

Gender Essentialism and American Law: Why and How to Sever the Connection

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American law presumes that all persons are born either female or male, and rests a surprising number of legal entitlements on this presumption. Persons' legal rights to express their identity at work, to use public accommodations, and to retain legal parenthood status with respect to their children may all depend on whether they are female or male. Yet we, as individuals, generally have no choice regarding whether we are legally designated female or male, just as people had no choice as to whether they were designated "colored" or "white" under past racial discrimination schemes. The American legal system plays a significant role in the construction, maintenance, and coercive enforcement of the binary gender system that requires people to conform their identities in distorting ways to be included politically. By sustaining the gender system, legal institutions unnecessarily undermine human well-being, and unjustly and disrespectfully constrain individual liberty. The United States and state governments should re-examine laws that use sex or gender as a category by adapting the Law Commission of Canada's methodology in Beyond Conjuality. In this fashion, American law can begin to move gradually away from the creation, maintenance, and enforcement of the gender system.

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INTRODUCTION

In *Kosilek v. Spencer*,¹ federal district court Judge Mark L. Wolf ordered the Massachusetts Department of Corrections to provide Sex Reassignment Surgery (SRS) for Michelle Kosilek, a prisoner designated male at birth who identifies as a woman. Kosilek alleged that the defendant, the Commissioner of the Massachusetts Department of Corrections (DOC), violated her² Eighth Amendment rights by denying her adequate medical care for Gender Identity Disorder (GID).

Kosilek's condition was so severe that she had attempted to castrate herself and had twice attempted suicide while awaiting trial.³ Kosilek had filed an earlier suit from prison, decided in 2002,⁴ requesting an injunction ordering the DOC to provide medical care for her condition that met the usual standard of care for patients with her diagnosis.⁵ One component of standard treatment is the administration of female hormones to male-to-female transsexual patients.⁶ Kosilek was not using prescription hormones when she began her prison sentence, although she had used black market hormones in the past.⁷ In response to Kosilek's suit, the Commissioner, Michael T. Maloney, implemented a blanket policy providing that inmates could be prescribed female hormones only if they had been receiving medically prescribed hormones prior to their incarceration.⁸ That policy made Kosilek ineligible for female hormone treatments.⁹ In 2000, to comply with a court order, the DOC's mental health team had engaged the expertise of a physician, Dr. Forstein, who specialized in GID, to diagnose Kosilek and to determine what medical treatment she would receive if not incarcerated.¹⁰ The DOC's policy was to deliver to inmates health care "comparable in quality to that available in the community."¹¹ Dr. Forstein recommended psychotherapy and psychiatric monitoring, female hormones, and consultation with a surgeon who performs SRS. The court determined that Kosilek's care—which consisted largely of talk therapy and anti-depressants—was not minimally adequate given the severity of Kosilek's condition.¹²

In 2002, the court found that Kosilek had a serious medical need that was not being met.¹³ However, to make out an Eighth Amendment claim, Kosilek would have had to prove that the DOC Commissioner (Maloney) was deliberately indifferent to her medical need, and that the indifference was likely

1. 889 F. Supp. 2d 190, 204 (D. Mass. 2012), *aff'd* 740 F.3d 733, 773 (1st Cir. 2014), *rev'd en banc*, 774 F.3d 63, 84–85 (1st Cir. 2014), *cert. denied sub nom.* *Kosilek v. O'Brien*, 135 S. Ct. 2059 (2015).

2. Because Kosilek self-identifies as a woman, female pronouns will be used to refer to her. Courts hearing this and related cases have not consistently used this convention.

3. *Kosilek v. Maloney*, 221 F. Supp. 2d 156, 164 (D. Mass. 2002).

4. *Id.* at 158.

5. For the relevant standards, see *infra* note 36.

6. *Maloney*, 221 F. Supp. 2d at 166–67.

7. *Id.* at 163.

8. *Id.* at 159–60.

9. *Id.* at 161, 189.

10. *Id.* at 168.

11. *Id.* at 167.

12. *Id.* at 189; see also *Kosilek v. Spencer*, 889 F. Supp. 2d 190, 230–36 (D. Mass. 2012).

13. *Maloney*, 221 F. Supp. 2d at 161.

to continue. Kosilek was unsuccessful in establishing that claim.¹⁴ The court warned Commissioner Maloney that if Kosilek's serious medical need continued unmet, now that he was on notice of the unmet need and his obligations under the Eighth Amendment, such continued refusal to meet Kosilek's medical need would constitute an Eighth Amendment violation.¹⁵

Ten years later, Kosilek sued the then DOC Commissioner, Luis S. Spencer, seeking an order that DOC provide her with SRS. Kosilek's physicians believed SRS to be the only means of effectively treating Kosilek's condition given the standard of medical care for GID and the failure of other treatments to provide adequate relief.¹⁶ The findings of fact recited in both the earlier and later case include the following.¹⁷ At the time of the first case against Maloney, Kosilek was 53 years old, serving a life sentence for murdering her wife. Kosilek had a troubled youth, orphaned at age 3 and already believing she was female, though she was punished for dressing or behaving femininely. Returned to her family at age 10, she suffered sexual and physical abuse at their hands. She ran away from home as a teenager, worked as a prostitute, and began to use illegal drugs. She began taking hormones when a doctor prescribed them as payment for sex. She met her wife, Cheryl McCaul, who was a volunteer counselor, while undergoing drug rehabilitation. McCaul believed that their marriage would "cure" Kosilek of her transsexual identity. Kosilek was later convicted of murdering McCaul during a confrontation that arose from Kosilek wearing McCaul's clothes. Since her incarceration in a medium-security men's prison, Kosilek has lived as a woman. She legally changed her name to Michelle Lynne, has long hair and fingernails, a feminine voice, and uses makeup. She has not been sexually assaulted or sexually involved with anyone in the Massachusetts prison (though she was serially raped during an earlier period of incarceration in Chicago). The court found that Kosilek remained at substantial risk of serious harm (in the form of self-mutilation or attempts at suicide) because she was not receiving adequate care.

In order to establish that her Eighth Amendment rights were violated, Kosilek had to prove that (1) she had a serious medical need, (2) SRS was the only adequate treatment for it, and (3) the DOC was deliberately indifferent to her serious medical need in denying her the only adequate treatment for it. In order to rebut the DOC's claim that there was a legitimate penological reason for denying her treatment, she had to prove that (4) the DOC's stated concerns about prison security were not legitimate. In order to be entitled to an injunction requiring the DOC to provide her with SRS, Kosilek had to prove further that (5) the DOC's deliberate indifference would continue into the future.

The DOC alleged that providing Kosilek with SRS "would create insurmountable security problems."¹⁸ However, the court found this claim to be a pretext, with the Commissioner's true reason for refusing to provide Kosilek

14. *Id.* at 195.

15. *Id.* at 162.

16. *Spencer*, 889 F. Supp. 2d at 196-97.

17. *Maloney*, 221 F. Supp. 2d at 163-65; *Spencer*, 889 F. Supp. 2d at 212-19.

18. *Spencer*, 889 F. Supp. 2d at 197-98.

with SRS being an aversion to “controversy, criticism, ridicule and scorn.”¹⁹ Since the medical decision regarding Kosilek’s care was not made for a medical reason or a legitimate penological purpose, the court found that the DOC violated Kosilek’s Eighth Amendment rights, and that Kosilek had established that it would continue to do so if the court did not issue an injunction for the DOC to perform the procedures prescribed by Kosilek’s physicians, including SRS.²⁰ The court noted with apparent irritation the recalcitrance and evasion tactics exhibited by Commissioner Maloney and his successors, Kathleen Dennehy and Harold Clarke.²¹ The court also remarked that it was not within its authority to decide where to house Kosilek after she underwent SRS; that issue would be for the DOC to decide in good faith.²²

The court found that Kosilek had met her burden of proof and ordered the injunction.²³ It rejected the notion that Kosilek should be denied proper medical treatment, even SRS, because it would be unpopular or expensive. Other treatments, it reasoned, such as treatments for cancer or kidney failure, are not withheld from inmates because of their expense.²⁴ Moreover, although a person outside prison may not be able to afford the procedure, the DOC has a special duty with respect to its inmates because they are in its custody, and so rendered incapable of meeting their own needs.²⁵ The court reasoned that to leave a prisoner suffering from a treatable medical condition, with deliberate indifference, when that prisoner is at substantial risk of serious harm, is cruel and unusual according to contemporary standards.²⁶ It concluded, citing other federal cases, that medical care for an inmate must be “based upon an evaluation of a prisoner’s unique circumstances rather than pursuant to a general policy applicable to all prisoners,” such as the blanket policy that Maloney had instituted.²⁷ To conform to Eighth Amendment requirements, medical decisions must be made only for medical reasons, unless there is “a legitimate penological

19. *Id.* at 198. The court quoted a local television news broadcast as evidence of the public pressure to deny Kosilek SRS: “Later this week, the state will tell the federal court that sex surgery for Michelle Kosilek would result in a security nightmare. When that happens, expect Kosilek to pursue her lawsuit. Then a federal judge will eventually decide whether you will pay the bill for Kosilek’s operation and beyond that, sex surgeries for other convicts serving time for horrendous crimes.” *Id.* at 223.

20. *Id.* at 198.

21. Luis S. Spencer was sued in his official capacity, as Commissioner of the DOC. The court cited a pattern of “unconstitutional conduct” that the DOC had engaged in over an extended period of time, and found that the delay tactics were likely to continue unless the court issued an injunction requiring the DOC to provide Kosilek with SRS and other medically prescribed treatments. *Id.* at 247–50.

22. *Id.* at 243.

23. The injunction was stayed pending appeal, conditional on the Commissioner (1) making all necessary arrangements for Kosilek’s SRS, so it could proceed immediately in the event she won the appeal; and (2) filing regular reports with the court documenting progress in making the arrangements. *Kosilek v. Spencer*, No. 00-12455-MLW, 2012 U.S. Dist. LEXIS 165852, at *2 (D. Mass. Nov. 20, 2012).

24. *Maloney*, 221 F. Supp. 2d at 156, 192; *Spencer*, 889 F. Supp. 2d at 199.

25. *Spencer*, 889 F. Supp. 2d at 198.

26. *Id.* at 205–07.

27. *Maloney*, 221 F. Supp. 2d at 183 (citing *Allard v. Gomez*, 9 F. App’x 793 (9th Cir. 2001)).

purpose” in selecting an alternative form of care.²⁸ The court found there was none, since the concerns stated by the DOC were pretextual.²⁹

The DOC appealed the district court’s injunction, and a three-judge panel of the First Circuit affirmed by a 2-1 vote.³⁰ The DOC requested, and was granted, an *en banc* hearing.³¹ The First Circuit, *en banc*, declared that it would defer to the district court’s conclusions of fact and credibility, and review the Eighth Amendment issue of law de novo.³² The pivotal question on appeal was whether the care that the DOC had offered Kosilek was constitutionally adequate. When the injunction was issued,³³ the Diagnostic and Statistical Manual of Mental Disorders (DSM) published by the American Psychiatric Association recommended a diagnosis of GID when all the following criteria were met:

1. Strong and persistent cross-gender identification, defined as the desire to be, or the insistence that one is, the other sex.
2. Persistent discomfort about one’s assigned sex or a sense of inappropriateness in the gender role of that sex.
3. Absence of a concurrent physical intersex condition.
4. Evidence of clinically significant distress or impairment in social, occupational, or other important areas of functioning.³⁴

The district court had accepted the Harry Benjamin International Gender Dysphoria Association’s Standards of Care for Gender Identity Disorders as representing the standard of care for treatment that would be accepted by prudent medical professionals. According to this protocol, treatment of GID (after proper diagnosis and counseling) proceeds according to an escalating 3-step process, as needed. First, the patient is administered hormone therapy to make them³⁵ more physically like a person of their desired sex. Second, if the first stage of treatment does not resolve the person’s clinically significant distress or impairment in functioning, the person is to live for two years in the social role of a person of the desired sex (“cross-live”). If the second stage of treatment does not resolve the person’s clinically significant distress or impairment in functioning, they are to undergo sex reassignment surgery (SRS).³⁶ A relatively

28. *Id.* at 183.

29. *Spencer*, 889 F. Supp. 2d at 238–49.

30. *Kosilek v. Spencer*, 740 F.3d 733 (1st Cir. 2014), *rev’d en banc*, 774 F.3d 63, 84–85 (1st Cir. 2014), *cert. denied sub nom.* *Kosilek v. O’Brien*, 135 S. Ct. 2059 (2015).

31. *Kosilek v. Spencer*, No. 12-2194, 2014 U.S. App. LEXIS 2660, at *3 (1st Cir. Feb. 12, 2014).

32. *Kosilek v. Spencer*, 774 F.3d 63, 84–85 (1st Cir. 2014) (*en banc*), *cert. denied sub nom.* *Kosilek v. O’Brien*, 135 S. Ct. 2059 (2015).

33. The DSM has since been revised. *See infra* p. 179.

34. AMERICAN PSYCHIATRIC ASSOCIATION, THE DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 581 (4th ed. 2000) [hereinafter DSM-IV-TR].

35. I have adopted the convention, following John Rawls, of using plural pronouns as a gender neutral alternative to singular gendered pronouns. Because some still regard this as ungrammatical, it is my hope that a better solution to the pronoun problem will be forthcoming.

36. *See generally* HARRY BENJAMIN INTERNATIONAL GENDER DYSPHORIA ASSOCIATION, STANDARDS OF CARE FOR GENDER IDENTITY DISORDERS (6th ed. 2001) [hereinafter Benjamin

few number of people with GID get SRS, possibly because of the expense, or because they find relief through the first two stages of treatment, or for other reasons.

Experts in both *Kosilek v. Spencer* (2012) and *Kosilek v. Maloney* (2002) disagreed about what level of treatment would meet prudent professional standards of care, which the district and appeals courts both acknowledged was the standard required by the Eighth Amendment. Whether the Benjamin Standards constituted the relevant professional standard, or merely served as guidelines that a prudent professional might accept or reject, was in dispute. Also in dispute was whether a prisoner could meet the cross-living requirement while in an all-male prison. To the dissenters' dismay, the majority treated these questions as mixed questions of law and fact, instead of as questions of fact.³⁷ The majority concluded that the Benjamin Standards were flexible guidelines from which a prudent professional might depart, particularly when fulfillment of the cross-living requirement was in question.³⁸ For that reason, the First Circuit found that the DOC's decision to provide treatment other than SRS, including psychotherapy, anti-depressants, hormones, electrolysis, and female clothing and cosmetic items, did not cause Kosilek harm significant enough to violate the Eighth Amendment.³⁹ It thus rejected both the district court's conclusion that SRS was the only medically adequate treatment available, and its conclusion that the DOC showed deliberate indifference to Kosilek's medical need when it refused to provide her SRS.⁴⁰ Furthermore, the court found that the DOC's expressed concerns about security were legitimate: in a female prison, Kosilek might traumatize fellow inmates, many of whom had suffered domestic abuse⁴¹; in the men's prison where she resided, one quarter of the population were convicted rapists,⁴² and she would be vulnerable to rape; and finally, if she received SRS, that might provide an incentive for people to commit crimes or feign suicide or self-mutilation attempts in order to obtain state-funded SRS.⁴³ Therefore, the First Circuit reversed the district court's order of injunction and remanded the case for dismissal.⁴⁴

Transgender rights advocates will find this outcome disappointing because transgender identity seems to preclude recognition of civil rights. Bigotry against Kosilek as a transgender person seems to have driven the decisions about her care, and Kosilek should have received the SRS that her physicians prescribed for her, which she would be able to obtain if she had not been not incarcerated and

Standards]. These were the standards of care previously endorsed by the World Professional Association for Transgender Health. They were in effect at the time the *Kosilek* cases were decided. They are available at <http://www.cpath.ca/wp-content/uploads/2009/12/WPATHsocv6.pdf> (last visited Aug. 28, 2015).

37. *Kosilek v. Spencer*, 774 F.3d 63, 97-99 (1st Cir. 2014) (en banc) (Thompson, J., dissenting); *id.* at 114-15 (Kayatta, J., dissenting).

38. *Id.* at 86-90 (majority opinion).

39. *Id.* at 89-90.

40. *Id.* at 91-92.

41. *Id.* at 80.

42. *Id.* at 24.

43. *Id.* at 92-96.

44. *Id.* at 96.

had adequate financial means (or if affordable quality medical care were universally available).⁴⁵

At the same time, we should be reluctant to consider any legal outcome, the way the issues are framed, as a victory for transgender rights. As civil rights advocates have frequently pointed out, that socially disadvantaged minorities can sometimes individually overcome their disadvantages does not make those socially imposed disadvantages acceptable from the standpoint of justice. Consider preferential treatment affirmative action in hiring or education as a rough comparison. Such affirmative action is a strategy for countering injustice, and is meant to be a temporary solution until social justice renders it unnecessary by extending equal opportunity to all. Transgender surgery, I suggest, is a temporary measure that should be made available to those who desire it, after being fully informed about its likely entailments and outcomes, until the injustice of gender can be eliminated. Nevertheless, we should still, as a society, aspire to, and take steps to, eliminate that injustice in the long term.

Even if Kosilek had received the surgery to which she is arguably entitled, the justification provided for why she was entitled to it further entrenches the gender system that causes so much unnecessary suffering for Kosilek and many others. The proffered justification is a natural outgrowth of the invidious sex segregation system created and enforced by the American legal system and the American medical establishment. In what follows, I intend to demonstrate how the courts' reasoning in the *Kosilek* cases further entrenches retrogressive cultural norms. I do not mean to claim that these cases are the only ones that fuel these norms, or that they are the most egregious cases in this respect. I only mean to use them as a paradigm example of how the legal system—probably inadvertently—entrenches damaging gender norms. In particular, I argue against the notion that in a just society SRS could be medically necessary to correct a pathology in which a person is gravely and understandably distressed by a mismatch between the sex of their body and the gender of their psyche. That is, I reject the idea that personal integration and mental health can be achieved, on a society-wide basis, by causing people's somatic sex to match their "brain sex." Instead, I argue, the pathology presented by transsexualism (where there is pathology) is located not in any individual(s), but in the cultural notion of sex itself. It is not the aim of this article to criticize individual persons who decide to undergo SRS for mental health or any other reasons. Given our cultural notions of biological sex and its meanings, SRS currently may be the best option for some people, and this is a matter for individuals to decide for themselves. My critique is of the cultural notions of sex, not the persons on whom these notions force such difficult choices.

In part I, I characterize the concepts that I rely on throughout this article, including what I mean when I refer to "gender," "sex," "transgender," and "intersex," and what the relevant distinctions are between related concepts. I explain how the medical community regards, diagnoses, and treats intersex and

45. Kosilek is old enough to qualify for Medicare if she were not incarcerated. Medicare no longer categorically excludes SRS from the list of reimbursable medical procedures because it is regarded as medically necessary for some patients, not as a cosmetic procedure. *E.g.*, Lisa Leff, *Medicare Ban on Sex Reassignment Surgery Lifted*, ASSOCIATED PRESS (May 30, 2014, 10:29 PM), <http://bigstory.ap.org/article/medicare-coverage-ban-sex-change-surgery-lifted>.

transgender conditions, and I describe what sex reassignment surgery entails and is meant to accomplish. I raise questions about the manner in which treatment objectives related to intersex and transgender conditions are conceptualized and pursued. Finally, I discuss why scientific evidence should dispel the notion, if we are being epistemically responsible and not ideological, that there is such a thing as “brain sex.”⁴⁶ In part II, I describe how binary gender—and even binary sex to some extent—are socially constructed by institutions such as law and medicine. I explain how transgender and intersex conditions emerge from this binary model of sex and gender and are related to it. Then I address the way gendered social practices contribute to mental illness, and unnecessarily, unjustly, and disrespectfully constrain individual liberty. In part III, I consider how the legal system can gradually relinquish its role in creating, maintaining, and enforcing a gender system. I recommend the methodology that the Law Commission of Canada employed for assessing its role in recognizing close personal adult relationships for the purposes of various laws. I then apply the Commission’s methodology to three legal domains that currently depend on sex-based categories—identification documents, sports, and prison housing—to demonstrate how the methodology can aid policymakers to identify and reform laws and policies that unnecessarily cause harm by using and reinforcing the gender system.

I. THE GENDER SYSTEM

Sandra Lipsitz Bem details how three “lenses of gender” serve as cultural filters through which people interpret the world. These lenses include gender polarization, biological essentialism, and androcentrism.⁴⁷ Together, they “systematically reproduce male power” because they, first, channel men and women into unequal life situations, and second, become internalized and bound up with the personal identities of individuals.⁴⁸ The lenses of gender generally operate below the level of conscious awareness, and this is what makes them so difficult to see: we look through them, not at them, much as a fish fails to see water in its environment. It permeates everything, and our experience contains no alternative model.⁴⁹

46. Those who argue for the existence of “brain sex” claim that female brains are innately organized to produce feminine social behavior and male brains are innately organized to produce masculine social behavior. See generally, e.g., ANNE MOIR & DAVID JESSEL, *BRAIN SEX: THE REAL DIFFERENCE BETWEEN MEN AND WOMEN* (1992).

47. SANDRA LIPSITZ BEM, *THE LENSES OF GENDER: TRANSFORMING THE DEBATE ON SEXUAL INEQUALITY 2* (1993). Bem defines *androcentrism* as male-centeredness: the unconscious tendency to regard males and male experience as the neutral standard or norm, where females and female experience are regarded by persons, and treated by social institutions, as sex-specific deviations from the norm. *Id.* at 41. For example, the paradigmatic worker in the labor market is a person who cannot become pregnant (male), so pregnancy and lactation present special considerations in the workplace; they are not ordinary life events that are presumed will be experienced by many workers at some time.

48. *Id.* at 3.

49. *Id.* at 140.

A. Gender

Although “gender” is frequently used as a euphemism for “sex” on forms we complete, what I mean by “gender” is conceptually distinct from sex. Gender is produced by the lens that Bem refers to as *gender polarization*: “the ubiquitous organization of social life around the distinction between female and male.” Gender polarization defines mutually exclusive female and male roles (i.e., masculinity and femininity), and characterizes departures from these roles as pathological deviations and punishes them.⁵⁰ Examples of feminine traits according to Bem’s Sex Role Inventory include being yielding, cheerful, shy, affectionate, flatterable, loyal, sympathetic, sensitive to the needs of others, understanding, compassionate, soft-spoken, warm, tender, gullible, childlike, child-loving, and gentle. Masculine traits include being self-reliant, independent, athletic, assertive, forceful, analytical, dominant, aggressive, individualistic, competitive, ambitious, willing to take risks, able to defend one’s beliefs and to make decisions easily, and having leadership abilities and a strong personality. It is generally expected that female humans (often understood by gender scholars as a biological category) should be feminine (a social category), and that male humans should be masculine. Female humans are expected to and usually do conform to, and are punished for failing to conform to, feminine behavioral scripts. The same is true for male humans and masculine gender scripts. Thus, we are thoroughly socialized, in overt and subtle ways, to believe and behave as though the sex of the body is naturally connected to the gender of the psyche. Traits and dispositions that are socially acceptable in both women and men are thus neither feminine nor masculine. What is assigned to each pole, and what is acceptable for either sex, varies somewhat from culture to culture, and across different periods in history, but the assignments are artificially constructed by society rather than arising spontaneously from biological differences between females and males. Gender is necessarily normative: it involves policing the boundaries of properly gendered behavior, such that a person who departs from norms of gender is subject to some degree of social ostracism.

Bem argues (and empirical data support) that the female-male dichotomy is socially constructed, because there is a “biological continuum of genes, chromosomes, hormones,” and so forth, and none of these, nor their correlates, is as “bimodally distributed” as we might think. Bem also cites the temporal and geographical variation in gender construction: some cultures, rather than dichotomizing gender, recognize three or more genders.⁵¹

B. Biological Essentialism

Biological differentiation of the sexes is the focus of the second lens of gender, *biological essentialism*, which causes us to view differences between men and women as natural, so that sex difference—and the inequality that accompanies it—are regarded as inevitable.⁵² As Bem demonstrates, the scientific evidence does not support this. In the past, pregnancy and lactation

50. *Id.* at 80–81.

51. *Id.* at 80.

52. *Id.* at 2.

may have required certain roles for women (those that did not demand intense physical exertion, or that could be done with infants carried or small children in tow), and it may have made sense for men to take on different, complementary roles. But sex-based role divisions are unnecessary in societies with modern technology. Many jobs are not physically demanding, most women have few enough children that time off for certain stages of pregnancy and recovery can be arranged, breast milk can be expressed and stored and children can be bottle-fed, paid child care is or could be a viable option, and so forth. With the exception of pregnancy and childbirth, men can play the same role in child rearing as women, given our current technology. Our technology alters what is possible for us, given our biology: because of airplanes we can fly, and because of medicine we can survive many illnesses that would have killed our ancestors.⁵³ For this reason, the domain of gender expands and contracts. For example, it used to be considered masculine to participate in sports. However, since the passage of Title IX and the expansion of women's sports programs in educational institutions, athleticism has become compatible with femininity.

Bem's research indicates that the only reason we have for believing that the gender of the psyche is naturally connected to the sex of the body is a strong prejudice contradicted by much evidence. What humans feel and enjoy doing are not naturally distributed along lines of sex, even though we artificially conform feelings and behavior to gender scripts. Diversity of disposition among women, and diversity of disposition among men, are both natural.⁵⁴ Imagine gender as a spectrum, with femininity at one pole and masculinity at the other. It could be socially acceptable for both human females and males to display any of the full range of human traits and behaviors; neither would be punished for straying too far from their socially assigned domain. Still, for nearly all of us, there is a strong tendency to perceive sex difference as dichotomous and natural.

Recall that gender is normative, and it involves policing the boundaries of human behavior and identity and punishing people with ostracism, or worse, for departing from gender roles. Suppose, just for the sake of argument, that women naturally have a tendency toward a different behavioral repertoire than men. How would any such tendency recommend what sorts of social norms or human behavior is acceptable, or what sorts of boundaries should be enforced? After all, it is arguably natural to relieve oneself whenever and wherever the need arises, to engage in sexual relations with anyone one finds sexually appealing, and to strike any person who has angered one; but people are deliberately socialized to resist natural impulses that are socially undesirable. So it does not follow that all feelings or behaviors that are natural are desirable and should be reinforced or expressed in behavior. As beings with a culture, we shape the raw material nature provides us, ideally in the way that gives us the most flourishing lives. Biology is *not* destiny. So we should preserve our gender scripts if they give us the most flourishing lives, and gradually dismantle them if they interfere with human flourishing.

53. See BEM, *supra* note 47, at 21-23 (“[T]he impact of any biological feature depends in every instance on how that biological feature interacts with the environment in which it is situated.”).

54. *Id.* at 167-68. See also MICHAEL S. KIMMEL, *THE GENDERED SOCIETY* 9-11 (2008).

C. Sex

Some scholars and researchers accept biological sex difference as the natural foundation for gender. That is, they regard sex as natural and biological; all species that sexually reproduce are supposed biologically female or male (except hermaphroditic species such as certain snails, mollusks, and fish that change their sex as they age). On this view, being female occurs naturally; it is an immutable characteristic. Whereas, femininity is defined and becomes part of one's identity through social practices, so that one could, in principle, refuse to conform to its standards. While this distinction can be useful for the purposes of introductory courses in women's studies or gender theory, the real picture is far more complicated than this.

If one wanted to support the claim that a particular person is biologically female (or male), there are a few different features that one could take as evidence. First, there is the common method of inspecting genitals, which generally occurs immediately after one is born. A newborn is usually pronounced a boy or girl based on the appearance of their genitals. Second, a chromosomal test could be performed, as had been done with female Olympic athletes in the late 1900s, to determine whether the individual is XX or XY. Third, one could check gonads: are there ovaries or testes? And finally, one could test the proportions of so-called sex hormones such as androgens, estrogens, and progesterones, to see whether the hormone profile is a typical female or male profile. The prevailing assumption in society, among ordinary people and medical experts, is that in "normal" people, all of these correspond. That is, a person who is XX has a vagina and ovaries, and has a higher ratio of estrogens and progesterones to androgens; she is female. A person who is XY has a penis and testes, and has a higher proportion of androgens to estrogens and progesterones; he is male.

If that were true, biological sex might justly be regarded as dichotomous. However, in at least 1.7% of the population,⁵⁵ these features do not correspond at birth.⁵⁶ The prevalence of non-correspondence probably is actually higher, however, since some people never find out that these features do not correspond in them. For example, in 1985, Spanish hurdler Maria Patino discovered she had XY chromosomes when she (along with every female athlete who qualified for the World Games) was tested by the International Association of Athletics Federations (IAAF) and quietly forced out of competition. If Patino were not an elite athlete, she may never have discovered that she is XY. In 2009, when Olympic track athlete Caster Semenya won a gold medal for South Africa in the 800 meter race, a controversy erupted over how the International Olympic Committee (IOC) should determine who qualifies to compete as a woman. Semenya was adjudicated a woman by the IOC and allowed to keep her medal, but the IOC consequently developed new guidelines for determining who

55. Melanie Blackless et al., *How Sexually Dimorphic Are We? Review and Synthesis*, 12 AM. J. HUM. BIOLOGY 151, 161 (2000).

56. See REBECCA M. JORDAN-YOUNG, *BRAIN STORM: THE FLAWS IN THE SCIENCE OF SEX DIFFERENCES* 17-18 (2010) (describing how research on intersex infants breaks down the distinction between sex and gender).

qualifies as a woman.⁵⁷ According to the new guidelines, women who are chromosomally XX but naturally have atypically high testosterone levels (such as Semenya) are barred from competing as women in the Olympics, because their hormone profiles are regarded as giving them an unfair advantage.⁵⁸ These examples demonstrate the way sex itself is socially defined; there is no biological definition of “female.” We must make policy decisions about who counts as female, male, or neither.

D. Intersex

When a person is born with an *intersex* condition, it is not clear whether the person should be regarded as female or male. Sometimes that is because the person’s genitals are ambiguous (such as when the penis is very small or the clitoris is very large). Other times, the person’s genitals seem to indicate that they are one sex, while their chromosomes and/or hormones indicate that they are the other sex. In what follows, I will briefly describe the most common, widely studied intersex conditions.

Genital ambiguity is most often caused by *congenital adrenal hypoplasia* (CAH). Genetic females (XX) with CAH are exposed in utero to high levels of androgens, which are overproduced by their adrenal glands. That results in masculine-looking genitals (usually a large clitoris, and sometimes a penis). Labia may be fused so they appear scrotum-like (without testes inside). Approximately 25% of CAH females are pronounced male at birth.⁵⁹ CAH males, however, do not seem to differ significantly from males who were not exposed to high androgen levels in utero.

Androgen insensitivity syndrome (AIS) can cause genetic males (XY) to have external genitals that appear female, while their internal organs are male typical. They have testes that produce androgens, but they do not have receptors sensitive to the androgens and are not able to make use of them. AIS males are in a sense the inverse of CAH females: they are genetically male but unable to use, and so deprived of, androgen, whereas CAH females are exposed to atypically high levels of androgens.⁶⁰ In genetic males with 5-alpha reductase deficiency (5-ARD), androgens are in the normal range for males, but the enzyme (5-alpha reductase) needed to develop male genitals is not present. Frequently, 5-ARD boys’ genitals “masculinize” at puberty.⁶¹

The final intersex category I wish to note consists of genetic males who are

57. Eric Vilain, *Gender Testing for Athletes Remains a Tough Call*, N.Y. TIMES (June 18, 2002), <http://www.nytimes.com/2012/06/18/sports/olympics/the-line-between-male-and-female-athletes-how-to-decide.html>.

58. Critics note that Olympic athletes have many genetic advantages over other competitors: height, long legs, keen eyesight, etc. Men have varying levels of testosterone, and those with the highest levels are not deemed to have an unfair advantage. Moreover, there seems to be no general connection between high testosterone levels and athletic performance in elite female athletes. *E.g.*, Rebecca Jordan-Young & Katrina Karkazis, *You Say You’re a Woman? That Should Be Enough*, N.Y. TIMES (June 17, 2012), <http://www.nytimes.com/2012/06/18/sports/olympics/olympic-sex-verification-you-say-youre-a-woman-that-should-be-enough.html>.

59. JORDAN-YOUNG, *supra* note 56, at 69–70.

60. *Id.* at 74.

61. *Id.* at 67.

born with male-typical genitals, hormone exposures, and chromosomes, but who lose their penis in an accident (such as during circumcision). When that occurs, the genetic male has generally been raised as a girl.⁶²

There are, additionally, chromosomal variations in humans beyond the XX and XY genotypes. For example, it is possible for a person to be XYY, XXY, or XYY (all considered male); or XO (one X chromosome only) or XXX (both considered female).⁶³ During cell division, chromosomes can break, resulting in loss, duplication, or inversion of the chromosome fragment. The fragment may also travel from the sex chromosome pairing and become attached to a different pair of chromosomes.

For decades it was the standard of care in medicine to perform corrective surgery immediately after birth on infants with significant genital ambiguity. Generally, parents were not told that the medical professionals attending their child were making decisions about whether to perform “corrective” surgery to make their child female or male. Instead, doctors told parents that their child was a girl (or boy) whose genitals were not formed properly; the child would need surgical operations to correct a deformity.⁶⁴ Thus, these operations were presented as medically necessary.

Generally, if the newborn had an XY genotype and a penis capable of (1) penetrating a vagina, and (2) urinating while standing, he would be assigned to the male sex; otherwise, the child would be assigned to the female sex. Surgery was then performed so that the child’s anatomy would conform as well as possible to the assignment. In some cases, that meant removing gonads that did not conform to the assignment, resulting in sterility. However, an XX child judged able to reproduce would be assigned to the female sex, regardless of the appearance of external genitals. If the clitoris appeared too large (3/8 of an inch or more) it might be reduced or removed, resulting in reduction or lack of sexual sensation. Critics of these practices, for which there was almost clearly no informed consent from parents, often point out that men are medically defined by their ability to penetrate a vagina, and women by their ability to procreate.⁶⁵

The perceived urgency to reshape intersex characteristics so they appear as typical female or typical male characteristics may have arisen from any number of social factors, including medical providers’ belief that binary sex is natural and normal and that intersex conditions are a form of disease; the desire to spare parents the anxiety of having a child who does not neatly fit into our social narrative about binary sex; and the desire to spare the child anxiety caused by difference or by lack of social acceptance. The social narrative about binary sex seems concerned primarily with promoting heterosexuality as the only normal and natural way to be connected to a life partner. It is conceptually impossible for a person who is neither female nor male to participate in a heterosexual

62. *Id.* at 75–79.

63. Blackless et al., *supra* note 55, at 152.

64. E.g., Karen Gurney, *Sex and The Surgeon’s Knife: The Family Court’s Dilemma: Informed Consent and the Specter of Iatrogenic Harm to Children with Intersex Characteristics*, 33 AM. J. L. & MED. 625, 632 (2007); Chinyere Ezie, *Deconstructing the Body: Transgender and Intersex Identities and Sex Discrimination – The Need for Strict Scrutiny*, 20 COLUM. J. GENDER & L. 141, 150–51 (2011).

65. E.g., Gurney, *supra* note 64, at 633; JORDAN-YOUNG, *supra* note 56, at 17, 258, 261.

relationship with a person who is female, male, or neither.⁶⁶

The medical procedures viewed as urgent to make a newborn into an unambiguous female or male are by no means simple or painless. Often children are required to undergo extensive monitoring and multiple surgeries for decades. Even with modern techniques, sexual reconstruction is only moderately successful in transforming the intersex person into a “normal,” functioning, well-adjusted, and flourishing female or male. Consider, for example, the protocol for treating and managing congenital adrenal hypoplasia (CAH) in girls and women. Usually female CAH newborns do not have vaginas that ever will grow large enough to be penetrated, and have “unaesthetic” vulvas and large clitorises. That is taken to require the construction or significant augmentation of the vagina and/or vulva and removal or reduction of the clitoris. Although in more recent surgeries there is an attempt to preserve sensation, patients usually report that sensation is absent or minimal due to extensive nerve damage.⁶⁷

Generally, the first surgeries to accomplish these results occur in early childhood. Then in adolescence or early adulthood, it is common for additional surgeries to be performed to correct difficulties caused by the earlier surgeries, including narrowing of the vaginal opening (usually due to scarring or growth), fistulas, and incontinence.⁶⁸ Most CAH women report finding vaginal penetration painful and more than a third say they never engage in it. A large majority of the CAH women who have engaged in penile-vaginal intercourse report low rates of orgasm, lubrication, and satisfaction.⁶⁹ They also report not masturbating, or not enjoying masturbation, though they perform it as a medical procedure to keep their vaginas open or to survey what the surgeons have done.⁷⁰ Additionally, CAH women report feeling violated and humiliated by the numerous physician visits undergone in their lives. Three or four times a year, a doctor would examine their genitals.⁷¹

Intersex activists recently have voiced their perspective that these surgeries are cosmetic, medically unnecessary, and cause more pain and illness than they prevent.⁷² There are also advocates for providing the child and child’s parents enough information to make an informed decision, as well as for delaying these traumatic and invasive surgeries until the child is old enough to decide for themselves.⁷³

E. Transgender

A person who is *transgender* does not identify with the gender connected to their sex assignment. For example, a transgender person may be regarded as

66. E.g., GIANNA E. ISRAEL & DONALD E. TARVER II, *TRANSGENDER CARE: RECOMMENDED GUIDELINES, PRACTICAL INFORMATION, AND PERSONAL ACCOUNTS* xii (1997); JORDAN-YOUNG, *supra* note 56, at 129.

67. JORDAN-YOUNG, *supra* note 56, at 240–41.

68. *Id.* at 240.

69. *Id.* at 241.

70. *Id.* at 243.

71. *Id.* at 242–43.

72. JORDAN-YOUNG, *supra* note 56, at 245. See generally Gurney, *supra* note 64.

73. Gurney, *supra* note 64, at 661.

“female” by physicians and “female” may appear on the person’s birth certificate, but the person rejects that identity. He may dress as a man, take hormones to appear more masculine, and/or go by a name that is considered a male name. Or, alternatively, the person may reject the social gender binary altogether, and choose not to emphasize femaleness or maleness. The person may dress androgynously and/or go by a name that is used by both men and women. “Transgender” is not a formal diagnosis of illness; rather, it is an identity that individuals may adopt.

One formal diagnostic category that may apply to a transgender person is “transsexualism.” A transsexual person is a person who has “the desire to live and be accepted as a member of the opposite sex, usually accompanied by the wish to make his or her body as congruent as possible with the preferred sex through surgery and hormone treatment.”⁷⁴ In order to be regarded as transsexual by the medical community, a person must have had a transsexual identity “persistently” for at least two years and their transsexualism must not be “a symptom of another mental disorder or chromosomal abnormality.”⁷⁵ According to the World Professional Association for Transgender Health, 1 in 11,900 to 45,000 people assigned male at birth, and 1 in 30,400 to 200,000 people assigned female at birth, is transsexual.⁷⁶

Transgender surgery for a person transitioning from male to female (an MtF transsexual person) involves genital reconstruction including removal of the testes and penis and creation of a vulva, clitoris, and vagina. It is also likely to involve some or all of the following: breast augmentation, tracheal shave, voice augmentation, facial reconstructive procedures, and laser hair removal and/or electrolysis. A female to male transsexual person (FtM) typically needs a radical hysterectomy, in which the uterus, ovaries, and fallopian tubes are removed, the creation of a penis and the insertion of prosthetic testicles, and a double mastectomy and chest reconstruction. He may also need facial reconstructive procedures. In both cases, “revisions” may be necessary to repair problems that develop from the initial surgeries. For example, FtM people (transmen) may need adjustments to their urinary tracts; MtF people (transwomen) may need to have fistulas or certain muscles removed. In a 2001 estimate, SRS for transwomen was projected to cost \$7,000-\$50,000; for transmen it was projected to cost \$100,000. The surgeries and recovery are painful, can have many complications, and often result in anatomical features that are disappointing to patients.⁷⁷ For example, Israel and Tarver’s transgender care guidelines, which are intended to give transgender persons a guide for making informed decisions about their options, say of FtM phalloplasty (construction of a penis) that its cosmetic results tend to be “poor, to moderately appealing.” MtF vaginoplasty results vary from poor to excellent.⁷⁸

Transsexualism is often understood, by transsexual persons, medical

74. Benjamin Standards, *supra* note 36, at 4–5.

75. *Id.*

76. E. Coleman et al., *Standards of Care for the Health of Transsexual, Transgender, and Gender-nonconforming People*, 13 INT’L J. TRANSGENDERISM 165, 169 (2011).

77. See ISRAEL & TARVER, *supra* note 66, chs. 4–5.

78. *Id.* at 85–95.

professionals who work with them, and judges deciding matters relating to aspects of transsexualism, as instances in which a person feels strongly that they were born with or inhabit “the wrong body.” That is, he feels like a man trapped inside a woman’s body, or she feels like a woman trapped inside a man’s body. Thus, the person’s mind (or “brain”) sex does not match the sex suggested by the rest of a person’s body, such as their genitals and secondary sex characteristics. Recall that psychologists such as Bem have long criticized the idea that there are female psyches that are supposed to match up with male bodies, and male psyches that are supposed to match up with female bodies, where both are neatly dichotomized.

It is worth noting that the most recent version of the Diagnostic and Statistical Manual, the DSM V, has replaced the chapter on Gender Identity Disorder with a chapter on *Gender Dysphoria*. That change is meant to recognize that the clinical problem is not a person’s gender identity, but the dysphoria experienced as a result of the incongruence between the person’s gender identity and the gender identity expected of a person who was assigned that person’s sex at birth. The chapter also recognizes that “[e]xperienced gender may include alternative gender identities beyond binary stereotypes.”⁷⁹ The six diagnostic criteria involve incongruence between a person’s experienced gender and their anatomical sex characteristics; a strong desire to change primary or secondary sex characteristics, or to be, or be treated as, a different gender; and a firm belief that one feels and reacts in a way typical of another gender. Two of the six criteria must be present for at least six months in order for a diagnosis of gender dysphoria to be appropriate.⁸⁰

F. The Myth of Brain Sex

Despite much research attempting to verify that there is something such as “brain sex” that is part of a natural process of sexual differentiation —and that female brains as a class differ from male brains as a class—the evidence does not support this theory. Nonetheless it remains popular, and even scientists often have difficulty overcoming confirmation bias in favor of this socially inculcated theory.⁸¹ The notion of brain sex seems to play a prominent role in the thinking of Judge Wolf and many other generally well-informed and well-meaning people. The incorrect supposition is that Kosilek and other transgender people have a disease: the gender of their brain does not match the sex of their body. Yet transgender individuals are not sick because they have a transgender identity; rather, the society is sick because it requires people to conform to a gender assignment. The pathology presented by transsexualism (where there is pathology) is located not in any individual(s), but in the cultural notion of sex itself. That is not to deny that the cultural notion of sex becomes internalized and deeply ingrained in most people’s personal identities, in varying forms and to

79. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 453 (5th ed. 2013) [hereinafter DSM-V].

80. *Id.* at 452.

81. For a plausible explanation, see Letitia Meynell, *Evolutionary Psychology, Ethology, and Essentialism (Because What They Don’t Know Can Hurt Us)*, 27 *HYPATIA* 3, 21 (2012).

varying degrees.⁸² Cultural notions of sex are transmitted to individuals as children in many subtle ways, most of which are not conscious or open to reflection, using a sort of “subliminal pedagogy.”⁸³ That is why it is so important to reform the cultural notion of sex that becomes incorporated into personal identities.⁸⁴ Society contributes to a great deal of mental illness, as I will explain,⁸⁵ simply by constructing, enculturating people to have, and policing, notions about biological sex, sex roles, and sex-typed identities. The change we need, then, is not to cause people’s bodies to “match” their brains,⁸⁶ but to stop socially and legally enforcing a system in which people’s identities and behaviors are imposed on them by others, based on morally irrelevant physical features.

Why have scientists endorsed the theory of innate brain sex, despite its lack of evidentiary support? Prior to the 1960s, animal researchers studied the organization of animal brains by certain prenatal hormones in utero, which seem to “hardwire” them to perform certain survival-enhancing behaviors, including sexual reproduction. These studies are known in the scientific literature as “brain organization research” (BOR). In 1967, the theory was first applied to humans, and BOR attempted to show that certain feminine traits and behaviors were hardwired in females, and certain masculine traits and behaviors were hardwired in males, if sexual development proceeded normally.⁸⁷ (Note the teleological orientation of that hypothesis: there is a proper direction in which sexual development should occur.)

Since the 1960s, numerous studies made headlines announcing differences found in human female and male brains, the discovery of a “gay” brain, and so forth. Popular audiences tend to welcome these announcements, which seem to justify familiar social practices and confirm the beliefs most of us already have.⁸⁸ Recently, however, scientists have been re-examining the studies that purport to find hardwired female and male differences in the brain, and have found serious flaws in these studies, suggesting that there is no hardwired difference at all.⁸⁹

If we observe female behaviors, traits, dispositions, and even physical brains – and the male counterparts – we can generalize some differences between the two groups. Note, however, that this does not suggest behaviors are innate or hardwired. One unique feature of the human brain is that, compared to other

82. See BEM, *supra* note 47, ch. 5, for a detailed discussion of how gender identities are constructed via an enculturation process.

83. *Id.* at 141.

84. *Id.* at 192-94.

85. See discussion *infra* Part II.B.

86. So long as society continues to construct and enforce gender, however, it remains obligated to relieve the suffering caused by the unjust gender system. For that reason, SRS should be made available to those who desire it after being fully informed about its likely entailments and outcomes, at least until the injustice of gender can be eliminated.

87. JORDAN-YOUNG, *supra* note 56, at 29.

88. See Meynell, *supra* note 81, at 5 (noting that “the sex essentialism of folk biology does not reflect the central insights of evolutionary biology” (citations omitted)). Meynell concludes that “only willful ignorance, buoyed by a prior commitment to sex dimorphism, seems able to explain why this research program persists.” *Id.* at 21.

89. See generally JORDAN-YOUNG, *supra* note 56. See also Catherine Vidal, *The Sexed Brain: Between Science and Ideology*, 5 NEUROETHICS 295 (2012) (offering “evidence against archaic beliefs about the biological determinism of sex differences”).

animal brains, it is very plastic: it changes and adapts to stimuli in the environment to a far greater extent than other animals, even close primate relatives. That may be because the gestation period required to bring human beings to a later stage of development would place too great a demand on the mother's metabolism for too long. Human babies are born unable to walk or care for themselves, and their cognitive development as well as their physical development proceeds for longer outside the uterus, because they do not have, relatively speaking, as much development time within the uterus. Because the human interacts more with the environment outside the uterus as it develops, human brains are much more plastic. Less is hardwired as instinct, and more is learned from the environment and social culture.⁹⁰

Human early birth and the unique plasticity of the human brain mean that more is determined by nurture, and less by nature, compared to other animals.⁹¹ Therefore, when we notice that on average the development of female brains is concentrated in certain brain regions, and the development of male brains in other regions, we understand that this could be attributed to innate differences or to socialized differences. That is, behavioral differences we observe, on average, between men and women could be due to innate brain differences; *or* because men and women are socialized to behave differently, the different behavior could develop different regions of the brain. The direction of causation is not established by the observation of an average difference, even if it is significant.⁹² But the average difference is actually very small. For example, while on average men have slightly better spatial ability and women have slightly better verbal ability, there is so much overlap in both instances that an expert observer could only guess whether a subject is female or male by looking at their verbal or spatial test scores 60% of the time, compared with 50% by chance alone.⁹³

Brain organization research (BOR) attempts to connect hormone exposures in utero to various sorts of behavior observed in men but not in women, and vice versa. The basic idea is that the androgens to which males are exposed in utero cause the brain to develop a certain way, and the estrogens to which females are exposed in utero cause female brains to develop a different way, if all goes well. However, if a male (XY) fetus is exposed to high levels of estrogen, he might be "feminized" and present with certain feminine physical and/or behavioral traits; and a female (XX) fetus exposed to high levels of androgens could be "masculinized" and therefore exhibit certain masculine physical and/or behavioral traits.⁹⁴ That is the basic BOR story.

Research on humans is much more complex and uncertain than research on other animals, because it is not possible, given ethical constraints to avoid causing serious harm to humans, to control many conditions that contribute to human development. For example, it would be highly unethical to control fetal exposures to androgen in utero, and observe what happens to a fetus with high

90. Kate Wong, *Why Humans Give Birth To Helpless Babies*, SCI. AM. (Aug. 28, 2012), <http://blogs.scientificamerican.com/observations/why-humans-give-birth-to-helpless-babies>.

91. *Id.*; JORDAN-YOUNG, *supra* note 56, at 106, 270–71, 286–91.

92. JORDAN-YOUNG, *supra* note 56, at 49–50.

93. *Id.* at 49–50, 280.

94. *Id.* at 33–40.

and low exposures. For that reason, brain organization theory works from two different directions in an attempt to compile a coherent body of evidence.

I will support my claim that brain sex is a myth primarily by drawing from *Brain Storm*, sociomedical scientist Rebecca Jordan-Young's recent, extensive and rigorous critical analysis of brain organization research studies. As Jordan-Young explains, there are two types of BOR studies, cohort studies and case-control studies. The cohort studies work forward from the cause by comparing people who experienced atypical hormone exposures in utero with people who did not.⁹⁵ The case-control studies work backwards from outcomes taken to be atypical (LGBT subjects, for example) and try to determine whether there were atypical hormone exposures during gestation. Both methodologies amount to what Jordan-Young refers to as "quasi-experiments": in these, it is impossible to isolate particular variables to study one by one. When relying on quasi-experiments, it is crucial to base interpretations on the overall body of evidence, and not to lean too heavily on single studies. To be consistent in one's evaluation, one must consider together *all* and *only* studies that investigate a single hypothesized cause and a single hypothesized effect. It also becomes especially important to define one's terms and to be careful and consistent about one's measurements throughout every evaluation of the entire body of data.⁹⁶

One major problem with BOR is its lack of terminological and conceptual precision. A variety of terms and concepts have shifted without any acknowledgment that what a term means now, or what a concept includes, is different from—even the polar opposite of—what it used to be. Thus, two studies with opposite results could easily be misread as confirming one another. For example, in determining whether a female brain was masculinized by a hormone exposure (such as an androgen), one must have a fixed concept of what it would mean for a brain to be "masculine" in that respect. BOR researchers claimed that femininity and masculinity were "common sense ideas" that needed no definition. Yet in early BOR studies of the 1960s and 1970s, a high level of interest in (heterosexual) sex was taken to be masculine, such that a female brain was thought masculinized if the woman showed a high level of interest in sex (with men). Since the 1980s, however, interest in sex with men has been considered the hallmark of femininity. So if a woman exhibits a low level of interest in heterosexual sex, she is taken to be unfeminine, hence, masculinized. So the same disposition that used to be considered indicative of the masculinization of her brain later became indicative of normal femininity. It may therefore appear that both studies indicate that prenatal androgens "masculinize" women's brains, even though these studies directly contradict one another. When reading conclusions in abstracts, the shift in meaning is not apparent, and the studies may appear to mutually support one another. As Jordan-Young remarks, "Like a shell game that has gone on too long, not only the observers but also the people wielding the shells seemed to lose track of what was underneath."⁹⁷

95. This could occur because of an intersex condition, because of sharing the uterus with a fraternal twin of the other sex, or because of a hormone prescription given to one's biological mother during pregnancy (e.g., DES to prevent miscarriage). Some studies rely on maternal blood test results during pregnancy, or on amniotic fluid samples, to infer fetal hormone exposures. *Id.* at 37.

96. *Id.* at 45.

97. *Id.* at 132.

I will provide one more example of how the conceptual unclarity and suppressed presumptions (“framing errors”) in BOR have contributed to the longevity of the myth of brain sex.⁹⁸ This involves BOR that investigates the relationship of prenatal hormone exposures to sexual orientation, without defining what is meant by “sexual orientation.” Is it identified by the sex or gender of actual partners? Sexual partners or life partners? By self-description? Or by the degree of desire one exhibits or reports toward members of the same sex or the other sex?⁹⁹ Researchers treat these different dimensions as if they should all be the same, and very often they are not. Because researchers tend to exclude from their studies subjects who are not consistently gay or lesbian across these criteria, they exclude *most* self-described lesbians and many self-described gay men.¹⁰⁰ Once the research subset of gay and lesbian subjects is chosen, one must wonder what other variables have been selected in or out through this process. Additionally, when comparing brains or behaviors, researchers do not directly consider whether it makes sense to treat lesbians and heterosexual men as a group (because they both are sexually oriented to women), or to treat lesbians and heterosexual women as a group (because they are both female). Some studies do one, and others do the other, generally without acknowledging the choice or difference. BOR does not settle on one strategy or method. Instead, it mixes and matches these as if it were “fishing” for a correlation; and that is not good science.¹⁰¹

To compound these deficiencies of BOR, researchers seem to ignore important recent studies that reveal information that contradicts older studies, and continue to cite studies that have been discredited, in a feedback loop that creates an illusion that the discredited studies are still current science. The soundest studies are not always the most-cited ones. Jordan-Young attributes that to scientists’ uncritical acceptance of other researchers’ conclusions, which do not account for shifting definitions or lack of conceptual stability or rigor. Additionally, when studies hypothesize that prenatal hormone exposures will result in an atypical outcome that is not found, researchers often decide not to publish the study. For that reason, a larger proportion of studies appear to conclude that prenatal hormone exposures lead to sex-typed characteristics than really is the case.¹⁰² Jordan-Young does not believe that BOR researchers intentionally obstruct scientific progress, but the effects of these practices on the scientific record are still worrisome.¹⁰³

When as careful an analysis of relevant brain organization research as Jordan-Young’s fails to find evidence that would offer any good reason to believe that prenatal hormone exposures “hardwire” female and male brains differentially, it seems epistemically irresponsible to fashion our institutions of medicine and law relying on assumptions about what is natural that are not supported by good evidence. Instead, it makes sense to treat sex dichotomy and

98. For Jordan-Young’s summary of BOR’s defects, see JORDAN-YOUNG, *supra* note 56, at 255–68.

99. *Id.* at 155–59.

100. *Id.* at 173.

101. *Id.* at 165.

102. *Id.* at 217, 227–28.

103. *Id.* at 143.

gender polarization as social choices, and to defend our choices with good reasons. If sex or gender were a naturally given dichotomy and one's brain sex usually matched one's dichotomous genital sex, a sizeable percentage of the numerous studies that have undertaken to prove this would have yielded some conclusive results. They have not. The burden of proof should be on those who appeal to natural sex and/or gender to justify the distinction they advocate, and to justify building it into the basic structure of society.

II. SOCIAL CONSTRUCTION AND ENFORCEMENT OF THE GENDER SYSTEM

In part I, I explained the concepts that I rely on, and described the medical understanding of, and treatment for, intersex and transgender conditions. I noted the frequently expressed suspicion that sex reassignment surgery (SRS) is aimed at making a person a "normal" female or male, who is then socially fit to engage in socially favored heterosexual partnerships, ideally marriage. The medical community and most ordinary people still appear to believe that for a person to be mentally healthy the sex of their body must match the gender of their psyche, or "brain sex." Having concluded that there is no justifiable reason to believe in the existence of brain sex, I will now demonstrate how social institutions such as medicine and law actively construct, maintain, and reinforce the gender system. Then I will argue that the social construction of gender dichotomy, and even sex dichotomy, together with the insistence that a person's traits, dispositions, and behaviors coherently unify according to the state of one's genital anatomy or other innate physical features, do not contribute to human well-being. Instead, creating and enforcing such dichotomies causes unnecessary pain, contributes to mental illness, and unjustly constrains individual liberty.

A. How Social Institutions Construct and Enforce Gender

1. Medicine

How does medicine construct a concept of sex as binary and essential? Through practices described earlier, including this example: the medical professional attending a birth pronounces the child female or male, even if the child does not unambiguously fall into one of those categories. Usually that is done by observing or examining the newborn's genitals. Recall that when intersex conditions are present, medical professionals may make the choice between judging an organ to be a large clitoris (and pronouncing the child female) or a small penis (and pronouncing the child male).¹⁰⁴ When the label of "female" or "male" does not match up with the child's characteristics after puberty, this is generally conceptualized as a mistake in judgment: the medical professional did not correctly assess the child's "real" sex, as if there were a right answer to be found. But what feature is definitive of a person's sex? Chromosomes? Hormone profile? Genitals? Personal preference for or comfort with an identity based on one sex rather than the other? Add to this that there is no such thing as "brain sex" (brains are not innately sexually differentiated), and that in a significant percentage of cases genitals are ambiguous. A fair conclusion is that, without a socially constructed sex dichotomy, every person would be

104. See discussion *supra* p. 176.

recognized as possessing and exhibiting a unique mixture of human characteristics and attributes. Even those culturally associated with sex and/or gender do not naturally occur in a bimodal distribution.

2. Law

Few realize how strong a role law has in requiring every person to be assigned to one of two sexes. Sex dichotomy so permeates our concepts, language, identity, and awareness that most of us rarely, if ever, notice its presence or influence. Yet, to take the starkest of examples, there are actually cases that adjudicate what sex a person is, and statutes that require people to identify themselves officially as one sex or the other. For example, state vital records laws require a baby's sex to be recorded on their birth certificate (causing much of the urgency surrounding the need to label a baby as one sex or the other); and until just recently, in the large majority of states that did not recognize same-sex marriage, persons marrying had to demonstrate through identification documents that they were different sexes to obtain a marriage license.

a. Marriage and Family

Consider *In re Estate of Gardiner*, in which the Kansas Supreme Court adjudicated the validity of a marriage between the decedent, Marshall Gardiner, and his widow, J'Noel Ball Gardiner, in order to determine whether J'Noel was entitled to a share of Marshall's estate. Marshall was born male, but J'Noel was a post-surgical male-to-female transsexual woman. The pivotal question was how the legal definitions of "sex," "male," and "female" were to be interpreted. Like the brain organization researchers described by Jordan-Young,¹⁰⁵ legislators had, in the court's view, assumed that these were ordinary terms to be given their plain meaning. After her surgery, Wisconsin permitted J'Noel's birth certificate and driver's license to be amended so that these documents identified her as female. Nonetheless, the Kansas Court of Appeals treated the question of J'Noel's sex as a question of fact, and engaged in a sophisticated analysis of medical and legal practices relevant for determining gender. It then remanded the case so the trial court could determine J'Noel's sex by collecting evidence about the facts that the Court of Appeals had determined likely to be relevant. However, on further appeal, the Kansas Supreme Court invalidated the marriage based on its judgment that J'Noel was not legally female, so the marriage was not between two persons of different sexes, as Kansas required. The ordinary meaning of the word "female," in the court's view, excluded a person who was transsexual. Most cases that have considered eligibility for marriage based on biological sex did not recognize sex reassignment surgery as qualifying a person to marry someone who would have been the same sex before the surgery.¹⁰⁶

But, as one commentator observes, what if J'Noel had married a woman? Then she might have been told that since her birth certificate and driver's license identified her as female, her marriage was invalid. Could it be the case that

105. See discussion *supra* p. 183.

106. See Susan Frelich Appleton, *Gender, Law, and Narrative: Contesting Gender in Popular Culture and Family Law: Middlesex and Other Transgender Tales*, 80 *IND. L.J.* 391, 431-32 (2005).

J'Noel, after SRS, was not eligible to marry either a female or a male? That would be a problematic result, given the U.S. Supreme Court's interpretation of the Constitution as guaranteeing persons a fundamental right to marry.¹⁰⁷ Consider another case implicating what the U.S. Supreme Court has interpreted as a fundamental right: parenthood. That right has been so zealously guarded by courts that children have frequently been harmed by its strength.¹⁰⁸ Nonetheless, Suzanne Daly lost her legal rights as a parent when she transitioned from male (a "father") to female. She was neither neglectful nor abusive as a parent, but only one legal father and one legal mother can be recognized for each child.¹⁰⁹ Thus, Suzanne lost her legal rights as a parent when she became a woman. As should be clear, even one's cherished legal rights to form and maintain family relationships can be jeopardized if one does not comply with the legal requirement to be female or male.¹¹⁰

b. Employment

Not only can one be excluded from the foundational social association, family, for changing one's anatomical sex, but one is alarmingly likely to be excluded from the means to support oneself via socially respectable and lawful employment. The transgender unemployment rate has been estimated at about seventy percent,¹¹¹ with the result that transgender people are disproportionately represented among those who earn money through prostitution, selling illegal drugs, and other unlawful trades.¹¹² They sometimes become connected with these trades in an effort to obtain black market hormones to accomplish transition to the other sex without medical assistance, which they sometimes cannot afford.¹¹³ These circumstances lead to a disproportionately high number of transgender persons in prison, where they are generally housed with persons of the sex they do not identify as.¹¹⁴

Because Title VII of the Civil Rights Act of 1964 prohibits sex discrimination in employment, an employer may not discriminate against an employee based on their sex, or a condition to which only their sex is subject (e.g., because the employee is pregnant). Nor may an employer refuse to hire¹¹⁵ or promote female (or male) employees because they are female (or male); or pay someone less based on that person's sex; or fire, demote, or fail to promote a woman because she is pregnant. But may an employer discriminate against a person because they refuse to behave in harmony with the sex assigned to them at birth? In 1984, a

107. See *id.* at 430–31.

108. See generally Melina Constantine Bell, *Children Are People: Liberty, Opportunity, and Just Parenthood*, 9 REV. J. POL. PHIL. 49 (2012).

109. *Daly v. Daly*, 715 P.2d 56, 59 (Nev. 1986).

110. The degree to which nationwide recognition of same-sex marriage will strengthen family rights for transgender people is still unclear.

111. Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731, 751–52 (2008).

112. See ISRAEL & TARVER, *supra* note 66, at 17–18.

113. See *id.* at 19–20.

114. See *id.* at 19.

115. There are very specific exceptions that are not pertinent here, such as permission to prefer one sex in a job that requires bathing and dressing someone of that sex, or to be cast as a character of that person's sex in an acting role. Here sex is taken to be a bona fide occupational qualification.

federal appeals court entertained a version of that question in *Ulane v. Eastern Airlines, Inc.*¹¹⁶ Born male, Karen Ulane was a flying officer fired by the airline after undergoing sex reassignment surgery. The district court found Ulane's dismissal prohibited by Title VII, reasoning that discrimination based on "sex" includes discrimination based on "sexual identity." The district court recognized that "sex" involves one's self-concept and social identity, and not just one's chromosomes or anatomy. However, the appellate court disagreed, finding that the plain meaning of "sex" did not extend beyond anatomy. Because Ulane was not female in the appellate court's view, she was not discriminated against for being a woman (or man). Instead, she was discriminated against for being transsexual; and that, the court held, does not fall within the purview of Title VII.

Five years later, in *Price Waterhouse v. Hopkins*,¹¹⁷ the U.S. Supreme Court offered hope that "sex" in Title VII encompasses more than the *Ulane* court supposed. In that case, Ann Hopkins was passed over for partnership by the accounting firm for which she worked because she failed to dress and behave as femininely as her firm preferred. Hopkins was not, therefore, discriminated against because she was female, but because she failed to behave in a stereotypically female fashion. She failed to style her hair, wear makeup, and walk and talk femininely, for example. The Court remarked that in enacting Title VII, "Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."¹¹⁸ Because sex stereotypes regarding behavior and grooming are not based on anatomy, the definition of "sex" for Title VII purposes appears more expansive than the *Ulane* interpretation. If a transwoman failed to behave or dress masculinely—or behaved and dressed femininely—and was discriminated against, then, it seems according to *Price Waterhouse* that Title VII would forbid discrimination against her on that basis. However, in subsequent federal district decisions, courts distinguished the cases before them from *Price Waterhouse* on the basis that Hopkins was not a transsexual person but an anatomical female. Thus, a transsexual person could not be protected under Title VII as being discriminated against because of their anatomical sex; it was their status as transsexual that was the basis of their discrimination, rather than their sex, and, on these courts' view, discrimination against transsexual identity is not included in the plain meaning of "sex" in Title VII.¹¹⁹

The Ninth Circuit, in *Schwenk v. Hartford*,¹²⁰ explicitly interpreted Title VII as containing an implicit distinction between sex and gender. Sex, according to the court, refers to one's biological or anatomical features, whereas gender refers to socially constructed, and/or individually endorsed, features of femininity and masculinity. According to its application of *Hopkins* to cases involving transsexual persons, such persons were excluded from Title VII not because of their anatomical sex, but because of their failure to conform to social scripts of

116. 742 F.2d 1081, 1082 (7th Cir. 1984).

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

118. *Id.* at 251 (quoting *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971)).

119. See generally *James v. Ranch Mart Hardware, Inc.*, 881 F. Supp. 478 (D. Kan. 1995); see also *Broadus v. State Farm Insurance Co.*, No. 98-4254CVCSOWECF, 2000 WL 1585257 (W.D. Mo. Oct. 11, 2000).

120. 204 F.3d 1187, 1200-02 (9th Cir. 2000).

masculinity or femininity; so they were discriminated against based on gender, not sex. However, the *Schwenk* court interpreted Title VII as forbidding both sex *and* gender discrimination. On this reading, it is unlawful to discriminate against a male and/or man because he fails to be masculine, or against a female and/or woman because she fails to be feminine. And that is precisely what occurs in discrimination against transsexual persons. Though the *Schwenk* court's interpretation of Title VII does not serve as precedent that other courts must follow, because the court's interpretation of Title VII was tangential to its decision,¹²¹ essentially the same reasoning was used by the Eleventh Circuit to justify the decision in *Glenn v. Brumby*.¹²²

Additionally, the Equal Employment Opportunity Commission (EEOC) has made discrimination against transgender people one of its strategic priorities.¹²³ Citing *Macy v. Holder*,¹²⁴ the EEOC declares: "In 2012, the EEOC held that discrimination against an individual because that person is transgender (also known as gender identity discrimination) is discrimination because of sex and therefore is prohibited under Title VII." In *Macy*, the plaintiff had been hired as a ballistics technician by the federal Bureau of Alcohol, Tobacco, and Firearms (ATF), through a private hiring agency. Shortly after Macy informed the agency that she was transitioning from male to female, they told her that the position for which she was hired had been eliminated. Actually, the position had been filled by a different applicant. The EEOC clarified that discrimination based on "sex stereotyping" and "gender identity," including transgender status, are forms of discrimination based on sex, not separate grounds of discrimination. For that reason, the EEOC interprets them as prohibited by Title VII as sex discrimination.¹²⁵

That development is a significant victory for transgender rights.¹²⁶ Nonetheless, there is still work to be done. Because the EEOC is an executive branch agency, interpretation of the laws it enforces can change when Presidential administrations change. The Employment Non-Discrimination Act (ENDA)¹²⁷ would offer stronger protection against gender identity and sexual orientation discrimination in employment if it becomes law. However, as it currently stands, ENDA still facilitates and permits gender dichotomy. Employers may require employees "to adhere to the same dress or grooming standards as apply to the gender to which the employee has transitioned or is

121. *See id.* In *Schwenk*, a transgender woman prisoner sued under the Gender Motivated Violence Act (GMVA), alleging a guard had attempted to rape her. The GMVA does not define gender, so the court looked to Title VII cases to borrow a definition from a law with a comparable purpose.

122. *See Glenn v. R. Brumby*, 663 F.3d 1312, 1316–17 (11th Cir. 2011). The Sixth Circuit appears to share this view. *See Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004).

123. U.S. EQUAL EMP. OPPORTUNITY COMM'N, STRATEGIC ENFORCEMENT PLAN FY 2013--2016 (2012), <http://www.eeoc.gov/eeoc/plan/sep.cfm>.

124. U.S. Equal Emp. Opportunity Comm'n, Appeal No. 0120120821 (April 20, 2012).

125. *Id.*

126. Also noteworthy is President Obama's Executive Order explicitly prohibiting discrimination by federal contractors and subcontractors on the basis of sexual orientation or gender identity. Exec. Order No. 13672, 79 Fed. Reg. 42,971 (July 23, 2014).

127. The Employment Non-Discrimination Act of 2013, S.815, 113th Cong. (2013).

transitioning,” or the one of birth.¹²⁸ It also explicitly states that employers are not required to provide new or additional facilities,¹²⁹ so gender nonspecific single-user (or multi-user) bathrooms cannot be demanded. Even this progressive (to the point of being impossible to pass, most likely) solution under consideration does not go far enough. One must still identify, and perform consistently, as a man or a woman to receive ENDA’s protection.¹³⁰

Additionally, in approximately two-thirds of U.S. states, in most places a person could live in the U.S., there is no protection against discrimination based on gender identity, or other laws that would protect access by transgender people to housing, public accommodations, health care, education, or credit.¹³¹ Transsexual persons are still frequently explicitly excluded, or effectively excluded, from most or all of these social goods, without legal recourse.

c. Identification Documents

Personal identification documents are another pitfall for transgender

128. S. 815 § 8(a).

129. S. 815 § 8(b).

130. This is not practicable, or even possible, for some transsexual persons. Paige Abendroth, for example, sometimes experiences life as – and identifies as – a woman, and at other times experiences life as – and identifies as – a man. Others report similar experiences. *Radiolab: Invisibilia*, N.Y. PUB. RADIO (Jan. 29, 2015), <http://www.radiolab.org/story/invisibilia>.

131. Eighteen states and the District of Columbia now have laws that protect transgender people against discrimination in employment, housing, and/or public accommodations. Approximately 200 cities and counties also have legal protections from discrimination based on “gender identity,” which is generally intended to include transgender persons. Five additional states and several other cities are under executive orders issued by governors or local officials forbidding discrimination against state, county or city workers based on gender identity. *E.g.*, Know Your Rights: *Transgender People and the Law*, AM. CIVIL LIBERTIES UNION, <http://www.aclu.org/lgbt-rights/know-your-rights-transgender-people-and-law> (last visited Aug. 26, 2015). However, nondiscrimination measures to protect transgender people have faced formidable opposition. Consider a recent ordinance passed by Charlotte, North Carolina that permitted people to use the public restroom that corresponds with their gender identity. North Carolina responded by passing a law that not merely requires people to use only the public restroom designated for the sex specified on their birth certificate, but also prohibits local anti-discrimination ordinances altogether. *E.g.*, Michael Gordon, Mark S. Price & Katie Peralta, *Understanding HB2: North Carolina’s Newest Law Solidifies State’s Role in Defining Discrimination*, CHARLOTTE OBSERVER (Mar. 26, 2016 11:00 AM), <http://www.charlotteobserver.com/news/politics-government/article68401147.html>. North Carolina’s law is an example of one of the many so-called religious liberty laws that states have proposed or passed in recent years, some of which exempt even secular, for-profit businesses from legal obligation to provide goods or services if doing so burdens their free exercise of religion. There is wide suspicion that these laws are intended to provide legal protection for those who want to discriminate against people with LGBT identities. Hunter Schwarz, *Indiana Is the Battle Over ‘Religious Freedom’ that Arizona Never Was*, WASH. POST (Mar. 26, 2015), <https://www.washingtonpost.com/news/the-fix/wp/2015/03/26/indiana-is-turning-into-the-battle-over-religious-freedom-that-arizona-never-was>. After North Carolina and Mississippi passed such laws, several large corporations announced plans to withdraw business from, and several other states implemented travel bans to, these states. *E.g.*, Jonathan M. Katz & Erik Eckholm, *Anti-Gay Laws Bring Backlash in Mississippi and North Carolina*, N.Y. TIMES (Apr. 5, 2016), <http://www.nytimes.com/2016/04/06/us/gay-rights-mississippi-north-carolina.html>. Meanwhile, Georgia’s governor vetoed a similar law after large corporations (such as major sports franchises and Hollywood celebrities) threatened a boycott. Sandhya Somashekhar, *Georgia Governor Vetoes Religious Freedom Bill Criticized as Anti-gay*, WASH. POST (Mar. 28, 2016), <https://www.washingtonpost.com/news/post-nation/wp/2016/03/28/georgia-governor-to-veto-religious-freedom-bill-criticized-as-anti-gay>.

persons. The REAL ID Act of 2005¹³² currently being implemented by states requires that persons present driver's licenses or state identification cards to enter certain federal buildings and to board commercial flights. These identification documents with enhanced security features must record the identified person's full legal name, date of birth, gender (presumably, anatomical sex), an identifying number, photo, and signature. To verify one's identification to obtain a REAL ID, most people will be required to present a birth certificate. Transgender rights advocates anticipate difficulties for transgender people whose current gender identity does not match the sex recorded on their birth certificate.

That concern is not unfounded. Most states that provide a judicial process whereby a transsexual person can change the sex recorded on their birth certificate, driver's license, and/or passport after their transition require that a medical professional certify that the person's genital anatomy has been changed (usually that they have undergone sex reassignment surgery). Four states do not permit a person to ever change their legal sex, or to amend their birth certificate to reflect their new identity.¹³³ The state-by-state treatment of sex determination often results in conflict when a person is born in one state but bears a driver's license in another. If the person's state of residence requires an amended birth certificate to change the sex designation on their driver's license, and that person's birth state never amends a birth certificate or issues a new one based on sex reassignment, that person will be stuck with documents that reflect their birth sex, not their current sexual identity. And that can cause trouble with law enforcement personnel and with access to various public goods (such as commercial air travel).

d. Sex Essentialism in the Courts

As Katherine M. Franke pointed out nearly two decades ago, courts tend to be essentialist about sex.¹³⁴ That is, they believe there is a natural, biological fact of the matter about whether a human individual is female or male, and this fact is taken to be immutable. Courts have been called on to determine a person's "real" sex especially in marriage cases, to establish eligibility for marriage given the different-sex spouse requirement that was once universal in the U.S.¹³⁵ As Franke recounts, the first Anglo-American case to adjudicate someone's sex was

132. Pub. L. No. 109-13, 119 Stat. 302 (2005). See NAT'L GOVERNORS' ASS'N ET AL., THE REAL ID ACT: NATIONAL IMPACT ANALYSIS (2006), http://www.ncsl.org/print/statefed/real_id_impact_report_final_sept19.pdf.

133. Idaho, Kansas, Ohio, and Tennessee do not permit a person ever to amend the sex designation on their birth certificate to reflect a new sex or gender identity. Lambda Legal, *Changing Birth Certificate Sex Designations: State-By-State Guidelines*, <http://www.lambdalegal.org/know-your-rights/transgender/changing-birth-certificate-sex-designations> (last visited Feb. 26, 2016); see also Nat'l Ctr. for Transgender Equal., *How Trans-Friendly Is the Driver's License Policy in Your State?* http://www.transequality.org/sites/default/files/docs/resources/NTDS_Report.pdf (last visited Feb. 26, 2016); MOVEMENT ADVANCEMENT PROJECT, LGBT POLICY TALLY SNAPSHOT, http://www.lgbtmap.org/equality-maps/legal_equality_by_state (last visited Feb. 16, 2016).

134. See Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 39, 47-48 (1995).

135. See *Obergefell v. Hodges*, No. 14-556 (U.S. June 26, 2015) (making same-sex marriage available nationwide on Due Process and Equal Protection grounds).

Corbett v. Corbett, a 1970 English case in which Arthur Corbett sought a divorce from his transsexual wife, April Ashley, on grounds that it was never a valid marriage because she had been and remained male (and thus their marriage was an ineffective attempt at same-sex marriage). The judge heard a great volume of medical expert testimony, taking the question of Ashley's sex to be an objective, scientific question of fact. He then latched onto expert testimony that genital sex reassignment surgery does not change sex; it simply helps the patient to live as the other sex so as to relieve the psychological pain the person experiences when performing the social role designated by their birth sex. Thus, one always is "really" the sex they were born, no matter how successfully they alter their bodies surgically or thorough hormones. In Franke's words, Ashley was judged a man not based on her physical genitals, but based on her "cultural genitals,"¹³⁶ or "true sex." Subsequent cases have largely followed suit. For example, in the previously discussed *In re Gardiner*,¹³⁷ the court refers to the transsexual widow J'Noel's female anatomy as "all man-made" (and therefore not really female) and quotes an earlier case from a different state, which rhetorically questioned whether a surgeon could "change the gender of a person with a scalpel, drugs and counseling, or is a person's gender immutably fixed by our Creator at birth?"¹³⁸ (That 1999 statement seems to echo an 1873 case in which a woman was denied admission to the bar in Illinois because the Creator intended for her to be a wife and mother, rather than to have a career separate from her husband's,¹³⁹ demonstrating the robustness of cultural beliefs about biological essentialism and gender.)

Kenji Yoshino points out the way some courts have shifted from identifying the legal sex of a transsexual person by referring to the chromosomes or genitals that make them essentially female or male, to referring to souls or minds, which are regarded as gendered feminine or masculine.¹⁴⁰ While the latter discourse is an improvement in that it recognizes the person as belonging to the gender to which they are transitioning or have transitioned, it is still deficient in that it continues to essentialize gender. Rather than locating a person's gendered core identity in a body, the soul/psyche discourse locates it in a soul or mind. Yet that approach still posits a gendered core identity that is fixed, from which gendered behavior supposedly emanates.¹⁴¹

From the preceding discussion, it should be clear that law has a powerful role in dichotomizing sex, and requires every person to be assigned one of two sexes in order to access essential social goods, including legal protection against unjust discrimination. Law also serves as gatekeeper in the process for changing identification from the sex assigned at birth to the other sex, if one prefers it when one must choose. Legislators, judges, experts and witnesses do not engage in gender construction and maintenance deliberately or methodically; instead,

136. Franke, *supra* note 134, at 38–40. Franke herself credits the term to Harold Garfinkel. *Id.* at 39.

137. *See supra* pp. 185–86.

138. *In re Estate of Gardiner*, 42 P.3d 120, 124 (Kan. 2002) (citing *Littleton v. Prange*, 9 S.W.3d 223, 224 (Tex. App. 1999)).

139. *See Bradwell v. Illinois*, 83 U.S. 130, 141–142 (1872).

140. Kenji Yoshino, *Covering*, 111 YALE L. J. 769, 922 (2002).

141. *See id.* at 921–23.

they rely on presumptions and prejudices regarding the naturalness and necessity of gender, as if it were an inevitable given.

Transgender people, whose personal and social identities are not built around their birth sex the way conventionally gendered people's are, are dehumanized by their inability to squeeze into the exclusive feminine or masculine gender grooves our society is constructed to maintain. They are regarded as falling outside the scope of legal protection owed to "real" females and males: "real" humans, who have a clearly discernible sex. The intricate details of their anatomies are discussed and assessed by courts in order to determine what sort of human they are, and whether they can be subsumed within a human category at all.¹⁴²

One commentator¹⁴³ observes that transgender parties to legal cases have been referred to as if they were Frankenstein's monster. One court refused to protect a transsexual woman who was fired because of her transsexual status, comparing her change from man to woman to a change from man to beast—specifically, to a donkey—as occurred in Shakespeare's *Midsummer Night's Dream*.¹⁴⁴ Another court, entertaining a petition for a name change, refused to be involved in a "freakish rechristening," declaring it irrational to "place a female name on a male."¹⁴⁵

e. Medicalizing Transgender Identity

Not only are transgender people dehumanized, but when they are treated as people, their identities are treated as intrinsically pathological. For example, the Americans with Disabilities Act lists exclusions from coverage. Transsexualism, transvestism, and gender identity disorders are among these exclusions, as are pedophilia, pyromania, kleptomania, and conditions arising from illegal drug use. Transsexualism, transvestism, and gender identity disorders, in juxtaposition to behaviors associated with criminal activity, are pathologized by implication.¹⁴⁶

Most transsexual people must receive a diagnosis of "gender dysphoria" from a medical professional to legally obtain hormones, surgeries, or other treatments to make their appearance conform to expectations for their preferred

142. Court cases have "plac[ed] [a transgender person's] genitals on trial," entertaining such details as whether the party urinated seated or standing, what sexual practices that person engaged in with their spouse, whether their genitals had a "good cosmetic appearance" and were "adequate for . . . traditional penile/vaginal intercourse." Ezie, *supra* note 64, at 162–63 (quoting *Kantaras v. Kantaras*, No. 98-5375CA, at *47–51 (Fla. Cir. Ct. Feb. 21, 2003) and *M. T. v. J. T.*, 355 A.2d 204, 206 (N.J. Super. Ct. App. Div. 1976)).

143. See Abby Lloyd, *Defining the Human: Are Transgender People Strangers to the Law?* 20 BERKELEY J. GENDER L. & JUST. 150, 159–62 (2013).

144. *Id.* at 160–61 (quoting *Ashlie v. Chester-Upland School District*, No. 78-4037, 1979 U.S. Dist. LEXIS 12516, at *13 (E.D. Pa. May 9, 1979)).

145. *Id.* at 161–62 (quoting *In re Petition of Richardson to Change Name*, 23 Pa. D. & C.3d 199 (1982)).

146. The ADA specifically provides that "the term 'disability' shall not include (1) transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders; (2) compulsive gambling, kleptomania, or pyromania; or (3) psychoactive substance use disorders resulting from current illegal use of drugs." Americans with Disabilities Act of 1990, 42 U.S.C. § 12211(b) (2009), amended by P.L. 110-325 (2008).

gender (or, recall, even to obtain proper identification documents).¹⁴⁷ They may receive these treatments and insurance coverage for them when it is available, but only if the treatments are “medically necessary,” meaning that without the treatments they would be ill.¹⁴⁸ Thus, transsexual people must prove that they are ill in order to conform to the cultural requirement that body sex match psyche gender.

Israel and Tarver’s transgender care guidelines, mentioned earlier, go so far as to provide a sample letter for physicians to write for their patients, explaining that their patient has gender identity disorder (the diagnosis that *gender dysphoria* has supplanted) and that part of their medically necessary treatment is to live as a member of their non-birth sex.¹⁴⁹ The patient can show that letter to law enforcement personnel who believe they are committing some sort of fraud or unlawful impersonation, and to employers who may object to their appearance and presentation. The need for such a letter to avoid these social difficulties that conventionally-gendered people do not face demonstrates how institutionalized gender is, and how otherized and pathologized nonconforming gender identities are.

Moreover, as some attorneys who represent transgender clients point out, many clients do not have the financial means to pay for physician visits or expensive treatments.¹⁵⁰ Others do not wish to have these treatments, but simply wish to express their transgender identities in other ways.¹⁵¹ And many, if not most, do not experience “clinically significant distress or impairment in social, occupational, or other important areas of functioning,”¹⁵² as a result of their gender identity, only as a result of the ostracism and discrimination heaped upon them because of it.¹⁵³ What seems here pathological, and in need of cure, is not the transgender person but the society that subjects the transgender person to ostracism and discrimination.

f. Caste Systems Enforced By U.S. Law

As has occasionally been observed,¹⁵⁴ the essentialized and naturalized legal presumptions about gender and sex rather closely parallel earlier presumptions, now debunked and rejected, about the supposed biological basis of racial identities. Gender and race are both caste systems, classifying persons in order to assign them a place in the social hierarchy. Not all caste systems are binary, but race and gender in the U.S. both have been that way.¹⁵⁵ During slavery and

147. See *supra* Part II.A.2.c.

148. See ISRAEL & TARVER, *supra* note 66, at 18; see also DSM-IV-TR, *supra* note 34, at 581.

149. See *supra* note 36 and accompanying text.

150. Lloyd, *supra* note 143, at 176, 194.

151. *Id.* at 185–86.

152. DSM-V, *supra* note 79, at 453.

153. See, e.g., Lloyd, *supra* note 143, at 175–76.

154. See, e.g., Ezie, *supra* note 64; Franke, *supra* note 134; Andrew Gilden, *Toward a More Transformative Approach: The Limits of Transgender Formal Equality*, 23 BERKELEY J. GENDER L. & JUST. 83 (2008).

155. Of course, there are different ways of looking at it, but in law it has generally been treated as binary. Anne Fausto-Sterling identifies six gender classifications that emerged in the U.S. Over time these have come to be regarded as natural or scientifically based: heterosexual men, heterosexual

segregation, there were only two races: white and colored one of which was recorded on public documents, including, in many localities, birth certificates and marriage certificates. That is exactly what is almost without exception done with sex in the U.S.: one's sex is recorded on one's birth certificate, school registration, driver's license, etc. as either female or male. Anti-miscegenation laws used to require that two persons have the same race recorded on their birth certificates before they could be issued a marriage license. That remained true with sex in the U.S. until very recently: one's birth certificate had to certify that one's sex was different from the one recorded on the prospective spouse's birth certificate.¹⁵⁶

During racial segregation, more and more immigrants arrived on U.S. shores, and it became necessary to decide whether they were "colored" or "white" for the purposes of segregation laws, marriage laws, etc. What were American Indians, Mexicans, Asian Indians, Koreans? These racial identities were sometimes litigated, just as litigation occurs now over whether someone is legally female or male. Just like sex categories, binary race categories are not dictated by nature; their classifications are social choices, and social institutions and the people who administer them can choose any number of different classification schemes. The required categories are not scientific, but ideological. That perhaps should have become apparent when lawmakers were faced with the choice of squeezing Asian people (for example) into the "colored" and "white" categories, and it should now be apparent that not all people are one of two possible sexes – or remain the same, unambiguous sex – from birth to death. One might also begin to wonder why the state needs to create, litigate, and record these sorts of distinctions, rather than merely to recognize that they exist (when necessary) to remedy the injustices that they have caused in the past and/or continue to cause.

g. The Civil Rights Model for Addressing Transgender Discrimination

The civil rights model of jurisprudence has significantly mitigated racial discrimination, especially overt discrimination. This model rests on the idea of a "protected class," which is a presumptively invalid basis for government, and often private, discrimination. As discussed earlier, sex is also regarded as a protected class (although it receives less rigorous constitutional protection than race). Both are protected in part because they are "immutable" or highly visible, are recognized as unrelated to one's social deservingness, and have served as the basis of unjust discrimination or prejudice in the past.¹⁵⁷ Like race, one's sex may or may not be "highly visible." When we notice a person's sex, we are not observing their genitals or hormones or chromosomes: we are noticing the way they dress and behave, and if by "sex" we mean some anatomical feature, that is not likely to be highly visible. The difficulty with providing protection on the basis of immutability is the underlying implication that if the person could

women, gay men, lesbians, bisexual men, and bisexual women. See ANNE FAUSTO-STERLING, *SEXING THE BODY: GENDER POLITICS AND THE CONSTRUCTION OF SEXUALITY* 11 (2000).

156. Appleton, *supra* note 106, at 430–31.

157. Protected classes must also be a discrete and insular minority, lacking the political clout to effect social change without the institutional support of nondiscrimination laws.

change the feature, society might demand that they change it.¹⁵⁸ Imagine someone being told that if she wishes to dress like a woman, she must have genital surgery in order to avoid discrimination; or that she must bleach her skin, if she wishes to avoid racial discrimination; or that she must change her religion if she wishes to avoid discrimination on the basis of her religion.

Part of the reason why intersex people are often treated with more compassion and social affirmation than transsexual people is that their condition is regarded as “not their fault” because they could not have chosen it. For the same reason, many gay and lesbian rights advocates hope that same-sex sexual orientation can be proven genetic or biological. When a characteristic that offends people is regarded by them as immutable or nonvoluntary, they are far more likely to tolerate or accept those with the characteristic. Transsexual persons are often not legally recognized as the sex with which they identify because they are regarded as making an imprudent or illegitimate choice. But if one’s sex is not a natural fact, why should one’s society get to choose one’s sex for one, instead of the person most affected by their sex identity choosing for themselves?

I will address that very question in more depth. First, however, I wish to develop the institutional racism-sexism analogy further using the example of *Rogers v. American Airlines*, a case widely criticized for failing to appreciate the social meaning of race in its institutional context. In *Rogers*, an African-American employee was dismissed for wearing her hair in cornrows, which was prohibited by company policy.¹⁵⁹ She sued under Title VII of the Civil Rights Act, alleging that her dismissal constituted racial discrimination. The court decided against her because it found that the discrimination was not based on her immutable or intrinsic African-American features, but on her hairstyle, which could be changed.¹⁶⁰ But one might ask: why were cornrows prohibited in the first place? The reason that seems most likely to many commentators is that Rogers’s immutable blackness would be tolerated, provided she did not “act” black when it was within her control to “act black” or “act white.” To the extent possible, American Airlines was requiring its employees to conduct themselves according to “white” norms, even though it would employ nonwhites willing to conform to those norms.¹⁶¹

That same requirement has often been noted in cases of gender: women may not be treated differently because they have two X chromosomes or a uterus, but it is not sex discrimination to require hours incompatible with family responsibilities, to give preferences to veterans despite decades of discrimination against women in the military, or to promote only those who are perceived as both competent and likeable, which women almost never are. Only if you can act like a man as a woman, or act “white” as an African-American, will you receive legal protection against discrimination. And as a transsexual person, you might be able to obtain reinstatement to your employment, providing that you

158. Kenji Yoshino refers to this as a demand to “convert” from the stigmatized identity to the socially favored identity. Yoshino, *supra* note 140, at 772.

159. *Rogers v. Am. Airlines, Inc.*, 527 F. Supp. 229 (S.D.N.Y. 1981).

160. *Id.* at 232–33.

161. Kenji Yoshino refers to this as a demand to “cover”: that is, to downplay aspects of one’s identity that are stigmatized within one’s society. Yoshino, *supra* note 140, at 772.

convincingly perform your chosen gender at all times in a way consistent with heterosexual norms.¹⁶² Show any ambiguity, and you may be facing perfectly legal discrimination against a transsexual person, who in many ways lacks standing as a legal person.¹⁶³

B. How a Coercive Gender System Contributes to Mental Illness and Unjustly Constrains Liberty

I have demonstrated some ways that institutions of medicine and law create, maintain, and enforce a binary gender system. I next explain how socially enforced rules about gender contribute to mental illness. Following that explanation, I will demonstrate how government, which organizes society, fails to respect citizens' liberty when it creates, maintains, and enforces a gendered social order.

1. How a Gender System Contributes to Mental Illness

Gender structures increase the prevalence of mental illness in many ways, aggravating a serious social problem. More than half of adults become seriously mentally ill at some point in their lives, and many people have repeated or frequent episodes of mental illness.¹⁶⁴ Not only does that cause a great deal of suffering, but it is socially costly in terms of work time lost, lower productivity, health care costs, etc. Social expenditures to address widespread mental illness consume social resources that otherwise could be used to alleviate poverty, cure disease, develop renewable energy sources, and so on.¹⁶⁵

Sociologist, researcher, and mental health advocate Corey Keyes defines mental illness as "a persistent and substantial deviation from normal functioning" that "impairs the execution of social roles (e.g., employee) and is associated with mental suffering."¹⁶⁶ Keyes's professional interest is to provide a

162. Andrew Gilden illustrates this beautifully in a discussion of Paisley Currah's comparison of two cases with opposite outcomes, both involving transgender teenagers. In the first case (*Doe v. Yunits*, 2000 WL 33162199 (Mass. Super. 2000)), a transgender teenage girl's school did not allow her to attend classes while wearing feminine clothing. The court found the school's conduct unlawful because it threatened harm to Doe's psychological health, given that she had received a diagnosis of gender identity disorder and part of her medical treatment regimen was to dress femininely. By contrast, in *Youngblood v. School Board of Hillsborough Cty.* (Case No. 8:02-CV-1089-T-24MAP, (M.D. Fla. Sept. 25, 2002)), Youngblood, a teenage girl who rejected feminine gender presentation, was excluded from her senior portrait because she wore the dress prescribed for boys instead of girls. She asserted her right to free expression under the First Amendment as well as sex discrimination. The court dismissed both of her claims. The perceived voluntariness of Youngblood's conduct, compared with Doe's conduct, seems to be what produced the divergent results. Gilden, *supra* note 154, at 113-16.

163. Kenji Yoshino argues for a new civil rights paradigm, which presumes (subject to rebuttal) that conditioning the enjoyment of social goods on a stigmatizing person's assimilation to majority norms of identity and/or behavior constitutes unlawful discrimination. That is, people should be legally protected against unreasonable or arbitrary demands to cover (see text accompanying notes 158 & 161 for a description of these demands). KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* 184-96 (2006).

164. Corey L.M. Keyes, *The Mental Health Continuum: From Languishing to Flourishing in Life*, 43 J. HEALTH & SOC. RES. 207, 207 (2002).

165. *Id.*

166. *Id.* The U.S. Surgeon General defines mental health as "a state of successful performance of

positive account of mental health, rather than defining it essentially as the absence of mental illness. To do this, he creates a model with two continua, one for mental health and one for mental illness. The two extremes of the mental health scale are *flourishing* and *languishing*, while the two extremes of the mental illness scale are *mentally ill* and *mentally healthy*. Thus, a person can be mentally healthy but languishing, or mentally ill but still flourishing at a given point in time. Keyes argues that society should not only seek to treat mental illness, but should also promote positive mental health in order to reduce the prevalence of mental illness, since the chances of becoming mentally ill are greatly reduced for people who are flourishing. Even for those who are mentally ill, flourishing counteracts some of the more serious effects of mental illness, just as having high HDL cholesterol counteracts the bad effects of high LDL cholesterol.¹⁶⁷ Because new mental illness arises and relapses occur faster than society can treat the existing mental illness at a given time, the only way to put a dent in the staggering prevalence of mental illness is to engage in prevention, rather than merely treating mental illness reactively when it occurs.¹⁶⁸

Mental health involves positive mental states and positive functioning, which Keyes divides into six aspects: “self-acceptance, positive relations with others, personal growth, purpose in life, environmental mastery, and autonomy.” Keyes elaborates on what these entail: “That is, individuals are functioning well when they like most parts of themselves, have warm and trusting relationships, see themselves developing into better people, have a direction in life, are able to shape their environments to satisfy their needs, and have a degree of self-determination.”¹⁶⁹ Keyes also identifies five dimensions of social well-being, which together with the six dimensions of psychological well-being, are used to assess individual functioning and to locate it on the mental health continuum.

These social dimensions consist of social coherence, social actualization, social integration, social acceptance, and social contribution. Individuals are functioning well when they see society as meaningful and understandable, when they see society as possessing potential for growth, when they feel they belong to and are accepted by their communities, when they accept most parts of society, and when they see themselves contributing to society.¹⁷⁰

A well-designed study of 1,850 American adults found that the most dysfunctional demographic groups—with significant depression and languishing—were women, young people, divorced people, and people with the fewest years of education.¹⁷¹ Given the measures of both psychological and social well-being, it is not surprising that women should fare poorly in these regards in a society with a sex hierarchy that subordinates women. But just as importantly,

mental function, resulting in productive activities, fulfilling relationships with people, and the ability to adapt to change and to cope with adversity.” *Id.* at 208.

167. Corey L.M. Keyes, *To Happiness and Beyond: Flourishing in Life and Real Healthcare Reform*, Address at Washington and Lee University (March 11, 2013). Keyes offered this analogy during this public lecture.

168. Keyes, *supra* note 164, at 209–10.

169. *Id.* at 208–09.

170. *Id.* at 209.

171. The MacArthur Foundation’s Midlife in the United States survey. *Id.* at 211.

gender polarization itself interferes with mental health along most of Keyes's eleven dimensions, to say nothing of the negative effect it obviously can have on the subjective mental states of anyone who is not conventionally gendered, given the problems it can cause with employment security and satisfaction, and ability to be part of a socially sanctioned family.

a. Dimensions of Psychological Well-being

Gender nonconformists include not only transgender people, but all people whose core inclinations or preferred activities are not regarded as gender appropriate. Understood that way, many people—perhaps most—are gender nonconformists in some respects or at some times. However, those for whom gender nonconformity is a significant aspect of their lives often struggle with self-acceptance, given their deviation from a rigid social norm. Positive relations with others can become difficult, for the gender nonconformist, with those who police gender, as most people do. Frequently close family members such as parents, siblings, and spouses engage in gender policing. For people who are transgender, society makes it very difficult to establish a socially sanctioned family, often the most important locus for positive relations.

Personal growth can be hampered by gender grooves for all people, whether or not they are gender nonconformists, since they are discouraged from developing traits or skills that are not regarded as appropriate for a person of their sex. A person's purpose in life is also likely to be constrained by gender grooves. For example, women often see their exclusive or primary purpose as nurturing others, which can displace other possible purposes that are wide open to men, including men who highly value family relationships and engage in significant nurturing. Finding a purpose in life can be complicated for transgender people because of the social discrimination and disapproval that interfere with achievement of their ends. This also relates to autonomy: those low on the gender hierarchy (women, gay men, transgender people) are constantly swimming against the same current that smoothly conducts heterosexual men toward their chosen destinations. And because of that current—an institutional framework built to facilitate heterosexual men's pursuit of the activities they value—those lower on the gender hierarchy tend to have great difficulty with environmental mastery. The poor fit between many people's gender identities and the androcentric, gender polarized, heterosexist institutional framework, is something of which most people disadvantaged by it are well aware, even if they cannot articulate the problem. The frustration it can cause threatens to undermine the psychological well-being of women, gay men, transgender people, and no doubt others.

Society's institutional structure denigrates people's identities, and thereby undermines their psychological well-being. They may be unable to like most parts of themselves because society's message is that they are inferior beings. It is difficult for people to have warm and trusting relationships with others to whom they must remain closeted, or with whom they will not be recognized as establishing a socially sanctioned family, or with a person who beats or rapes them because they are regarded as a servant, a sexual object, and/or property. To the extent gender nonconformists regard themselves as developing into better people, often it is because they are resisting oppressive social norms, and as a

result many others will perceive them as becoming worse people. A gender nonconformist may be perceived by others as “better” if, exhausted from swimming against the tide, the person acquiesces to subordination or resigns to staying in the closet, which decreases the amount of social conflict caused by the gender nonconformity. Thus, gender nonconformists must constantly manage the tension between two aspects of being a good person: maintaining integrity and being socially cooperative.

Anyone can have a direction in life at some time, but those whose aspirations are stifled by gender norms might have to set sights lower to accomplish anything at all of value. Consider, for example, the pre-med student who decides not to attend medical school when she fully realizes the difficulty she will face balancing her career with family responsibilities, a choice men almost never make. Or the teenager who wants to be a clergyman of his faith, but realizes he is gay and learns that his faith does not accept gay clergy. Related to this are people’s ability to shape their environments to satisfy their needs and to have a significant degree of self-determination. When the environment forces women to choose between family and career, and legally denies people employment because of their sexual orientation, their ability to shape their environments to satisfy their needs is significantly reduced. While the pre-med student and the teenager have some degree of self-determination, it is a small degree—a far smaller degree than the heterosexual men at the top of the gender hierarchy have—and comparatively speaking the student and teenager have insufficient opportunities for self-determination.

Thus, as we can see, gender polarization threatens to undermine the psychological well-being of at least those who are not heterosexual men— more than half the population—and probably also of heterosexual men (who, for example, are discouraged from seeking treatment for mental illness, are expected to suppress their emotions, etc.). According to the DSM V, adults and adolescents who experience a mismatch between their socially imposed gender identity and preferred gender identity (i.e., people with gender dysphoria), prior to gender reassignment, “are at increased risk for suicidal ideation, suicide attempts, and suicides. After gender reassignment, adjustment may vary, and suicide risk may persist.”¹⁷² Thus, people’s mental health can be expected to improve—and mental illness to diminish—probably dramatically, if the institutional gender hierarchy is dismantled.

It is important to be clear that women, gay men, and others disadvantaged by the gender hierarchy can be mentally healthy and can flourish in a society such as ours, despite the absence of gender justice. People are resilient, and as struggles such as the women’s rights movement, civil rights movement, and marriage equality movements demonstrate, are capable not only of adapting effectively to difficult conditions, but also of fighting against oppression and securing significant wins. However, I wish to reiterate¹⁷³ that the ability of some people to adapt to injustice and/or to resist oppression does not justify hierarchical and/or oppressive social arrangements, and does not vitiate our social or individual obligations to reform society by eliminating harmful and

172. DSM-V, *supra* note 79, at 454.

173. For the earlier discussion, see *supra* p. 170.

oppressive hierarchies.

b. Dimensions of Social Well-being

Gender polarization interferes, not only with people's psychological well-being, but also with their social well-being. It jeopardizes social coherence for many people, who do not view society as meaningful and understandable. College women often cannot understand why they have to be so careful about not "hooking up" with too many men, because it will ruin their reputation, when hooking up with a lot of women enhances men's reputations. Mothers puzzle over why, when they work full time just like their husbands, they are the ones the school calls when a child is ill or in trouble; and why they are expected to make the dish for the church potluck, empty the dishwasher, and manage the family schedule. Transgender people cannot understand why people are angry at them for using the men's room *or* the women's room, especially in places where there is no gender neutral alternative. Gay men and lesbians wondered for decades whether social actualization—the potential for growing in society—was possible for them when they were not permitted to marry the person they loved and start a family because that person was the "wrong" sex. Even with same-sex marriage nationally recognized, many barriers remain to social actualization for people who do not regard themselves as heterosexual. Women doubt they can be socially actualized when they cannot have a satisfying career *and* family life, given that most people's conception of the good includes both of these.

Social integration, the sense of belonging and acceptance in one's community, is impossible for many, if not most, transgender people, since so many communities do not accept transgender people at all. Although gay men and lesbians, and same-sex couples are gaining greater acceptance in the U.S., many would still prefer to deny them access to the foundational unit of society, the family; and in most states, they cannot rely on legal protection from sexual orientation discrimination in the workplace or elsewhere.¹⁷⁴ That tends to prevent full social integration. Even heterosexual mothers may have difficulty with social integration, since if they are married they may face disapproval for working full time, and if they are single they may face disapproval for not doing so, even though safe, affordable child care remains unavailable for many.

Social acceptance—that a person accepts most parts of society—probably applies to most people, even those whose lives are made disproportionately difficult by gender polarization, economic inequality, racism, ableism, and other social failures. I would argue, though, that people *should not* be as accepting as they are of these injustices and social flaws. Many socially disadvantaged people view themselves as defective, rather than seeing the society around them as defective. They ask themselves: Why can't I balance career and family, when so many other people seem to be able to? Why was I born with a mind that does not match my anatomy? And so forth. Moreover, even those who recognize its flaws are probably inclined to believe that "most parts" of society are acceptable, despite these many problems. However unreflective or even false, that belief

174. See MOVEMENT ADVANCEMENT PROJECT, *supra* note 133 (detailing laws and policies in each state related to equality for LGBT individuals, including laws that address marriage recognition, adoption and parenting, and identification documents).

nevertheless permits social acceptance for most people.

Finally, social contribution—the view of oneself as a (presumably positive) contributor to society—is almost certainly undermined by denial of access to the institution of family which some transgender people still face. Gay, lesbian, and transgender people have significantly limited opportunities for social contribution in states where their protection from employment discrimination is uncertain. So clearly, gender polarization interferes significantly with people's social well-being.

Furthermore, as the DSM V notes:

Gender dysphoria, *along with atypical gender expression*, is associated with high levels of stigmatization, discrimination, and victimization, leading to negative self-concept, increased rates of mental disorder comorbidity, school dropout, and economic marginalization, including unemployment, with attendant social and mental health risks, especially in individuals from resource-poor family backgrounds. In addition, these individuals' access to health services and mental health services may be impeded by structural barriers, such as institutional discomfort or inexperience in working with this patient population.¹⁷⁵

Thus, we can see that gender polarization operates to threaten or compromise the mental health of many women, gay men, and transgender people, and probably others, by undermining their psychological and social well-being, as well as by leaving them with frequent or persistent negative emotional attitudes.

2. How Creation and Enforcement of Gender Unjustly Constrains Liberty

Let us now turn to my claim that when the government, which organizes society, creates, maintains, and enforces a gendered social order, it deprives people of the respect that democratic governments owe to their citizens, and it unjustly and unnecessarily constrains their liberty.

a. Dworkin's Personal Versus External Preferences

To demonstrate what I mean, I will borrow a useful distinction offered by legal philosopher Ronald Dworkin. Dworkin distinguishes between *personal preferences* and *external preferences* to explain why utilitarian politics can reach inequitable results by inadvertently double-counting certain preferences and discounting others.¹⁷⁶ Personal preferences pertain to one's own ability to obtain certain goods and/or opportunities; they are self-regarding.¹⁷⁷ External preferences are preferences about how goods and/or opportunities are made available to others; they are other-regarding preferences. Sometimes these are inextricably related, because extensions of my opportunities or access to goods will affect the availability of these goods and opportunities to others. For example, if I am competing for an employment position, I prefer that I am the one to receive it (personal preference), and therefore I prefer that my rival not receive it. However, my preference that a certain person not receive a position

175. DSM-V, *supra* note 79, at 458.

176. RONALD DWORIN, TAKING RIGHTS SERIOUSLY 234–38 (1977).

177. *Id.* at 234–35.

would be an external preference if I simply held it out of dislike for the applicant, and not out of concern for how that person's obtaining the position might affect my ability to do so.¹⁷⁸

As Dworkin notes, external preferences arising from prejudice are particularly difficult to separate from personal preferences.¹⁷⁹ For example, if I am prejudiced against people who do not sound like native English speakers when they talk, I might prefer that a person who sounds this way to me not be hired as my coworker, even though such a hire would not affect or would positively affect my ability to perform my own work well. If my preference counted in my company's hiring practices, particularly if many of my coworkers shared that preference, a more qualified candidate could be excluded from employment at my company for reasons that are unfair, unjustifiable, and inefficient. Such preferences should not count when weighing aggregate preferences to reach an optimal decision; they impede, rather than facilitate, the objective: hiring the best candidate for the job. Furthermore, they are unfair to the candidate, whose chance for the job should depend on their job-related merits, not merely on whether potential coworkers hold an irrational prejudice against them. This situation is particularly stark when the prejudice in question is "widespread and pervasive," as was the prejudice against African-Americans that supported segregation laws.¹⁸⁰ It is unjust for a majority to impose disadvantages on a minority simply because individuals in the majority share a prejudice against members of the minority, and share a willingness to impose disadvantages on them.

Using that principle, if I preferred for a person to conform to gender stereotypes determined by their sex of birth, my preference would be merely external. Others' visible rejection of, or self-presentation incompatible with gender stereotypes or notions of binary and/or immutable sex, do not affect my own ability to form and express my identity in the way that I prefer. Supporting social institutions and policies that disadvantage transgender people would impose my own preference on them, limiting their freedom in a significant way, without expanding mine in any significant way. Suppose that you would be happy living in a yellow house and that you find many of the other colors people commonly paint houses repulsive. Would you support a law requiring everyone to paint their house yellow?¹⁸¹ Would the fact that you share a preference with many other people justify your imposition of that preference on others, and the consequent limitation of their freedom to satisfy their own preferences? Imagine persons behind a Rawlsian veil of ignorance,¹⁸² unable to know what their

178. *Id.*

179. *Id.* at 236.

180. *Id.* at 236-38.

181. Some zoning ordinances resemble this kind of rule. However, such ordinances are generally limited to small areas, and anyone who does not wish to live under the restrictions can reasonably choose not to move into the zone.

182. Rawls explicates his theory of justice, justice as fairness, using a hypothetical social contract. In this model, the parties to the hypothetical contract are positioned behind a veil of ignorance, and assigned the task of choosing principles to govern the basic structure of their society. This is known as the "original position." Behind the veil of ignorance, parties know nothing about their own personal characteristics or preferences, or about the particular circumstances of their society. The principles that the parties would choose must be fair, in Rawls's view, because no one is in a position

preferences regarding house colors will turn out to be once the veil is lifted, authorizing a law requiring houses to be painted yellow. It seems unimaginable. Yet, house colors are insignificant compared to the sorts of restrictions on personal choice that would be permitted if people knowingly and deliberately accepted, as a just and legitimate exercise of majority rule, that everyone must live according to the majority's preferences.

One might argue that while the yellow-house rule is clearly a silly rule, people's policy preferences regarding ethical matters are different in kind. They are not mere irrational preferences, but deeply held beliefs about what a good society is, and what sort of society they wish to live in. According to Dworkin, there may well be a "public morality" that is justly enforceable.¹⁸³ Consider, for example, the principles embodied by the U.S. Constitution. As Dworkin plausibly claims, one principle of public morality is that voters and lawmakers should not restrict people's liberty in order to indulge their own prejudices and personal aversions.¹⁸⁴ Policy can legitimately reflect community morality, but community morality should not consist in common or even universal prejudices.¹⁸⁵ We, as a community, should be able to give reasons for having the moral principles we have, and these reasons should appeal to principles *all of us* share as a society (that is, they cannot be based on religious, moral or philosophical doctrines that many of us reject).¹⁸⁶ What moral principle or reason could support the social and legal requirement to conform one's behavior to a particular social script, based on an accident of one's birth, as a pre-requisite for enjoying the rights, privileges, and social goods to which one is entitled as a member of society? No such moral principle or reason can be derived from public morality in the U.S.

We can derive the opposite principle from public morality, legal history, and traditions of the U.S.: the principle that social advantages should have a basis in individual merit or choices. Assignment of social role based on one's circumstances of birth, by contrast, is a feudal principle opposed to the practice of meritocracy, which assigns social benefits and obligations either equally for all, or unequally but tailored appropriately to reflect the relevant skill, effort, or type of obligation that makes one deserving of the benefit, or bound by the duty.¹⁸⁷ Another widely accepted public principle is that people should be allowed as much freedom as possible to develop their own identities, characters, projects, and plans, consistent with others' ability to do the same.¹⁸⁸ Thus, the traditional principles of meritocracy and individual freedom both count against

to choose principles to benefit themselves (given that they do not know what would benefit them). The original position is carefully designed to be a perfectly impartial standpoint that will yield pure procedural justice. See JOHN RAWLS, *A THEORY OF JUSTICE* 136-42 (1971); JOHN RAWLS, *JUSTICE AS FAIRNESS: A RESTATEMENT* 85-89 (2001).

183. DWORKIN, *supra* note 176, at 262-64.

184. *Id.*

185. *Id.* at 259-65.

186. *Id.*

187. I do not mean to claim that the U.S. is a meritocracy: only that meritocracy is a principle of morality in the U.S., however imperfectly realized (or unrealized).

188. JOHN STUART MILL, *ON LIBERTY* 5, 13, 18-21, 109-20 (Henry Regnery Co. 1955) (1859); see also JOHN RAWLS, *JUSTICE AS FAIRNESS: A RESTATEMENT* 111-15 (Erin Kelly ed., Harvard Univ. Press 2001).

institutionalized, coercively assigned, and enforced gender roles. The only apparent reason why gender requirements continue to be institutionalized and enforced today is that they continue to appeal to the prejudices of the majority. And as we have seen, majority preference based on prejudice is not a defensible reason for public policy.

b. Laden's Right to Choose Personal Identity

Not only does socially institutionalized and legally enforced gender constitute objectionable government enforcement of prejudiced external majority preferences, but it also reflects an egregious failure of government to respect as full citizens transgender persons and other persons who do not wish to conform to social norms about gender. In *Reasonably Radical*, an attempt to reconcile liberalism and the politics of identity, Anthony Simon Laden argues, correctly in my view, that it is unjust to socially impose nonpolitical identities on citizens; people ought to have a say about what their personal identities are.¹⁸⁹ Laden is concerned with social institutions and policies that force people to conform their identities in a way they find distorting in order to be included politically.¹⁹⁰ Recall that is exactly what the law forces transgender people to do: Identify as a man or as a woman (almost always based on sex assignment at birth) or give up the rights you otherwise would have to be employed, to use public accommodations, and to retain legal parenthood status with respect to your children. Assimilate or face social exclusion.

As Laden demonstrates, people who are assigned identities (such as race and gender identities) that are rigidly defined and hierarchically arranged in our society are not in a position to relate as one citizen to another.¹⁹¹ In a liberal democracy, that circumstance undermines political legitimacy.¹⁹² If the positions of parties who are supposed to be deliberating are sufficiently unequal in power, the less powerful party does not have a meaningful opportunity to reject the other party's proposals, and this coercive structure makes genuine mutual agreement impossible. Laden designates the circumstances where that occurs "social exclusion."¹⁹³ He explains:

When an aspect of someone's identity is imposed, the source of the authority of the reason is not her own identification but the determination of her deliberative partner. When we stand in such a relationship with others, we are prevented from forming a political relationship with them that is characterized by freedom and equality. . . . When an aspect of my identity is imposed, there is a set of claims I am assumed to have accepted. My actual rejection of these claims will be ignored or taken as evidence of my unreasonableness. Since I have no say over the authority of these claims, no relationship I form in which these claims are

189. See ANTHONY SIMON LADEN, *REASONABLY RADICAL: DELIBERATIVE LIBERALISM AND THE POLITICS OF IDENTITY* 134-48 (2001).

190. *Id.* at 137-39.

191. *Id.* at 17-19.

192. See *id.* at 19.

193. In the case of transgender persons, Laden's account of legal exclusion is also apt. The example he gives is that only men are subject to military conscription. For that reason, men's opinions about whether to go to war are taken to have greater weight, and men's protests against war have more influence. *Id.* at 137-39.

made can be considered free. . . . In rejecting a claim made upon me, I will appear to be attempting to reject an obligation that follows from an identity that is in fact mine. The constraint on my freedom in such a case comes at the level of an effective prohibition on my ability to challenge the relevance of the identity itself, or to challenge the particular shape it has been given. In looking only at the particular deliberation in question, however, we may easily miss this limitation, either because those deliberating have internalized the identity and the claims about its relevance, or because others have been trained to see the identity as obviously relevant and to look upon anyone who would question that fact as themselves unreasonable.¹⁹⁴

Thus, if we take for granted the necessity or propriety of binary gender roles, based on the sex assigned at birth, then the claim that a transwoman (and everyone else) is assumed to have accepted is: no woman has a penis. When a transwoman explicitly rejects that assumption, she is regarded as mistaken, crazy, unreasonable. When she disagrees with her deliberative partner's claim that she should not wear a dress or use a women's restroom, her partner does not regard her claim about her identity with respect. And why should any deliberative partner respect her claim that she is a woman, when her identity has been legally constructed as "man" or as "monster," not as woman? The social exclusion is legally sanctioned. There is nothing the transwoman can say to persuade her deliberative partner to regard her as an equal whose claims are worthy of consideration, and whose reasons demand reasons in response, instead of rejection out of hand as preposterous.

Laden proposes amending the U.S. Constitution to include a provision that would protect citizens' right to live in harmony with the reasonable¹⁹⁵ nonpolitical identities they choose, without having identities imposed on them by the state.¹⁹⁶ That would liberate them to construct their own identities, live according to them, and enjoy the social goods and opportunities associated with full citizenship.¹⁹⁷

While I agree with Laden that constitutional rights should be expanded in the way he proposes, I want to explore not the ideal outcome, but rather some strategies that could move us toward a culture in which such a constitutional amendment would be feasible. How could social institutions, and in particular law, operate differently with respect to gender norms to promote mental health and individual freedom for members of society?

As we have seen, breaching the rigid, socially prescribed boundaries of gender roles has serious consequences. Gender is not voluntary or optional. The socially enforced rules about gender increase the prevalence of mental illness, infringe in other ways on individual autonomy, and limit opportunities for self-development to an extent that could only be justified by a very compelling social necessity. Yet, there is no compelling reason to coercively channel people into pre-cut gender grooves that deform them. When a government, through its laws,

194. *Id.* at 134-35.

195. That is, consistent with others' rights and one's own legitimate social obligations, the content of which are determined in a free and equal, fair deliberation among citizens. *See id.* at 171-72.

196. *Id.* at 179.

197. *See id.*

treats persons in that manner, it deprives them of the respect that democratic governments owe to their citizens.

III. PUTTING AN END TO THE GENDER SYSTEM

As we have seen, the gender system is profoundly damaging and unjust, and law plays a critical role in creating and maintaining it. How can the legal system gradually relinquish its role in creating, maintaining, and enforcing the gender system? My proposed strategy is derived from the Law Commission of Canada's methodology in its 2001 study, *Beyond Conjuality: Recognizing and Supporting Close Personal Adult Relationships*.¹⁹⁸ To a much greater extent than the U.S., Canada takes some care not to enforce majority prejudices of the sort Dworkin considers unjust to enforce.¹⁹⁹ Consider that for decades in the U.S., the government was actively involved in the often coercive promotion of heterosexual marriage. Federal and state aid programs providing financial assistance to families who qualify often include monetary incentives for beneficiaries to marry, and sometimes funds allocated to alleviate poverty may be, and are, spent on marriage promotion programs with the (mistaken) idea that marriage is a ticket out of poverty. Another example is the wave of state constitutional amendments passed less than a decade ago to prohibit the recognition of same-sex marriage and to punitively exclude even different-sex conjugal couples from enjoying the benefits of marriage, in order to persuade people to enter heterosexual marriages. The message of the U.S. to its citizens is: if you want to enjoy the full benefits of citizenship, shoehorn yourself into the form of family to which the majority has determined you should belong. Canada, by contrast, seems to ask: what are our people's needs and individual preferences about their own lives? How can government better support people's plans of life and choices? How can we include a diversity of different conceptions of the good and create an even playing field for them?

A. Canada's Four-Question Methodology in *Beyond Conjuality*

In order to demonstrate how Canada's approach could help rid the U.S. of its worst institutional gender injustices, I will describe Canada's strategy in *Beyond Conjuality*. The Law Commission of Canada undertook the *Beyond Conjuality* study of close personal adult relationships "[i]n keeping with its mandate to consider measures that will make the legal system more efficient, economical, accessible, and just."²⁰⁰ The Commission wanted "to determine how well law and policy were responding to contemporary realities"²⁰¹ and "align state policy with social facts."²⁰² It found that certain demographic shifts resulted in more diversity in close personal adult relationships (CPARs) in the three decades or so preceding the study. It classified these types of relationships into

198. *Beyond Conjuality: Recognizing and Supporting Close Personal Adult Relationships*, LAW COMMISSION OF CANADA (Dec. 21, 2001), http://www.samesexmarriage.ca/docs/beyond_conjuality.pdf [hereinafter *Beyond Conjuality*].

199. See *supra* part II.B.2.a.

200. *Beyond Conjuality*, *supra* note 198, at xxiv.

201. *Id.*

202. *Id.* at 1.

four categories: “conjugal,” “non-conjugal between relatives,” “non-conjugal between non-relatives,” and “caregiving relationships.”²⁰³

The Commission explicitly stated the governmental objectives in regulating CPARs, and the values and principles it sought to recognize and respect. The governmental objective in recognizing CPARs is to provide an orderly framework in which individuals can express commitment and assume rights and responsibilities within relationships.²⁰⁴ The values endorsed by the Commission include equal treatment of different types of CPARs; institutional support for adult members of those relationships in setting and maintaining the parameters of the roles that they wish to establish within those relationships; and individual autonomy (for adults) in choosing the composition of one’s family.²⁰⁵ They also include protecting individuals’ personal security, shielding relational privacy from undue government intrusion, promoting freedom of conscience and religion, coherence (proper tailoring of each regulation to its objective) and administrative efficiency.²⁰⁶

The Commission’s methodology was to ask, for every Canadian law that depended on a definition of family or on a determination of close personal adult relationship status: *which* relationship status should be used for the purposes of the law, *if* a relationship status should be used at all.²⁰⁷ It asks four questions:

1. Does the law pursue a legitimate policy objective?
2. Is the relationship status used relevant to the law’s objective?
3. Would the law’s objective still be accomplished if the individual could designate which relationship(s) she would like the law to apply to?
4. Could the law be revised to more accurately define the relationship status or function that is relevant to the law’s objective?²⁰⁸

If the answer to each of the first two questions is “yes,” then proceed to question 3; “no” to either question marks the law for repeal or revision. “Yes” to question 3 or 4 marks the law for revision, while “no” to both of those questions permits it to remain unchanged.²⁰⁹

The Commission highlights the importance of the third question: if the answer is yes, than allowing individual designation serves the value of autonomy, decreases invasion of privacy (e.g., determining whether the relationship is conjugal), and increases equality among different kinds of relationships (e.g., conjugal vs. nonconjugal).²¹⁰ The Commission considers the advantages and disadvantages of extending common law marriage, including the following:

203. *Id.* at 2–6.

204. *See id.* at 115, 131.

205. *See id.* at 14–24.

206. *Id.* at 19–24.

207. *Id.* at 29–30.

208. *Id.* at 30.

209. *Id.* at 30–34.

210. *Id.* at 32–33.

1. It is not clear what it means to live in a conjugal relationship, and very personal inquiries may be required to determine the answer. (Disadvantage)
2. One might overcome the problem in 1 by concentrating on the functions of CPARs important to the state benefit: e.g., emotional intimacy, economic interdependency, shared residence, but not sexual relationship. (Advantage)
3. Marriages are universally understood, portable, and much less complicated than tailored sets of relationship statuses. (Advantage)
4. Parties may be recognized as having a common law marriage when they do not realize they are married, or when they wish not to be married. (Disadvantage)²¹¹

The Commission also considers, as an alternative to extending common law marriage, the advantages and disadvantages of creating a range of tailored statuses based on the functions served by the particular relationship, including:

1. It provides greater certainty to the parties. (Advantage)
2. It may be less equality-promoting, unless well-tailored to objectives. (Potential disadvantage)
3. It may be less coherent, unless well tailored to objectives.²¹² (Potential disadvantage)

The Commission decides, while the data collected is studied further, to continue to recognize civil marriages, which have the advantages of being voluntary, stable, certain, and public. It concludes, after its examination, that express individual contracts may be burdensome and costly for parties to make, and that power differentials in bargaining power may leave some parties vulnerable to exploitation.²¹³ At the same time, it notes, enforcing implicit contracts is costly and uncertain.²¹⁴ It considers the option of ascription (e.g., imputing common law marriages to parties in certain cases), finding it useful when necessary to protect a party from exploitation.²¹⁵ However, the Commission recognizes, ascription may infringe on individual autonomy by imposing on parties what they have not chosen.²¹⁶ Finally, it proposes the creation of a new status called a Registered Domestic Partnership (RDP), which like marriage, provides an orderly framework for people to express commitment and assume rights and responsibilities, which is voluntary, stable, certain, and public.²¹⁷ Unlike marriage, though, it promotes equality among conjugal and non-conjugal relationships, affirming individual autonomy and privacy.²¹⁸

211. *Id.* at 34–35.

212. *See id.* at 35.

213. *Id.* at 115–16.

214. *Id.*

215. *Id.* at 116.

216. *Id.*

217. *Id.* at 117–18.

218. *Id.* at 113–18.

B. Adapting the Four-Question Procedure for Laws Utilizing Sex or Gender as a Category

The same methodology used in *Beyond Conjugalinity*, including a version of the four questions it asks tailored to the subject of gender identity, can provide a guideline for reforming U.S. laws that depend on gender identity. We could ask, of each law that creates or enforces gendered identity, or that requires a person to identify as a man or woman to enjoy its protections or to avoid its penalties:

1. Does the law (or individual provision of a law) pursue a legitimate policy objective?
2. Is the gender identification required or specified relevant to, or necessary for accomplishing, the law's objective?
3. Would the law's objective still be accomplished if the individual could designate which gender they would like to be identified as?
4. Could the law be revised to more accurately define the status, condition, or function that is relevant to the law's objective, instead of using gender identity as a proxy?

Following the *Beyond Conjugalinity* report's method, I will consider some examples of laws that create or enforce gendered identity, or that require a person to identify as a man or woman to enjoy its protections or avoid its penalties.

First, it is worth noting that Canada's Law Commission, in deciding to retain marriage as a legally recognized form of CPAR, dispenses quickly with the question of whether same-sex couples should qualify to enter into marriages:

[T]he argument that marriage should be reserved to heterosexual couples cannot be sustained in a context where the state's objectives underlying contemporary state regulation of marriage are essentially contractual ones, relating to the facilitation of private ordering. There is no justification for maintaining the current distinctions between same-sex and heterosexual conjugal unions in light of current understandings of the state's interests in marriage. The secular purpose of marriage is to provide an orderly framework in which people can express their commitment to each other, receive public recognition and support, and voluntarily assume a range of legal rights and obligations... [A]s the Supreme Court of Canada has recognized, the capacity to form conjugal relationships characterized by emotional and economic interdependence has nothing to do with sexual orientation.²¹⁹

So while the answer to the first question seems to be yes, marriage law does pursue a legitimate policy objective (providing the orderly framework mentioned), the second question must be answered in the negative. Gender identification is not relevant to the law's objective, and for that reason it must be removed from the law. The Commission recommends just that: that civil marriage in Canada should be gender neutral.²²⁰

The three further examples I will consider are laws requiring or permitting

219. *Id.* at 130 (citation omitted).

220. *Id.* at 129-31.

sex to be specified by personal identification documents, laws permitting sex-segregated sports, and finally laws regarding sex-segregated prison housing. My objective in undertaking this analysis is not to reach definitive conclusions about how these matters should be addressed legally. Laws governing such matters should be crafted after careful consideration of empirical data, robust attempts to gather the data to answer important questions for which inadequate data exist, and conscientious deliberation among policymakers as to how to balance various competing interests. I will not pretend that I can singlehandedly resolve these difficult issues. I only mean to provide examples of how the method might be used to make good policy, and what sorts of reasons it would be important to consider.

1. Identification Documents

Recall that a transgender person is vulnerable to the charge of fraud if the sex specified on their driver's license or other personal identification documents (IDs) does not appear to match up with the bearer's presentation. Moreover, problems can arise when different states' rules governing birth certificates and drivers' licenses conflict with one another, making it necessary but difficult to determine what sex a person is "legally." This can result in intrusive examinations, or even overly hasty medical decisions (as in the case of intersex newborns) for the sole purpose of checking a box on a form. So do we really need to have people's sex specified on these documents?

The first of the four questions asks whether laws requiring the creation, carry, or production of IDs pursue a legitimate policy objective. The answer to that question must be affirmative. Identification documents such as birth certificates, driver's licenses, and passports serve a variety of important state interests. In the U.S., birth certificates indicate a person's U.S. citizenship and age, which must be verifiable for many purposes, including eligibility to vote and to collect social security payments. Driver's licenses serve state interests such as the interest in security and the interest in child protection. People committing crimes and traffic violations can be identified in police stops, and people can prove they are old enough to purchase alcohol, be admitted to R-rated movies, or get access to other age-restricted items. The international use of passports is justified because a country should be able to ascertain who is within its borders, to secure personal safety for all, to ensure citizens access to the goods of citizenship, and to assist visitors. There are many other valid state objectives for requiring the possession or display of IDs.

The second question asks whether the gender identification required or specified is relevant to the law's objective. Here it is important to distinguish between the state's asserted interests and its legitimate interests. For example, the state could assert an interest in ensuring that biological males do not use women's public restrooms. For police to enforce restroom sex segregation, proof of sex would be necessary. So a transwoman asked to show her license might be identified on it as male, and police could exclude her from the women's restroom or ticket her afterwards for using it. However, there seems to be no *legitimate* reason for including a sex or gender designation on a driver's license, because there is no legitimate reason for sex segregation of restrooms that have privacy stalls; and all multi-person restrooms either do or should have stalls. The

prevention of fraud does not justify identifying people's sex on their drivers' licenses either. A man could disguise himself as a woman to commit a fraud, but he could also disguise himself as a man with a different appearance, using a different color or hair-length wig, or pretending to walk with a limp while using a cane, and also commit a fraud. Only a tiny fraction of frauds could be prevented by a gender designation, and that small benefit of sex designation does not justify the harm that is done by requiring a person to carry a label that they do not wish to apply to themselves. Because the answer to the second question is "no," laws requiring sex or gender to be indicated on IDs should be amended not to require that.

For the sake of argument, suppose someone were convinced that there is a legitimate state interest in specifying sex or gender on some types of IDs. Then we would reach the third question: Would the law's objective still be accomplished if the individual could designate which gender they would like to be identified as? And here it is difficult to understand why any state interest in identifying a person's gender could not be satisfied by permitting the individual who is labeled to choose the designation, instead of the state choosing it. As explained earlier, the assignment of gender, and even sex, is a choice. The categories do not have to be binary, and assignment to one category or another is arbitrary, since the categories themselves are arbitrary. There is no obvious reason why, *even if* the state has a legitimate interest in being able to identify a person's gender at any time, there must be only two genders. More than two would actually enhance accurate identification of individuals, since it would reduce the number of individuals to whom any given designation applies. However many categories are chosen, what would seem to be important (supposing the state has a legitimate interest in requiring the specification of gender on a person's IDs) is that everyone belong to one, and only one category; but why should the state, rather than the individual, choose the designation? To the state it should make no difference. To the individual who would be labeled, it makes an enormous difference. Thus, even if the state did have an interest in requiring the designation of a person's sex on their IDs, the laws requiring such designations should permit the individuals labeled to choose their designation, and there should be a procedure for changing designation when appropriate (as when a person transitions from one gender to another). Therefore, although laws requiring the creation, carry, or production of IDs pursue a legitimate policy objective, gender identification is not necessary for accomplishing the objective; and even if it were necessary, the individual identified should be permitted to choose the gender designation indicated on the document. Either way, justice and citizen/resident well-being require amendment of many ID laws.

2. Sex Segregation in Sports

How can the Law Commission of Canada's four-question methodology be used to evaluate legally required or permitted sex segregation in sports? In sports, sex segregation is widely accepted, even by many of the most ardent feminists, as justified by biological differences between men and women. Equality feminists stress that identical treatment is not always equal treatment, when the needs of females and males differ and the needs that society is organized to satisfy are the male needs. As mentioned earlier, Bem refers to this

as *androcentrism*.²²¹ To avoid privileging the male body, society must be arranged to accommodate the female anatomy and physiology as well as the male. So employment disability policies should not exclude pregnancy from benefits coverage,²²² and divorce laws should not pretend that mothers and fathers are similarly situated “parents” of their children.²²³

Popular wisdom about most sports that people of both sexes commonly play is that post-pubescent males generally have significant biological performance advantages over post-pubescent females, perhaps due to much higher levels of testosterone, greater lean body mass and lung capacity, and even mechanical advantages such as narrow hips for faster running and greater average size and height. Most people believe that if adult competitive sports were not segregated, very few women would have opportunities to play, since tryouts would result in all-male or nearly all-male teams.²²⁴

Title IX of the United States Education Amendments of 1972 prohibits sex discrimination in any educational program that receives federal financial assistance, including primary, secondary and post-secondary athletic programs.²²⁵ Nonetheless, “where selection for . . . teams is based upon competitive skill,” or the sport is a contact sport, Title IX permits sex segregation.²²⁶ Relevant and significant to consider, then, in the context of sex segregation of sports, are the *exemptions* to Title IX that effectively permit the widespread sex segregation of sports.

The first question to consider is whether the law, and its exemptions, each advance legitimate policy objectives. Title IX’s objective is to prevent sex discrimination in federally assisted educational programs, including sports programs. That is a legitimate, in fact commendable, objective. What is the policy objective served by the contact sports exemption? Legal decisions denying boys access to girls’ teams have stated or implied that allowing arrangements to protect girls from physical harm is the exemption’s purpose.²²⁷ The objective served by the competitive selection exemption apparently is to protect girls’ opportunities to play. These objectives are surely legitimate as well.

221. See *supra* note 47 and accompanying text.

222. The U.S. Supreme Court found that excluding pregnancy from employment disability policies was not discrimination based on sex; rather, said the Court, the policies discriminated between “pregnant persons” and “nonpregnant persons.” See *BEM*, *supra* note 47, at 74–77. This decision was widely ridiculed, and soon mooted by the Pregnancy Discrimination Act of 1978, which amended the Civil Rights Act of 1964.

223. Martha Albertson Fineman has been an outspoken critic of gender neutral divorce laws, which operate to disadvantage mothers and children by assuming that parent-child attachments are the same for both parents, and that both parents are equally positioned to support children financially, when in fact mothers usually have far less earning power because of the time they devote to caring for their families at the expense of their careers. See generally *MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* (1995).

224. Adam Love & Kimberly Kelly, *Equity or Essentialism? U.S. Courts and the Legitimation of Girls’ Teams in High School Sport*, 25 *GENDER & SOC’Y* 227, 229–30 (2011) [hereinafter *Equity or Essentialism?*]; EILEEN McDONAGH & LAURA PAPPANO, *PLAYING WITH THE BOYS: WHY SEPARATE IS NOT EQUAL IN SPORTS* 41, 58 (2008).

225. 20 U.S.C. § 1681 (1972).

226. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 34 C.F.R. § 106.41(b) (1975).

227. See *Equity or Essentialism?*, *supra* note 224, at 242–43.

The second question is whether the use of *sex* as a legal category is relevant to the law's objective of preventing sex discrimination in sports. In order to determine whether sex discrimination is occurring, or to prevent its occurrence, it is necessary to legally recognize sex as a social category and possible basis of discrimination. Not to do so would be to make a similar mistake to the one the U.S. Supreme Court made when it found that excluding only pregnancy, and no other condition, from employment disability policies did not constitute sex discrimination.²²⁸ We could ignore the fact that only one sex can become pregnant, but ignoring sex as a category in such a case does not advance sex equality. Instead, it aggravates sex inequality by refusing to recognize the pertinence of sex in the specific case. Any law that seeks to protect against sex discrimination must recognize sex as a category in order to provide the intended protection.

The Title IX *exemptions* use the category of sex differently than the law itself, however. They offer opportunities to continue practicing sex discrimination, in the form of segregation, in ways that otherwise would be prohibited by Title IX. So it becomes important to ask whether these exemptions appropriately advance the law's objective by accommodating ways in which females and males are not similarly situated (as in the pregnancy disability case), or whether they prevent the law from going as far as it should to promote sex equality in sports. Let us begin with the contact sports exemption. "[C]ontact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact."²²⁹ The purpose of this exemption has been interpreted by courts to be to protect girls and young women (but not boys and young men) from harm.²³⁰ That has a common sense appeal to it, when one considers that post-pubescent males are, on average, larger and heavier than post-pubescent females.²³¹ A justification for exempting pre-pubescent sports (those played at an age at which it would be very rare for any child to have reached puberty) seems absent, however, since boys and girls do not differ in average size or strength at that stage of life. With respect to young adult women, such as college aged women, this exemption may be

228. See *supra* note 222 and accompanying text.

229. *Equity or Essentialism?*, *supra* note 224, at 238.

230. See, e.g., *Kleczek v. Rhode Island Interscholastic League*, 612 A.2d 734 (R.I. 1992) (finding that the league had a compelling reason to exclude boys, such as the plaintiff, from girls' field hockey because of the risk of harm); *Williams v. Sch. Dist.*, 998 F.2d 168, 179–81 (3d Cir. 1993) (citing *Kleczek* in the course of reversing the district court's order granting summary judgment for the plaintiff and remanding the factual question of "whether there are any real physical differences between boys and girls that warrant different treatment, and whether boys are likely to dominate the school's athletic program if admitted to the girls' teams."). That these are two separate factual questions necessary to determine the legal question demonstrates that protecting girls' opportunities is not the only issue; and whether a boy will cause girls physical harm seems like the only other reason for its relevance. However, girl plaintiffs have been granted opportunities to play on boys' football teams on equal protection (rather than Title IX) grounds. E.g. *Lantz v. Ambach*, 620 F. Supp. 663 (S.D.N.Y. 1985)). Therefore, while boys entering a girls' team pose too great a risk of harm to girls, girls entering a boys' team don't pose too great a risk of harm to boys, even though the sports are both (regarded as) contact sports. See *Equity or Essentialism?*, *supra* note 224, at 242–43.

231. Cheryl D. Fryar, et al., *Anthropometric Reference Data for Children and Adults: United States, 2007–2010*, 11 VITAL HEALTH STAT 252 (2012), http://www.cdc.gov/nchs/data/series/sr_11/sr11_252.pdf.

unduly paternalistic. Playing contact sports involves certain risks to players, which they assume in deciding to play the sport. Sports such as boxing and wrestling have weight classes, which mitigate some of the average differences between men and women. While men tend to be on average stronger at the same weight, many believe that this difference has to do with training regimens rather than hormonal or other biological differences.²³² One might still argue that post-pubescent girls—who are not yet adults—should be protected from possible harms involved in playing contact sports with boys. That reasoning leads equally to the conclusion that smaller boys should not be permitted to play, and could cause us to conclude that children should not play contact sports at all due to the risk of harm. Since the protection of children—rather than the paternalistic protection or exclusion of girls—does not seem to be the real concern at work, it is difficult not to conclude that the contact sports exemption fails to advance the legitimate purposes of Title IX, and that it should be removed from the law.

Now let us turn to the competitive selection exemption. Does it appropriately advance the objective of Title IX, to prevent sex discrimination in sports, by accommodating ways in which females and males are not similarly situated? It does not paternalistically single out girls and young women for protection that boys and young men do not receive. Some would say that it protects girls' and young women's opportunities to play sports by creating a domain in which males will not be selected for nearly all of the positions. But the idea that, without segregated sports, males would dominate in tryouts and win nearly all the positions is a supposition that some argue is both false, and perpetuates a self-fulfilling prophecy.²³³ On this view, females tend to perform less competitively than males, on average, in certain sports, because they have always played on sex segregated teams for which expectations were always lower. They internalized the belief that males have natural advantages that make them superior players. And the stereotype threat arising from segregation itself has made female players, on average, perform at a lower level than male players.²³⁴ If that is true, then the competitive selection exemption is also unjustified and should be removed. This empirical question may take time to answer, but the state has an obligation of justice to take affirmative action to answer it (as by providing certain legal incentives not to sex segregate select sports that have been segregated in the past) rather than to simply accept the sex discrimination that the exemption involves as necessary to prevent worse sex discrimination.

232. The Massachusetts Supreme Court, in ruling unlawful an exclusion of boys from girls' teams, remarked, "any notion that young women are so inherently weak, delicate or physically inadequate that the state must protect them from the folly of participation in vigorous athletics is a cultural anachronism unrelated to reality" (citation omitted). *Equity or Essentialism?*, *supra* note 2274, at 241. For that reason, "classification on strict grounds of sex, without reference to actual skill differentials in particular sports, would merely echo 'archaic and overbroad generalizations'" (citation omitted). *Id.* However, more recent decisions have diverged from this 1979 case, as trends have returned us to widespread belief in essential sex differences. *Id.* at 241–42.

233. *Equity or Essentialism?*, *supra* note 224, at 245–46; MCDONAGH & PAPPANO, *supra* note 224, at 58.

234. See *Equity or Essentialism?*, *supra* note 224, at 245–46; Katrina Karkazis & Rebecca Jordan-Young, *The Trouble with Too Much T*, N.Y. TIMES (April 10, 2014), <http://www.nytimes.com/2014/04/11/opinion/the-trouble-with-too-much-t.html?emc=eta1&r=1>.

Assuming the exemption turns out to be necessary, we might reach the third question: would the law's objective still be accomplished if the individual could designate which gender they would like to be identified as? What makes this a complicated matter is that the psychological attributes and physical skills that play the greatest role in athletic excellence are developed from an early age. If indeed there are relevant biological reasons for segregating sports, by the time a person chooses a sex identity, the relevant attributes and skills will already have been developed as the girl or boy the person was. It is certainly no solution to ask children to choose sex identity young, for all the reasons discussed earlier.²³⁵ Those reasons instead point in the direction of discouraging children from identifying with a specific gender until their late teen or even adult years. So if the reasons for the competitive selection exemption are legitimate, individuals probably could not choose their gender without undermining its objective.

However, reaching the fourth question (continuing to assume the exemption turns out to be necessary), the law *could* be revised to more accurately define the status or function that is relevant to the law's objective, instead of using gender identity as a proxy.²³⁶ Here the "law" at issue would be the Title IX competitive selection exemption. If the status or function relevant to sports performance is size, or strength, or speed, or skill, that attribute could be used directly to categorize athletes, rather than using sex as a proxy for other, relevant attributes. While women are not as large or strong as men on average, there are women who can outperform most men at even the most grueling physical tasks. Consider, for example, the two women who qualified as U.S. Army Rangers, when 60% of the men who attempt the two-month course fail to pass the test and qualify.²³⁷ Rather than observe that men on average are larger or stronger in a sport where size or strength is an advantage, and segregate by sex, why not simply group by size or strength? Classifications based on the attribute in question would be more accurate and functionally superior, *and* more just, because they would not engage in unjustified (or any) sex discrimination.

Thus, even assuming that further empirical data that the state proactively gathers demonstrate that there are relevant biological differences between men and women on average in the performance of certain sports, the objective of Title IX's competitive selection exemption could be satisfied by classifying athletes according to the actual attribute relevant in the particular sport, rather than using sex as a proxy. That exemption, like the contact sports exemption that treats girls and women but not boys and men paternalistically, should be removed from Title IX if the facts assumed in this analysis are accurate.

235. See *supra* pp. 177–78.

236. See *Dothard v. Rawlison*, 433 U.S. 321 (1977), in which the U.S. Supreme Court held that the district court was not in error when it rejected the Alabama Board of Corrections' claim that requiring prison guards to be at least 5 feet 2 inches in height and 120 pounds in weight was a bona fide occupational qualification. That requirement had a disparate impact on women, since it excluded more than 40% of women but less than 1% of men. *Id.* at 329–30. Noting the lack of evidence of a direct correlation between height or weight and strength or ability, the Court remarked that a direct strength requirement, rather than the use of a proxy for sex, could qualify as a bona fide occupational qualification if it were found necessary for performing the job effectively. *Id.* at 331–32.

237. *Two Women Qualify as U.S. Army Rangers*, THE GUARDIAN (Aug. 18, 2015), <http://www.theguardian.com/us-news/2015/aug/18/two-women-qualify-as-us-army-rangers>.

3. Sex-segregated Prison Housing

The third case to which I will apply the Law Commission of Canada's four-question methodology returns us to where we began: the case of Michelle Kosilek, a transwoman who sought sex reassignment surgery (SRS). What if the appeals court had affirmed the district court's injunction requiring the Department of Corrections (DOC) to provide SRS for Kosilek?

Does a transwoman belong in a men's prison, or in a women's prison? This prison housing question has arisen in a surprising number of cases. One reason why states object to providing SRS for prisoners is that each prisoner must be housed in either a women's or a men's prison, and either option poses difficulties. Prisoners could be housed according to their current legal sex, or the legal sex they were at sentencing. As discussed earlier, one's "legal sex" is not a simple question, and the answer may vary depending on the state in which one resides.²³⁸ In nearly all of the legal cases involving transgender prisoners, the prison's practice is to house the prisoner according to their presumed sex at sentencing, without any determination of the person's legal sex. Until relatively recently, courts, legislatures, and correctional facilities operated under the assumption that a person's sex is an easily ascertainable and permanent fact. That a person's sex assigned at birth, current sex, sex of sentencing, sex of self-identification, and legal sex are identities that can differ, was not even considered. So prison housing, like so many institutions within society, is organized as if it were a brute natural fact that there are two easily determinable sexes, female and male. Because the assumption of natural dichotomous sex does not match up with reality, institutions such as prisons must adjust to accommodate newly acknowledged facts.²³⁹

Given the mismatch between institutional organization and reality, an interim solution must be found immediately for a prisoner such as Kosilek, who was assigned "male" at birth and sentenced as a man, but who is now a woman (absence of SRS notwithstanding) housed in a men's prison. Housing a woman in a men's prison raises concerns for her safety. She might be vulnerable to rape or other violence, targeted because of her gender. Even though Kosilek was not so targeted, this is a legitimate worry given the gender hierarchy and prevalence of male violence against women throughout society. Prison officials argued against providing SRS for Kosilek on security grounds: that having a woman in a men's prison would disrupt prison security, including making Kosilek

238. See *supra* pp. 189-90.

239. The Prison Rape Elimination Act of 2003 (PREA) created a commission to develop standards for eliminating prison rape. In 2012, the U.S. Department of Justice (DOJ) passed a final rule based on the commission's recommendations, which required departments of corrections to make individual decisions about where transgender inmates should be housed, and directed them to take into account the inmates' judgments about whether they would be safest housed with men or women. Nonetheless, prisons have continued to house inmates based on their genital anatomy. *E.g.*, Maria L. La Ganga, *US Prohibits Imprisoning Transgender Inmates in Cells Based on Birth Anatomy*, THE GUARDIAN (Mar. 24, 2016), <http://www.theguardian.com/us-news/2016/mar/24/transgender-prison-gender-identity-anatomy-doj-rules>. In March 2016 the DOJ released a clarification that "a policy that houses transgender or intersex inmates based exclusively on external genital anatomy" violates PREA standards. Case-by-case consideration of each inmate's situation is required. *National PREA Resource Center, Compliance, LGBTI Inmates/Residents/Detainees/Staff*, 115.42, 115.43, Screening (Mar. 24, 2016), <http://www.prearesourcecenter.org/node/3927>.

vulnerable to violence. This demonstrates that prison officials do not regard Kosilek, in the absence of SRS, as a woman; and that they *would* regard her as a woman if she had received SRS. The trouble with transferring her to a women's prison after surgery would have been, it seems, that she would still be regarded as posing a risk of harm to "real women." The issue may be partly political: imagine the public outcry that would ensue if a person serving time for an extreme form of violence against women—wife murder—ended up housed with women to unleash more violence upon. But of course, there are many violent women in prison—some undoubtedly for murder—who pose a risk of serious harm to other women absent adequate security. How is Kosilek different, with or without SRS? The only difference seems to be that she would not be regarded, even if she had received SRS, as a "real woman" like the other women prisoners. At the same time, with SRS, she would no longer be perceived as a man, and could be a likely target of violence in a men's prison, where only men belong. Because she does not fit within the sex dichotomy around which society is organized, there is no appropriate place to house Kosilek whether or not she receives SRS.²⁴⁰

Let us engage in our four-question examination of the necessity of segregating prisons by sex. First, does criminal law imposing imprisonment as punishment for crime pursue a legitimate policy objective? The answer to this seems to be affirmative. There is widespread agreement in society that certain behaviors should be criminalized and that crimes should be punished. Imprisonment has been considered the humane alternative to torture and is regarded as a lesser punishment than death in states where death is a legal punishment. Granted, which behavior should be criminalized, sentencing length, and prison conditions can be controversial, but in general Americans accept imprisonment as punishment for serious or frequent criminal adult behavior. The imprisonment itself, though, is the punishment prescribed. Prisoner-on-prisoner violence, like legally unjustified guard-on-prisoner violence, is something correctional facilities, as institutions, aim (or should aim) to prevent.

We now reach the second question: is separation of men and women into different prisons, or different units within prisons, a necessary or appropriate component of the law, if it is to serve its objective effectively? Legally authorized punishment is only effective if violence among prisoners is generally prevented. The justification for sex segregation seems to be to protect female prisoners from the potential violence or other harm that male prisoners could otherwise inflict on them. While it is surely the case that women can inflict violence on one another, and that men are also vulnerable to violence in men's prisons, there are several factors that make male violence against women a special case. First, sex hierarchy pervades all of society, including prisons. That means there is a wide social context in which men as a class view women as a class as particularly appropriate or vulnerable targets for violence. In the context of social sex hierarchy, men are prone to viewing women as inferior, and frequently engage in

240. Some suggest that she could be placed in isolated quarters, essentially solitary confinement. *Kosilek v. Spencer*, 889 F. Supp. 2d 190, 243 (D. Mass. 2012). But that arrangement wrongfully increases the punishment she would receive beyond that to which she was sentenced. It is an additional punishment, for being transgender, in addition to the sentence a conventionally gendered man or woman would have served in the same prison.

aggression and violence against them. Women are socialized to be submissive and, compared to men, are usually ill equipped, physically, psychologically and emotionally, to defend themselves. They tend to be more conciliatory in conflicts with men outside prison, and in a gender-integrated prison would seem more likely to end up victims of male aggression and violence. Second, at least in part because of their social conditioning, women tend on average to be smaller, less strong, and less skilled and experienced with fighting than men. Finally, prisoners share sleeping quarters, toilets, and shower facilities. Given the sexual objectification of women throughout the culture, forcing women to shower with men or to share sleeping quarters makes women highly vulnerable to sexual harassment and violence, including rape. Although in a future without institutionalized sex dichotomy or widespread social hierarchy sex segregation in prison might be unnecessary, today under current conditions sex segregation in prisons is justified.

That leads us to the third question: would the objective of the law still be accomplished effectively if the individual could designate which gender category he or she belongs to? Certainly prisoners could be punished by imprisonment if they chose their gender identity. Prison would still be a deterrent to crime for, and/or would exact retribution from, transgender people housed in a facility consistent with their gender identity, as is the case with conventionally gendered people. Would allowing prisoners to self-identify as female or male make anyone an especially vulnerable target for violence? As just discussed, sex hierarchy in society constructs men as dominant and women as subordinate. A transwoman, such as Kosilek, in a women's prison would have adopted the identity of the subordinate. She also has likely felt what it is like to be a social subordinate, both as a woman and as transgender, in how she is treated by others. Perhaps being in a women's prison would not rectify that, but there is no reason to think it would exacerbate it either. It also appears unlikely that a transwoman would have the superior or aggressive attitude that a man might have toward women he lives with. Some suggest that conventionally gendered men might pretend to be transgender to be housed in a female prison, where they could escape the greater brutality of men's prison.²⁴¹ People who suggest that do not, in my view, understand the rigidity of the sex hierarchy, which makes it extremely unlikely a man would surrender his status and lower himself far enough on the social hierarchy to live as a woman, if in fact he did not identify sincerely as a woman. Being viewed as effeminate would be worse to him, in all likelihood, than the brutality of men's prison. Moreover, if false representations about gender identity became a problem, the sentencing court could verify that the person convicted identifies with the sex category that they claim to, based on evidence of how they lived prior to the arrest. For people who transition in prison that may be trickier, but gender identity could be established in a hearing, before a body that is equipped to determine a wide variety of factual issues (such as a corrections hearing board or court) at the prisoner's request.

The greater risk of fraud would be the possibility that a transman would

241. Female prisoners engage in fewer, and less serious, acts of violence compared to male prisoners. See Miles D. Harer & Neal P. Langan, *Gender Differences in Predictors of Prison Violence: Assessing the Predictive Validity of a Risk Classification System*, 47 CRIME & DELINQ. 513, 521-23 (2001).

pretend to identify as a woman in order to escape the brutality of men's prison. However, transmen almost certainly go to women's prisons as things are. So even if that occurred, it would not increase the risk of harm to women in prison, or to transmen in women's prison, compared to the current practice. A transman would also be less likely than a woman—perhaps less likely than some small or not very masculine men—to appear as a target for violence to other men in prison, due to the self-consciousness with which he has adopted and practices masculine behaviors. The most difficult situation would be for a non-operative or pre-operative transman in a men's prison. His different anatomy would surely be noticed by those around him, and that would be likely to make him a target of violence both for the appearance of his genitals and his audacity to claim a place among the dominant class, a place where he will be seen as an imposter. For that reason, it might be necessary to house non-operative or pre-operative transmen in women's prisons. Two questions would need further investigation. First, whether a non-operative or pre-operative transman would pose a threat to the women with whom he is housed (perhaps misbehavior could lose him this privilege, and cause him to be transferred to men's prison); and second, whether if he chose to be or otherwise wound up housed with men, that would create too great a risk to his safety. In short, then, it may be possible for prisoners to choose a sex category based on their own personal identity, at least in many cases.

Could the law be revised to more accurately define the status or function that is relevant to prison housing segregation? Perhaps. If the worry is that men are larger, stronger, and more prone to violence because of socialization, perhaps prisoners could be housed according to these more relevant factors, rather than using sex as a proxy for size, strength, and proneness to violence. Proneness to violence might be ascertainable by viewing the person's criminal record or other aspects of their personal history. Size and lean mass are easily measured. Perhaps people could be housed based on a formula combining their history of violence, size, and other factors to divide them into appropriate classes, like weight classes in boxing. Different prison units could be composed of different classes of prisoner, more finely grained than maximum and minimum security. Sex hierarchy might still be considered a factor in proneness and vulnerability to violence, so that the sex identity a person was raised with, and that a person currently identifies with, could serve as two more factors in the formula determining housing classes in prison.

Certainly using sex to segregate people is more convenient than dividing them into classes in this way. But it would be convenient to use sex as a proxy for a great many things, including who should stay home with children and who should work full time, or who is the "head of household" for census or tax purposes. But these shortcuts play an enormous role in galvanizing sex roles, which are hierarchically arranged, and which cause so many other problems, especially once we recognize that the two-sex model does not match up with reality. These convenient shortcuts are also unjust to women, whose subordination is reinforced through them.

For all of these reasons, sex segregation in prison housing—and sex discrimination everywhere in society—needs careful reexamination so that our social institutions do not continue to perpetuate the ignorant errors of the past. In particular, we should stop using the female sex as a proxy for vulnerability. We

should recognize existing vulnerability and protect those who are vulnerable, but we should not maintain and sustain vulnerability by assuming it is natural instead of noticing how we ourselves create it.

CONCLUSIONS

Michelle Kosilek should have received the SRS that her physicians prescribed for her, which likely would be eligible for Medicare reimbursement if she were not incarcerated. The punishment that the state legitimately imposes is incarceration, for both the conventionally gendered and for the gender nonconforming. Subjecting Kosilek to additional suffering because of her position as an outcast in an unjust gender system, over which she has no control, should be considered cruel and unusual by contemporary standards. Reasonable and sincere inquiry should be made into whether Kosilek should be transferred to a women's prison. My inclination is say that since she is a woman who must be in prison, she should be in a women's prison, unless sufficiently compelling reasons—not political or public relations reasons—can be produced why she should not.

As we have seen, the medical community contributes to the construction and maintenance of the binary gender system, especially through practices of natal sex assignment, and the medicalization of intersex conditions. Medicine also tends to naturalize the sex/gender dichotomy and reinforce people's tendency to essentialize binary sex and gender. Despite that, it is difficult to find epistemically responsible reasons to suppose that gendered social behaviors arise from hardwired differences in people's brains, given that numerous scientific studies attempted to find such differences and failed.

We also considered how law, as well as medicine, constructs and coercively enforces binary identities along lines of gender and sex, and how transgender and intersex conditions emerge from this model. The social creation, maintenance, and enforcement of a gender system contributes to mental illness, and unnecessarily, unjustly and disrespectfully constrains individual liberty. The American legal system should re-examine laws that use sex or gender as a category by adapting the Law Commission of Canada's methodology in *Beyond Conjuality*, perhaps in the way I have suggested. In this fashion, it can begin to move gradually away from the creation, maintenance, and enforcement of the gender system.

That probably will not mean eliminating legal categories of gender and sex altogether, all at once. Some categories are necessary to protect those who are subordinated within the gender hierarchy, hopefully only temporarily, until the culture begins to relinquish gender. For instance, ending sex segregation in locker rooms or dressing rooms where people change clothes or shower would harm women, intersex, and transgender people, given the current state of the gender hierarchy. As with affirmative action to try to achieve racially diverse student bodies and workplaces, it is hoped that differential treatment is a temporary way to get to a point when it will no longer be needed, because the hierarchy it is aimed at demolishing will no longer exist. Some ways to mitigate the immediate problem of prison housing include reducing prison populations generally by improving education, providing or subsidizing safe, affordable childcare, ensuring universal access to treatment for addiction, and improving

other social opportunities for people so that they are less likely to resort to crime. Criminal reform, especially as it relates to nonviolent drug offenders, and better legal representation for people with limited financial means, would also shrink prison populations. The overrepresentation of transgender people in prison could be eliminated by affording them reliable protection from employment discrimination so their access to respectable, legal employment is ensured; including them within the social infrastructure of family, which provides significant support and opportunities for personal investment in others; and ensuring them access to affordable, appropriate health care, so they are not forced to seek drugs they need to maintain their gender identity in a shadow market.

There are a number of other things we can do immediately as a society, other than legal reform, to reduce the suffering caused by the gender system. We can all stop gender policing others' behavior that may be perceived as sex atypical. We should find a solution to the gender-neutral pronoun problem, since language so powerfully shapes how we think. And we should increase the number of unisex restroom facilities in public places. Parents could permit intersex teens to decide whether to take hormones or undergo genital surgery after helping them obtain the information they need to make a good decision. Parents could stop immediate sex-norming surgery on infants by explicitly communicating to the doctor attending a birth that this is not wanted (and could withhold consent for sex norming operations on young children). Parents-to-be could educate themselves so they are prepared to make these decisions, if necessary, when they bring a child into the world or into their family. And there are probably hundreds of other things we can do individually or in small groups to relieve suffering caused by the gender system. Justice, and concern for the well-being of the people of our nation and beyond, entreat us to resist the gender system.