provider."

B. *Transgender Rights Litigation: Potential for Change*

A New Jersey Superior Court embarked on the path of separating the conception of sex from anatomy nearly twenty-five years ago. In *M.T. v. J.T.*, a husband claimed that he had no duty to support his estranged wife on the ground that his marriage was invalid: He argued that his wife, a male-to-female transsexual woman, was legally male.[132] In upholding the validity of the marriage, the court explained that sex is comprised of more than a person's genitalia at birth: "[T]he evidence before this court teaches that there are several criteria . . . which may be relevant in determining the sex of an individual."[133] The court noted the agreement among most experts that the crucial component of sex is gender identity, one's sense of self as male or female, which is firmly established at a young age.[134] While a person's anatomical sex is usually aligned with gender identity and thus appears to be determinative, the court explained, when the two are discordant, "the facts of one's anatomy are really secondary."[135] The New Jersey court thus recognized that the components that determine sex typically include, but are far broader than, anatomical birth sex.

This fuller understanding of sex may be helpful in sex and sexual orientation nondiscrimination jurisprudence because of what it suggests about gender roles. Courts frequently view deviation from traditional gender roles, by either the parent or the child, as a basis for denial or modification of custody.[136] Trans litigation offers the unique opportunity to directly address and refute the view of sex and gender as inextricable from anatomy, which challenges the perceived fixity of gender roles. Consider, for example, the case of *Vecchione v. Vecchione*, in which a woman attempted to void her marriage to her husband, a female-to-male

131. Id. (discussing case of Debbie Langford, in which a judge explicitly based grant of custody to mother on promise that she would quit job and not return to work until child was in school full-time).

132. 355 A.2d 204, 205 (N.J. Super. Ct. App. Div. 1976).

133. Id. at 208.

134. Id. at 205.

135. Id. (quoting expert testimony).

136. See supra Part II.A.

transsexual man, on the ground that he was legally female.[137] Effectively adopting an understanding of sex that is broader than one's anatomy at birth, the court concluded that the state legislature granted legal recognition to sex reassignment when it enacted a statute permitting post-operative transsexual persons to change the sex designation on their birth certificates.[138] After holding that the husband, Joshua Vecchione, was legally male, the court awarded him fifty percent custody of their child.[139]

It could be argued that, far from resulting in a more expansive understanding of sex, courts such as those in *M.T.* and *Vecchione* are simply overlaying the law's paradigmatic approach to sex onto transsexual marriages. While the process that the courts are using is one of precedent, the result is not simply a reproduction of the traditional view of sex. By recognizing that sex may be decoupled from anatomy, and given that "gender" has come to be viewed as a surrogate for "sex," these opinions provide a means of disentangling gender from anatomy. For instance, Joshua Vecchione's life experiences, like those of other transgendered individuals, confound notions such as "father-absence." Has Joshua's daughter—raised by a man whom she calls "daddy," whom medical experts declare male, and who by all appearances is indistinguishable from any other man—been growing up without a father? What "gender" of skills is he bringing to parenting? If the man before the court was (or is) anatomically indistinguishable from a woman, this undermines the assertion that there is something integral that a parent conveys to a child by virtue of biology; it undermines the claim that children require one male and one female parent for optimal gender role development.

While both *M.T.* and *Vecchione* involve post-operative transsexual persons, I do not mean to imply that feminists and gay rights advocates should limit themselves to bringing cases on behalf of persons whose sexual anatomy now corresponds to their gender identity. To the contrary, the ultimate goal of the proposed litigation is to capture much of the currently irremediable discrimination that affects a multitude of persons whose gender is in some way perceived to be in conflict with their sex.[140] There is, however, an advantage to bringing some cases on behalf of post-

137. See, e.g., Vecchione v. Vecchione, No. 95D003769 (Cal. Sup. Ct., filed Apr. 23, 1996). In the interest of full disclosure, I acted as co-counsel for Joshua Vecchione on behalf of the ACLU, in conjunction with the National Center for Lesbian Rights (NCLR). The views expressed in this Essay are mine alone and do not necessarily reflect those of the ACLU, Mr. Vecchione, or NCLR.

138. *Vecchione*, No. 95D003769 Minute Order 1–2 (Nov. 26, 1997) (on file with the *Columbia Law Review*).

139. Telephone Interview with Shannon Minter, Senior Staff Attorney, National Center for Lesbian Rights (Jan. 20, 2001) (confirming initial award of fifty percent custody of child to Joshua Vecchione, following court's determination of validity of the couple's marriage).

140. For example, advocates could bring litigation on behalf of persons who are not transsexual but who are gender nonconforming, or on behalf of transsexual persons who have not undergone complete (or any) sex reassignment surgery or hormone therapy.

operative transsexual persons in a heterosexual marriage. Advocates can attempt to use the laws created to privilege the system of hetero-patriarchy as an instrument to begin to chip away at the system itself.[141] There are innumerable such laws, from the generative monopoly grant of marriage rights to heterosexuals, to the presumption that a child born during the marriage is the couple's legal child,[142] to the alternative insemination presumption that the woman's husband (and not the sperm donor) is the child's legal father.[143] It is precisely this access to heterosexual entitlement that facilitates the process of slowly dismantling the law's enforcement of gender norms.[144]

Even if we were to assume that trans litigation ultimately broadens the juridical views of sex and gender, some may ask whether cases such as *M.T.* and *Vecchione* run the risk of reinscribing marriage as a solely heterosexual union.[145] This is a serious concern: The court in *M.T.*, for example, explicitly addressed the issue of whether the parties had to be of different sexes for the marriage to be valid and concluded that a "legislative intent . . . which would sanction a marriage between persons of the same sex, cannot be fathomed."[146] This is not a necessary outcome, however. In *Vecchione*, the court determined that the validity of same-sex marriage was not before it and that to address the issue would be to unnecessarily raise the question of the marriage statute's constitutionality.[147] Importantly, even unsuccessful transgender marriage and custody cases

141. By "hetero-patriarchy," I mean the social and legal privileging of men and masculine norms through the systems of sex and sex orientation inequality, which work in tandem to maintain rigid sex and gender role differentiation. I have adopted this understanding from Valdes, supra note 6, at 8 nn.12–14.

142. Michael H. v. Gerald D., 491 U.S. 110, 111 (1989) (upholding statutory presumption that child born during the marriage is the couple's legal child).

143. See, e.g., Cal. Fam. Code § 7613 (West 1994) (providing that husband is legal father of child conceived through donor artificial insemination when insemination is performed with husband's consent and under physician's supervision).

144. See, e.g., infra notes 148–157 and accompanying text (describing how some gay and lesbian transsexuals have availed themselves of rulings refusing to recognize the post-operative sex of transsexual persons by legally marrying their partners).

145. Another objection to taking on trans litigation is that, because of courts' relative unfamiliarity with, and the greater social marginalization of, transgendered persons, courts are likely to be even less receptive to transgender rights claims than to sex and sexual orientation discrimination challenges. The potential hostility of the courts is a substantial barrier faced by trans advocates and all others who are disempowered. As many of the cases discussed above demonstrate, however, the hurdle need not be insurmountable. Contrary to what one might expect based on projected political views, for example, two of the three judges who decided *Hernandez-Montiel* were Reagan appointees; the *Vecchione* case was decided in Orange County, California, which is known as a conservative stronghold; and *M.T.* was decided nearly twenty-five years ago. Moreover, even though advocates inevitably will encounter judicial hostility, the benefits of undertaking transgender rights litigation, described in this Essay, are potentially far-reaching.

146. M.T. v. J.T., 355 A.2d 204, 208 (N.J. Super. Ct. App. Div. 1976).

147. Record at 4–5 (Nov. 21, 1997), Vecchione v. Vecchione, No. 95D003769 (Cal. Sup. Ct. filed Apr. 23, 1996) (on file with the *Columbia Law Review*) (including statement by the court that "I don't have to go that far nor do I plan to").

may present an opportunity to transform the terms of the debate. Some states and foreign jurisdictions have ruled that post-operative transsexuals remain legally defined by their anatomical sex at birth.[148] In *Littleton v. Prange*, for example, the Texas Court of Appeals ruled that Christie Littleton, a male-to-female transsexual woman, did not have standing to bring a medical malpractice claim arising out of the death of her husband.[149] Phrasing the issue before the court as whether "a person's gender [is] immutably fixed by our Creator at birth,"[150] the court reasoned that, because sex reassignment surgery does not alter chromosomes or result in the creation of a womb, cervix, or ovaries, "a post-operative female transsexual is still a male."[151] Under this reasoning, the appellate court held that Christie's marriage was invalid.[152] Does this mean that Christie is not entitled to marry anyone at all? Presumably, Christie has the same empty right to marry as do gay men and lesbians: She can marry someone deemed to be the "opposite" sex, which, under *Littleton's* logic, would be another woman.

While Christie is heterosexual and is thus effectively denied the right to marry, gay and lesbian transsexuals can and have married their partners in Texas. Jessica and Robin Wicks were the first lesbian couple married in Texas following the *Littleton* court's ruling.[153] Although a lesbian couple in the eyes of most (including themselves), they are considered a married, heterosexual couple in the eyes of Texas, since Jessica is a post-operative male-to-female transsexual woman. Turning lemons into lemonade, Christie Littleton's lawyer has sent out an invitation world-wide, urging similarly situated couples "to take a week's vacation [in San Antonio] and get married."[154] Similar marriages have been reported in

148. See, e.g., Littleton v. Prange, 9 S.W.3d 223 (Tex. App. 1999), cert. denied, 121 S.Ct. 174 (2000) (holding that the state does not legally recognize post-operative transsexual persons as their post-operative sex); In re Ladrach, 513 N.E.2d 828 (Ohio Prob. Ct. 1987) (same); Corbett v. Corbett, 2 W.L.R. 1306 (P. 1970) (same). For an in-depth analysis of the *Littleton* case, see Julie A. Greenberg, When is a Man a Man, and When is a Woman a Woman?, 52 Fla. L. Rev. 745 (2000).

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

150. Id. at 224.

151. Id. at 230. Given the court's emphasis on internal reproductive organs, it is unclear how the court would classify women who have undergone hysterectomies, particularly if they have a chromosomal anomaly.

152. Id.

153. Adolfo Pesquera, Lesbian Couple get License to Wed; Transsexual Ruling Clears the Way, San Antonio Express-News, Sept. 7, 2000, at B1.

154. Id. In fact, five days after Jessica and Robin's wedding, another lesbian couple legally married. John Gutierrez-Mier, 2 More Women Obtain County Marriage License, San Antonio Express-News, Sept. 21, 2000, at B7.

Oregon,[155] Utah,[156] and England.[157] These cases highlight the incongruity of limiting the definition of "sex" to one's birth anatomy and the definition of "marriage" to persons differently sexed.

While these marriages are currently sensationalized, they are increasing in number. Familiarity may breed contempt, but it also may help diminish some of the fear and dehumanization that often accompanies the awareness of a person's gender nonconformity. I am not predicting a sudden, radical shift in views towards gender-variance; I am simply referring to the incremental, yet important developments already taking place. In *M.T v. J.T.,* for instance, the court carefully recounted the wife's personal progression from a child who wore feminine clothes to an adult who underwent sex reassignment surgery and had a decade-long relationship with the man who became her husband.[158] The New Jersey court concluded its opinion by looking at what the ruling was likely to mean for the wife, "M.T.," as a person: "Such recognition [of M.T. as female] will promote the individual's quest for inner peace and personal happiness, while in no way disserving any societal interest . . . ."[159] Media reports of the *Vecchione* case similarly conveyed the day-to-day quality of Joshua's life with his daughter.[160] Conveying the humanness of M.T. and Joshua not only breaks down some of the myths and prejudice surrounding transgendered individuals, but also helps dispel the biases faced by the wide spectrum of persons whose lives fall outside of expected gender norms, including nontraditional mothers and gay parents.

CONCLUSION

Far from being outliers on the edge of civil rights advocacy, transgender rights cases promise to play a central role in advancing a broad movement for equality that encompasses the rights of women, gay men and lesbians, and gender variant persons within its scope. An antidiscrimination suit brought by a woman on the grounds of sex or sexual orientation discrimination importantly challenges the notion of *who a woman can be:* She may be masculine, like Ann Hopkins, or may have configured her intimate life around another woman, like many lesbian

155. Oregon Couple Adds Twist to Love Story: The Bride and Groom Plan to Wed Legally, But Then the Man Intends To Have His Gender Altered, News Trib. (Tacoma, Wash.), Dec. 14, 1996, at A3.

156. Michael Vigh, Transsexual Weds Woman in Legally Recognized Union, Salt Lake Trib., Feb. 5, 1999, at 1C.

157. Chris Beam, For Better or for Worse?, OUT, May 2000, at 60, 60–64 (discussing marriage of lesbian couples in England and Ohio, in which one spouse of each couple is a post-operative male-to-female transsexual woman).

158. M.T. v. J.T., 355 A.2d 204, 205 (N.J. Super. Ct. App. Div. 1976).

159. Id. at 211.

160. See, e.g., Jeanne McDowell, What are Dads Made Of?, Time Mag., July 7, 1997, at 36 (stating, "Right off the top of his head, Vecchione knows his daughter's favorite color (blue), how she likes her corn (scraped off the cob) and her favorite video (The Lion King).").

mothers. An antidiscrimination suit brought by a transgendered woman, in contrast, challenges the notion of *who can be a woman*: Like Crystal Marie Schwenk, she may be someone born physiologically male. By contesting the social and jurisprudential reliance on biological sex as the fixed marker of gender identity, trans litigation holds the potential to defuse the power of gender as a mechanism for discrimination.