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Defining the Human:

Are Transgender People Strangers to the Law?

Abigail W. Lloyd†

Josh is a white, female-to-male (FTM) transgender man1 from Springfield, Illinois. He has never sought counseling, does not have a diagnosis of Gender Identity Disorder (GID),2 and has, thus far, opted to forgo hormones and sex

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1. This is the term Josh uses to describe his identity. However, throughout this article I will try to be careful with definitions, balancing my readers' need for clarity with my desire to respect the multi-dimensional process of defining, self-defining, and re-defining that makes the transgender and queer community so exciting and constantly changing. Transgender identities are by no means monolithic or universally accepted by those who might fall in the "transgender" community as I define it. For purposes of this article the term "transgender" incorporates all forms of gender variant people, including transsexuals, people with and without a Gender Identity Disorder diagnosis, and people who identify as gender-queer or otherwise outside of the monolithic, normative understanding of sex and gender. Another scholar defined the transgender movement in the following way: "We are a movement of masculine females and feminine males, cross-dressers, transsexual men and women, intersexuals born on the anatomical sweep between female and male, gender-benders, many other sex and gender-variant people, and our significant others. All told, we expand understanding of how many ways there are to be a human being." LESLIE FEINBERG, TRANS LIBERATION: BEYOND PINK OR BLUE 5 (1998).

2. Gender Identity Disorder (GID) is recognized as a mental disability in the Diagnostic and Statistical Manual of Mental Disorder—Fourth Edition (DSM-IV-TR). DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS § 302.85 (4th ed. 1994). Among other diagnostic criteria the DSM-IV-TR defines GID to include: "A strong and persistent cross-gender identification (not merely a desire for any perceived cultural advantages of being the other sex) . . . . In adolescents and adults, the disturbance is manifested by symptoms such as a stated desire to be the other sex, frequent passing as the other sex, desire to live or be treated as the other sex, or the conviction that he or she has the typical feelings and reactions of the other sex." Id.
Josh grew up in a working-class family on the poor side of town where his single mom worked as a waitress. He moved to Chicago at age nineteen and obtained a job waiting tables in a pizza restaurant. Because his driver’s license and other identifying documents indicated that he was female, Josh acknowledged this on his employment application and used his birth name “Shannon” while at work. “Shannon” is a relatively gender-neutral name, and thus did not automatically “out” him to his coworkers and customers as transgender. He wore the serving attire traditionally worn by men at the restaurant, and was usually addressed as “sir.” With his chest bound, and at 6'0” and a slender 160 pounds, Josh typically “passed” as a male, although his delicate features and lack of facial hair made him look young and slightly effeminate. With that appearance frequently came a customer’s embarrassing and hurtful question, “Are you a boy or a girl?” Riding on his response, he sometimes felt, was his livelihood—the tips that made ends meet.

One Saturday night four boisterous and obviously intoxicated customers came into the restaurant and sat down at a table. They shouted to Josh, “Hey faggot, come over here and get us some drinks.” Josh requested that someone else serve the table, but his manager denied the request, saying that Josh was the only server on duty. Josh walked over to the table to take their order. Each of the customers referred to Josh as a faggot as they ordered. Eventually Josh became upset and turned to walk away from the table. One of the customers, substantially larger than Josh, stood up and grabbed Josh by the collar and yanked him back towards the table saying, “Faggot, I was not done talking to you.” As he was dragged back across the floor of the restaurant, Josh turned and punched the man in the face. Before the man could retaliate, Josh’s manager stepped in and separated them. Someone else called in the police. The drunken man shouted, “That faggot punched me. I am going to kill him!” The manager shouted back, “That’s not a faggot, that’s a girl!” The drunken customers, several of the other employees, and the police who had just come in looked up and exclaimed, “He’s a girl?”

Josh was fired the next day. When Josh asked for an explanation, his manager stated that the way Josh looked and acted upset and confused the customers because they could not figure out “what” he was.

This wasn’t the first such incident for Josh. As he has done several times after losing a job because of his gender or sexuality or whatever the undefined and confused animus towards him might be called, he stormed around furious, hurt, and mortified for a few days. As his friend and partner at the time, I encouraged him to speak with a friend who worked for a legal advocacy organization about his possible legal options. Ultimately, however, he decided

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3. His reasons for this include lack of insurance and therefore inadequate financing for either counseling or medical treatment, possible complications due to his severe asthma, and personal issues with the idea of modifying his body in that way.
to cut his losses, find another job, and just move on. As someone who cared deeply for him, I found it very difficult to move on. It is my outrage at what happened to Josh that inspired the topic of this article.

At its most basic level, this article serves as an exploration of Josh's legal options and the unacceptable position the law's rigidity and biases impose upon him. The first two sections of this article dissect the idea of the "normal" that underlies the persecution Josh faces. To develop a theoretical grounding, the article looks briefly at Sigmund Freud, Leo Bersani, and Judith Butler. Based on their discussion of "the normal," the article constructs an argument that the law acts in the service of a self-affirming idea of "the normal" when deployed to dehumanize transgender people—fashioning transgender bodies as monstrous and using rhetoric that resonates with historical moments that involved the colonial classification of 'new' legal subjects. At a systemic level, the law fails to recognize liminal subjects; faced with a transgender person who challenges traditional categories of normalcy, the law makes his or her identity so impossible, invisible, and monstrous as to be outside of the law's protection.

The third portion of the article presents a crashing moment, delving into the practical, and often painful, ways transgender people are forced to configure their identities in order to become recognized legal subjects. The article examines sex discrimination, disability, and sexual orientation laws in order to determine whether certain subsets of transgender people might obtain protection under one or more of those groups of laws, specifically including whether or not Josh could have stated a claim. The analysis of potential legal options available to transgender people also probes the personal and political implications of each strategy, informed by an interview with Josh about how he would feel pursuing his rights in these ways.

Thus, this article takes a hard look at the dehumanizing rhetoric the law relies on to excuse doctrinally unsupportable denial of legal protection for transgender people, before parsing through the narrow room this judicial animus leaves for an injured transgender person to state a claim. By approaching the topic of transgender justice in this way, this article seeks to foster a more informed climate in legal scholarship for the discussion and pursuit of transgender justice, bringing the phenomenon of dehumanization to the forefront and illuminating the untenable position the current state of the law creates for transgender people.
Transgender people encounter extreme discrimination and prejudice in every facet of life, including "employment, housing, public accommodations, credit, marriage, parenting and law enforcement." Yet litigation consistently fails to win basic civil rights protection for transgender people. As Paisley Currah, the founder of the Transgender Law and Policy Institute, and Shannon Minter, the Legal Director of the National Center for Lesbian Rights, comment:

This discrimination is rooted in the same stereotypes that have fueled unequal treatment of women, lesbian, gay, bisexual people and people with disabilities—i.e., stereotypes about how men and women are "supposed" to behave and about how male and female bodies are "supposed" to appear. For the most part, in other words, anti-transgender discrimination is not a new or unique form of bias, but rather falls squarely within the parameters of discrimination based on sex, sexual orientation, and/or disability. From a strictly philosophical or doctrinal perspective, therefore, it might well seem that the most logical course would be to seek protection for transgender people through litigation under statutes that already prohibit discrimination on those bases, rather than attempting, legislatively, to create a new set of statutory protections. In practice, however, litigation alone has proved to be a singularly unsuccessful route to winning basic civil rights protections for transgender people.

What is going on? What motivates courts to exclude transgender people when the doctrinal infrastructure to protect them is already in place? Legal scholars have suggested a number of explanations for the law's failure to treat transgender plaintiffs in a reasoned or doctrinally consistent way. Yet, as

5. Id. at 38-39.
6. Id. at 39. See, e.g., Mary Anne C. Case, Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence, 105 YALE L.J. 1, 4 (1995) (arguing that "under Title VII, the existing statutory language and doctrinal categories, if correctly applied, already provide the necessary protection to both effeminate men and feminine women, as well as their masculine counterparts"); Taylor Flynn, Transforming the Debate: Why We Need to Include Transgender Rights in the Struggles for Sex and Sexual Orientation Equality, 101 COLUM. L. REV. 392, 392 (arguing that reduction of sex to anatomy "significantly hamper[s] courts' ability to address the core of sex... sexual orientation" and transgender discrimination: "hostility based on failure to conform to conventional gender norms"); Katherine M. Franke, The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender, 144 U. PA. L. REV. 1, 2 (1995) (arguing that Title VII should recognize the primacy of gender norms as the root of both sexual identity and sex discrimination, and thereby the law should prohibit all forms of normative gender stereotyping regardless of the biological sex of any of the parties involved); Julie A. Greenberg, Deconstructing Binary Race and Sex Categories: A Comparison of the Multiracial and Transgender Experience, 39 SAN DIEGO L. REV. 917, 922 (2002) (arguing that transgender people are excluded because "sex classification systems... are still based primarily on the assumptions that sex is binary, unambiguous, and
Currah and Minter lament, it is "not possible to identify any single doctrinal error or logical mistake that will account for—and thus provide a simple means of remedying—the historical exclusion of transgender people from equal protection in the courts." No matter how a transgender plaintiff articulates his injury, he is likely to encounter a court that draws a line in a way that makes him a stranger to all of the laws that could protect him. Another commentator notes, "[T]he Orwellian rhetoric in [transgender] cases suggests that it is bias and bigotry, rather than logic, that determined their outcomes." Transgender activist Leslie Feinberg poignantly puts it another way:

If you are a trans person, you face horrendous social punishments—from institutionalization to gang rape, from beatings to denial of child visitation. . . . This brutalization and degradation strips us of what we could achieve with our individual lifetimes. . . . No one knows how many trans lives have been lost to police brutality and street-corner bashing. The lives of trans people are so depreciated in this society that many murders go unreported. And those of us who have survived are deeply scarred by daily run-ins with hate, discrimination, and violence. Trans people are still literally social outlaws.

This section presents elements of the work of Sigmund Freud, Leo Bersani, and Judith Butler as tools for understanding what is happening to transgender people and their bodies in American jurisprudence. Freud, Bersani, and Butler can aid in the examination of the legal exclusion of transgender people by highlighting the court’s general, unarticulated idea of ‘the normal’ that underlies the historically systemic dismissal of transgender people as legal subjects and maintains their status as “social outlaws.” Freud, who began the medicalization of “abnormal” bodies and identities, serves as the starting point, because he—like, arguably, the law does now—fails to see that a theory of what is normal can be biologically determined, despite scientific research that indicates that none of these assumptions are completely accurate”); Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of “Sex,” “Gender,” and “Sexual Orientation” in Euro-American Law and Society*, 83 CAL. L. REV. 3, 6-8 (1995) (arguing that conflated treatments of sex, gender, and sexual orientation cause harm to individuals, to legal culture more generally, and to society as a whole precisely because the conflation is at odds with fundamental legal and cultural values); Jennifer Marie Albright, Comment, *Gender Assessment: A Legal Approach to Transsexuality*, 55 SMU L. REV. 593, 594 (2002) (arguing that transgender people are excluded because the binary system of sex/gender categorization “withholds from them the rights and protections that the law affords to those individuals who were ‘properly assigned’ at birth”); Jody Lynne Madeira, Comment, *Law as a Reflection of Her/His-Story: Current Institutional Perceptions of, and Possibilities for, Protecting Transsexuals’ Interests in Legal Determinations of Sex*, 5 U. PA. J. CONST. L. 128, 160 (2002) (arguing that transsexual people are excluded because a liberty interest in self-identification of sex has not yet been articulated).

9. LESLIE FEINBERG, *We Are All Works in Progress, in TRANS LIBERATION: BEYOND PINK OR BLUE* 1, 5-10 (1998).
underlies his definition of what is perverse and other. The work of Leo Bersani, who identifies Freud's smooth narrative of sexuality with a kind of violence, creates a theoretical framework for understanding the injury that Freud's and the law's unarticulated theory of the normal inflicts on transgender people. Finally, the theory of Judith Butler names those most injured by the narrative of normalcy "the abject," a concept that serves as a strong model for understanding the treatment of transgender people in American jurisprudence.

A. Sigmund Freud

Few figures have so fundamentally influenced the course of modern medical, psychological and cultural history as Sigmund Freud. Societal conceptions of sexuality, identity, childhood, and, more generally, of meaning, have been shaped by and in opposition to Freud's work. His work is intensely debated, but as one commentator noted, "on one thing the contending parties agree: for good or ill, Sigmund Freud, more than any other explorer of the psyche, has shaped the mind of the 20th century." This article suggests that the manner in which Freud evades articulating what is normal, and yet fiercely defends it, informs the behavior of the law toward transgender people. By employing a smooth narrative of normal sexuality and gender, the law is able to cast transgender people as less than human, and often as monstrous.

First, a very basic recitation of Freud's account of human sexuality: according to Freud, "the person from whom sexual attraction proceeds [is] the sexual object and the act towards which the instinct tends is the sexual aim." In normal situations, the sexual aim is considered to be the union of the genitals in copulation, which ultimately leads to a feeling of release and temporarily assuages the sexual instinct. In cases that are considered abnormal, Freud describes the sexual instinct and the sexual object as "merely soldered together." Thus abnormality or perversion results from having a sexual instinct and sexual object merely soldered together, rather than connected harmoniously.

Throughout his Three Essays on the Theory of Sexuality, Freud suggests that few, if any, people completely escape abnormality or perversion. He even goes so far as to assert that "perversion form[s] a part of what passes as the normal constitution." However, Freud never seems to entirely confront or

14. Id. at 15.
15. Id. at 14.
16. Id. at 26, 37.
17. Id. at 37.
articulate the idea of the normal that underwrites his argument about sexuality. To understand the path of the wild or perverted as one kind of path, a reader needs to detect Freud's framework of the normal. In other words, if there was not a designated and idealized endpoint for all people—heterosexual coupling with the aim to produce children and create a family—then there would be no such thing as deviation or perversion. Freud's argument about sexuality assumes a heteronormative endpoint. If one de-legitimizes or disregards this heteronormative framework, then all the things that Freud connects under the heading of normal libido, including the normal sexual instinct and the normal sexual object, are merely soldered together as well. Yet, without such an underlying concept it is very difficult to see why it is only one kind of thing that Freud is describing as libido. Freud must have an unstated but rigid idea of what social/sexual organization should be, and the type of people who can fit within his framework. He not only must envision a normal kind of sex act, but also a normal kind of person—a person who wants to form a heterosexual couple and create a family. For example, the neurotics in Freud's studies do not have any trouble having sex; they simply cannot function in relationships and thus are abnormal.

B. Leo Bersani

Before turning to cases that reflect a similar failure to recognize and name the underlying concept of 'the normal' that guides them, it makes sense to briefly delve into a way to conceptualize the injury Freud's grave omission inflicts. In *The Freudian Body: Psychoanalysis and Art*, Leo Bersani criticizes Freud's attempt to place a smooth, normalizing narrative onto human sexuality. Under Bersani's framework, the ontological schema of sexuality is represented by the destabilized, de-narrativized, and mobile consciousness. The very nature of human sexuality, according to Bersani, involves a constant instability as well as a constant threat to any attempts to contain and narrate that which is inherently overwhelming. In fact, Bersani identifies the impulse to cast everything as a stable narrative with a violent, "repressive discourse." This conception implies that the continued monitoring and beating into shape of our identities through narratives is a kind of sadism, because our identities are mobile and unstable and cannot thrive so confined.

This article examines the way in which judicial opinions function as
powerful, important narratives in society that violently beat the identities of transgender people into a kind of “normal” shape. The law rejects the idea that gender and sexuality are what Bersani sees as unstable and mobile concepts and responds to transgender bodies as threats to a narrative of stability. Thus the law, like Freud, assumes a heteronormative endpoint, categorizing deviation and perversion freely and casting people who do not fit into the undefined normal framework as beyond the law’s protection. This fierce defense of normality does dual violence to transgender people. On the one hand, when transgender people are open about their identities and experiences, the law demonizes them and denies protection. On the other hand, legal recognition of the existence of rigid categories of normal sex and sexuality bullies transgender people into articulating their identities in a way that conflicts with their sense of self. This is another kind of violence.

C. Judith Butler

Judith Butler provides a careful analysis of the mechanism by which the normalizing tendencies like those of Freud produce abject populations. In Bodies that Matter, Butler positions the abject as a discursive product, a domain of rejected subjects excluded from accepted subjects and cast into “those ‘unlivable’ and ‘uninhabitable’ zones of social life which are nevertheless densely populated by those who do not enjoy the status of subject.” One commentator helpfully notes the origins of the word “abject”: “In Latin, “abject” (or abiectus) literally means thrown off, down, or away. As in English, this quality of outside placement takes on the additional meanings of contempt, servility, and wretchedness.”

Butler posits in Gender Trouble that the regulatory repetition of certain cultural configurations of gender come to signify what is “real” in society and consolidate societal hegemony through what she characterizes as “felicitous self-
naturalization." In other words, social conceptions of the "natural" or "material" actually emerge from the repetition of norms formulated through societal power relations. Judicial rhetoric about transgender bodies fits within this model. By casting transgender bodies as monstrous and unnatural, the law contributes to the "felicitous self-naturalization" of its vision of the normal man and woman. Ousted from this understanding of the normal, transgender claimants are relegated to "abject" status; for example, as neither male nor female they theoretically cannot claim protection under Title VII.29

Butler describes texts like those of Freud as narratives depicting a utopian, undifferentiated understanding of sex and gender which concludes with enforced separation and the creation of difference.30 As one scholar explains,

[Butler] looks at how the Freudian "grand narrative" privileges a certain story, certain pattern of identifications, that supposedly produce a coherent unified gendered self (man, woman, masculine, feminine), and says no, that's not how it really works—you could have variations, fragmented identities, discontinuous or provisional understandings of our gender identities based on [a] wider variety of identifications.31

Judicial opinions function in a similar manner to Freud's text. These powerful, authoritative narratives "[give] a false sense of legitimacy and universality to a culturally specific and, in some cases, culturally oppressive version of gender identity."32 For a transgender person to navigate the confines of these restrictive legal narratives in order to obtain justice is a catch-22. On the one hand, the conventional legal narratives of proper gender roles and identity potentially hold the key to a necessary legal good: for example, nondiscrimination in employment, housing, or access to one's children. On the other hand, articulating one's identity to fit within one of the recognized legal narratives—sex discrimination, disability discrimination, etc.—may also do violence to a transgender person’s sense of self. This will be explored further below.

D. Applying Theory to Judicial Text

The theories of Freud, Bersani, and Butler serve the ends of this article because they demonstrate, at least minimally, that judicial pronouncements about the monstrosity and sub-humanity of transgender bodies do not arise in a vacuum. They result from a long history of efforts to codify a rigid gender

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29. Title VII of the Civil Rights Act of 1964 prohibits employment discrimination based on sex, race, color, religion, and national origin. Later in the article I will discuss an example of this problem. See Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1084-85 (7th Cir. 1984).
31. Id.
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system, usually in opposition to a perverse or abnormal other. As the analysis in Section III will discuss, the law’s dehumanization of transgender people is a rhetorical tool that legitimates the decision to deny transgender people legal recognition and protection. In an analogy examined in further detail in Section II, C, the courts behave in a manner reminiscent of colonizers who legitimated their decisions to enslave, subjugate and discriminate against “new” peoples by denying their equal humanity. This move helped colonizers, as it arguably does for the law now, to legitimize their terrible, self-serving decisions.

SECTION II: FRANKENSTEIN’S MONSTER:
ABJECTION OF TRANSGENDER BODIES

On January 5, 1993, a 22-year-old pre-operative transsexual woman from Seattle, Filisa Vistima, wrote in her journal, “I wish I was anatomically ‘normal’ so I could go swimming. . . . But no, I’m a mutant, Frankenstein’s monster.” Two months later Filisa Vistima committed suicide.33

After my surgery, after the bloody mess had healed and the stitches removed, after the Frankenstein reconstruction had finally become Human, I marveled. I finally felt . . . right. Correct.34

“This is a strict Frankenstein science,” said Randy Thomasson, executive director of the Sacramento-based Campaign for California Families. “It’s not something that should be forced upon any taxpayer.”35

In these circumstances, I find a deep affinity between myself as a transsexual woman and the monster in Mary Shelley’s Frankenstein. Like the monster, I am too often perceived as less than fully human due to the means of my embodiment; like the monster’s as well, my exclusion from human community fuels a deep and abiding rage in me that I, like the monster, direct against the conditions in which I must struggle to exist. . . . Like that creature, I assert my worth as a monster in spite of the conditions my monstrosity requires me to face, and redefine a life worth living. . . . Though we forego the privilege of naturalness, we are not deterred, for we ally ourselves instead with the chaos

A simple Internet search for “transgender and Frankenstein” brings up over 7,900 results. A search for “transgender and monster” brings up about 196,000 results. Monstrosity is a familiar trope for transgender people socially and politically, and therefore it should come as no surprise that in judicial opinions the language of monstrosity is used to dehumanize transgender people as well.

Jacques Derrida notes, “[M]onstrosity may reveal or make one aware of what normality is . . . so that people will be forced to become aware of the history of normality.” As with Freud, to understand the courts’ categorization of the monstrous, subhuman, and illegitimate as one kind of phenomenon, a reader needs to detect the normal framework in which the law mediates this violence. As Derrida suggests, the judicially created monsters—abjected subjects—force us to become aware of the violent, judicially maintained history of normality that underlies them.

A. Early Cases

The following cases from the late 1970s and early 1980s display outcomes of some legal struggles to define a repulsive subject in a way that codifies normalcy and justifies the treatment of the “new” transgender subject as other than human. Perhaps the most astonishing case of the judicial abjection of transgender bodies occurred in Ashlie v. Chester-Upland School District. The Ashlie court supported its conclusion that the right to privacy does not protect Jenell Ashlie, a male-to-female transsexual schoolteacher, from termination with the following elaborate analogy:

It might just as easily be argued that the right of privacy protects a person’s decision to be surgically transformed into a donkey. The transformation, by its very happening, would lose the quality of privateness. Certainly, those who had known the donkey as a man would detect the change, even though those acquainted only with the donkey might never have occasion to remark upon it. In addition, the change from man to beast might be just as devoutly wished, as psychologically

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36. Stryker, supra note 33, at 228.
37. Information based on an Internet search for “transgender and Frankenstein” on http://www.google.com on 1/05/2005.
38. Information based on an Internet search for “transgender and monster” on http://www.google.com on 1/05/2005.
39. Jacques Derrida is a French philosopher, “whose work originated the school of deconstruction, a strategy of analysis that has been applied to literature, linguistics, philosophy, law and architecture.” http://www.connect.net/ron/derrida.html.
41. No. 78-4037, 1979 U.S. Dist. LEXIS 12516, at *13 (E.D. Pa. May 9, 1979) (holding that a transsexual who transitions on the job may not seek protection under the privacy doctrine from a state government employer’s job discrimination).
imperative, and as medically appropriate as the change from man to woman, but the Constitution, I fear, could not long bear the weight of such an interpretation.\footnote{Id. at *14-*15.}

Despite the court’s later disclaimer that it was inspired by Bottom’s transformation into a donkey in Shakespeare’s “delightful” Midsummer Night’s Dream,\footnote{Id. at *14.} the choice of the donkey showed the court’s repugnance with the transgender plaintiff. By analogizing her existence to that of a man-made ass, the court foreclosed the possibility of her humanity. Despite “devout” desire, psychological “imperative,” and medical necessity, the “change from a man to a woman” is no different than from “man to beast” and deserving of no more legal recognition or protection.\footnote{Id. at *15.} The court seemingly ignored what should be the plainly obvious difference between the surgically created donkey and Jenell Ashlie, namely her humanity.

Similarly, a dehumanizing animal analogy underlies the court’s decision in In re Petition of Richardson to Change Name.\footnote{23 Pa. D. & C.3d 199 (1982).} The court noted, “Like the gargoyles of medieval architecture, with their distortion of human and animal figures, Percy wishes to fasten to his male body the female appellation of ‘Diane Diane.’”\footnote{Id. at 199.} In concluding the opinion, the court continued its dehumanizing rhetoric:

> The point, however, as we see it is that we are being asked to lend the dignity of the court and the sanctity of the law to this freakish rechristening. To place a female name on a male is to combine incompatibles, and to do so legally is to pervert the judicial process, which is supposed to act in a rational manner.\footnote{Id. at 201.}

The court’s language demonstrates Butler’s “felicitous self-naturalization” and the court’s ardent belief in a smooth narrative of normalcy. By comparing her name change to a “freakish rechristianing”\footnote{Id.} and her body to the grotesque distortion of human and animal present in gargoyle figurines,\footnote{Id. at 199.} the court violently casts Diane beyond the bounds of humanity.

Richardson is only nominally about names. The court’s language peculiarly centered in on the petitioner’s body—“Percy wishes to fasten to his male body the female appellation”\footnote{Id. at 199.}—in a way that recalls what perhaps the court was most upset about, the petitioner’s “fastening” of other female accoutrements to her body. The court is focused on all the “incompatibles”
Diane is choosing to combine. Like Freud, the court adopted the role of identifying and regulating “perversion” through the power of its position in society. Diane, a transgender person at the mercy of the court’s power, suffers the consequences of being an abject body.

_Daly v. Daly_, child custody case, divested a woman of roles crucial to her identity—mother, father, and parent:

[I]t can be said that Suzanne, in a very real sense, has terminated her own parental rights as a father. It was strictly Tim Daly’s choice to discard his fatherhood and assume the role of a female who could never be either mother or sister to his daughter.51

The court ostensibly recognized Suzanne Daly by her self-identified gender but nevertheless relegated her to a void space outside of society. The court located her as another “kind” of woman, one who can never be a mother or a sister. In this case, the court’s struggle to condemn a gender norm transgression culminated in the creation of a new species of female by a kind of ontological fiat which stripped Suzanne of her rights and humanity.

**B. Current Cases**

This section primarily focuses on employment discrimination cases, since that is what Josh experienced, but also touches on two marriage cases that reflect similar treatment. Like the cases in the previous section, the language in these opinions operates to deny transgender people their entitlement to legal protection by stripping their humanity and participating in the creation of social norms about what is natural.

_Ulane v. Eastern Airlines, Inc._ poignantly illustrates the judicial trend of identifying transgender bodies as other than human by viciously dissecting and ridiculing the plaintiff’s body.52 In _Ulane_, the Seventh Circuit overturned a district court’s reinstatement of a male-to-female transsexual as a flying officer with full seniority, back pay, and attorney fees:

Ulane is entitled to any personal belief about her sexual identity she desires. After the surgery, hormones, appearance changes, and a new Illinois birth certificate and FAA pilot’s certificate, it may be that society ... considers Ulane to be female. But even if one believes that a woman can be so easily created from what remains of a man, that does not decide this case.... [I]f Eastern did discriminate against Ulane, it


52. 742 F.2d 1081 (7th Cir. 1984). _Ulane_ has no negative subsequent appellate history and some courts continue to rely on it, although each year some courts question, criticize or distinguish it. See, e.g., Smith v. City of Salem, 378 F.3d 566, 573 (6th Cir. 2004) (holding that Title VII bars discrimination on the basis of a transsexual’s failure to conform to stereotypical gender norms and that _Ulane_ “has been eviscerated by _Price Waterhouse_.”) I will discuss _Smith_ later in the Article.
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was not because she is female, but because Ulane is a transsexual—a biological male who takes female hormones, cross-dresses, and has surgically altered parts of her body to make it appear to be female.53

After scorning the idea that Karen Ulane may be a woman, the court barely suppressed its disgust that what “remains” of this “male” is a jumble of female hormones, woman’s clothing, and surgically altered body parts made to “appear” female. In the court’s eyes, Karen Ulane was not a man or a woman, but rather a transsexual—a sort of monstrous, repulsive intermediate deemed all the more appalling because she chose this embodiment. And since male and female are the only alternatives the court recognized as legitimate, the court’s decision, in effect, leaves Karen Ulane less than human and therefore an unprotected legal subject.54 It is important to note that this is not just the chromosome test;55 the court was not simply functioning in defense of “sex” as defined by biology or chromosomes.56 Something more insidious was happening.

The only room the Seventh Circuit seemed to preserve for Karen Ulane to articulate a Title VII claim was if she could demonstrate that her employer discriminated against her while believing that she was a female. The court noted, “even if we accept the district judge’s holding that Ulane is female, he made no factual findings necessary to support his conclusion that Eastern discriminated against her on this basis.”57 In fact, the district court concluded

53. Ulane, 742 F.2d at 1087 (footnote omitted).
54. See Keller, supra note 27, at 373 (“When the Ulane v. Eastern Airlines, Inc. court suggests that it may not be so easy to create a woman ‘from what remains of a man,’ it also suggests that the transsexual litigant is something less than either a man or a woman, and—since it has previously offered those as the only choices—something less than human.”)
55. “The ‘chromosome test’ focuses not on one’s psychological or anatomical sex, but on the presence of X and Y chromosomes” in determinations of sex. Kevin Tallant, Note, My “Dude Looks Like a Lady”: The Constitutional Void of Transsexual Marriage, 36 GA. L. REV. 635, 648 (2002). The test has been predominantly articulated in cases determining the validity of marriages involving transgender people. See id. at 648 n.102.
56. Additionally, determining “sex” based on biology or chromosomes is not a simple endeavor. Although the courts would like to adhere to categories of male and female, medicine recognizes that many variations of male and female exist biologically:

[T]he typical XY and XX combinations are only two of the many possible variations on human sexuality. For example, it is possible for a woman to be born with only a single X (XO) sexual chromosome, a condition termed Turner syndrome. These women generally lack secondary female sexual characteristics including developed breasts and menstruation . . . . Also, males who have XXY as their sexual chromosomal makeup have ambivalent “sexual characteristics, including partial breast development, broadening of the hips, and small testes” . . . . This sexual makeup is dubbed Klinefelter syndrome. . . . What should be clear from this description of mixed traits coming out of human sexual chromosomes is that categorical sexual determination is misguided. Human sexuality is not an either/or proposition; there is clearly a middle ground which even genetic science must admit. This spectrum lends credence to the argument-espoused by others writing on transsexual rights—for the adoption of a sexual continuum, with no polar ends but a sliding scale for determining sexuality.

Id. (citations omitted).
57. Ulane, 742 F.2d at 1087.
that the sexual discrimination the plaintiff experienced applied with "equal force whether plaintiff be regarded as a transsexual or a female." 58 The Seventh Circuit rejected this analysis, demanding clear evidence that Karen Ulane was discriminated against because she is female, and not simply because she is a transsexual woman. 59

Thus, Ulane places the burden on the transgender plaintiff to demonstrate that her employer was either unaware of her transgender status when discriminating against her or that the discrimination she experienced was somehow only based on animus towards women as a group and disconnected entirely from animosity towards transgender women. Yet, as one commentator observed,

requiring transgender plaintiffs to prove that an employer is unaware that the plaintiff is transsexual as a condition to recovery under anti-discrimination laws places an unreasonable burden on transgender plaintiffs. Also, this requirement legitimates the bizarre defense that it is permissible to sexually harass a transsexual, but not a male or a female. 60

The absurdity of the court's position can also be seen in other examples of intersectional discrimination. As many critical theorists have observed, discrimination directed at a black woman is not cleanly differentiable as either gender-motivated or race-motivated—she experiences discrimination as a black woman with the concurrent set of stereotypes and historical meanings that identity entails. 61 Similarly a transgender woman likely experiences discrimination as a transgender woman (or a transgender woman of color, as the case may be); the animus she encounters is likely motivated not only by stereotypes of women or women of color as a group, but also by the particular hatred reserved for transgender women, stereotypes likely based on social animus towards men in dresses, transvestites, queers, prostitutes, child molesters, and perverts. By only prohibiting discrimination against women and condoning discrimination against transgender people, Ulane creates a nearly impossible

58. Id.
59. Id.
61. See, e.g., AUDRE LORDE, Age, Race, Class, and Sex: Women Redefining Difference, in SISTER OUTSIDER: ESSAYS AND SPEECHES 114, 120 (1984) ("As a Black lesbian feminist comfortable with the many different ingredients of my identity, and a woman committed to racial and sexual freedom from oppression, I find I am constantly being encouraged to pluck out one aspect of myself and present this as the meaningful whole, eclipsing or denying the other parts of self."); Angela Harris, Race and Essentialism in Feminist Legal Theory, 42 STAN. L. REV. 581, 589 (1990) ("[A]s long as feminists... continue to search for gender and racial essences, black women... will always be required to choose pieces of ourselves to present as wholeness."); see also BELL HOOKS, AIN'T I A WOMAN: BLACK WOMEN AND FEMINISM (1981) [hereinafter HOOKS, AIN'T I A WOMAN]; BELL HOOKS, TALKING BACK: THINKING FEMINIST, THINKING BLACK (South End Press, 1989) [hereinafter HOOKS, TALKING BACK]; THIS BRIDGE CALLED MY BACK: WRITINGS BY RADICAL WOMEN OF COLOR (Cherrie Moraga & Gloria Anzaldua eds., 2d ed.) (1983).
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hurdle for transgender women to overcome.

So what is normal? What is Karen Ulane? The Seventh Circuit seems in possession of a definition of the normal because it can certainly expound on what is not—Karen Ulane. But a definition of the normal is never given to us as such. Ronald Garet notes that the court in Ulane expresses "a guarding of gender not so much against illusion or misplaced agency as against what is perceived as cheap imitation."62 The Seventh Circuit's analysis in a footnote strengthens Garet's assertion. Examining different medical perspectives on transsexualism, the court found that some "individuals conclude that post-operative male-to-female transsexuals do in fact qualify as females and are not merely 'facsimiles.'"63 This language implies that the court evaluated the possibility that Karen Ulane is actually a facsimile. The court's careful dissection of Karen's body and cataloging of the components of her "real" identity ("a biological male who takes female hormones, cross-dresses, and has surgically altered parts of her body to make it appear female")64 also supports Garet's observation.

As with Freud, to understand the path of the unreal, un-legitimate woman as one kind of phenomenon, a reader needs to detect the court's framework of "normal." In other words, if there is not somewhere we are supposed to end up—a normal conception of gender in society—then there would be no such thing as deviation, cheap imitation, or someone society sees as a woman but nevertheless does not measure up in the court's powerful eyes. The Seventh Circuit's unarticulated narrative of what is normal performs the sort of violence that Bersani identifies in Freud's text. Karen Ulane is left as one of Butler's abject, cast into the "unlivable" and "uninhabitable" zones of social life.

The Seventh Circuit's forceful analysis in Ulane has taken on a life of its own. Although Ulane is a Title VII case, it is cited as an authoritative opinion about transgender bodies, sex, and identity in a litany of non-employment and non-transgender related contexts, including cases to deny protection to homosexuals, effeminate men, and others.65 For example, a federal district court

63. Ulane, 742 F.2d at 1083 n.6.
64. Id. at 1087.
65. See, e.g., Dillon v. Frank, No. 90-2290, 1992 U.S. App. LEXIS 766, at *12 (6th Cir. Jun. 15, 1992) (citing Ulane to define "sex" in a case denying Title VII relief to a man harassed because his coworkers believed he was homosexual); Ruth v. Children's Med. Ctr., No. 90-4069, 1991 U.S. App. LEXIS 19062, at *15 (6th Cir. Aug. 1991) (same); Nasim v. Loecher Motors, Inc., No. 98C4433, 1999 U.S. Dist. LEXIS 18819, at *2 (N.D. Ill. Nov. 24, 2002) (citing Ulane to support the proposition that Title VII does not encompass homosexuals); Oiler v. Winn-Dixie La., Inc. No. 90-3114, 2002 U.S. Dist. LEXIS 17417, at *9-*10 (E.D. La. Sept. 16, 2002) (relying on Ulane to deny Title VII protection to a transgender plaintiff who was terminated because of "off-duty acts of crossdressing and impersonating a woman"); Hamm v. Weyauwega Milk Prods., Inc., 199 F. Supp. 2d 876, 887 (E.D. Wis. 2002), aff'd, 332 F.3d 1058 (7th Cir. 2003) (citing Ulane to support the proposition that Title VII does not protect employees from discrimination based on homosexuality); Mims v. Carrier Corp., 88 F. Supp. 2d 706, 714 (E.D. Tex. 2000) (citing Ulane as a case denying Title VII protection to transsexuals, even though the case at hand was about whether Title VII
in the Southern District of Indiana relied on *Ulane* in holding that Title VII does not prohibit discrimination on the basis of a person’s intention to change sex\(^{66}\) and the Northern District of Illinois used *Ulane* to support its conclusion that Title VII does not prohibit discrimination on the basis of sexual orientation.\(^{67}\) Additionally, *Ulane* is frequently invoked as an excellent example of reading the plain meaning of a statute in areas of the law that are completely unrelated to transgender issues.\(^{68}\) The Seventh Circuit’s plain meaning analysis places transgender people outside of society and basic human categories such as male and female, and therefore beyond the protection of Title VII. This is not to say that male and female are the only “sexes” or that “male” and “female” have ontological credibility as objective categories. The point is that these are basic human categories in the eyes of the law, and it is meaningful that the court excludes transgender people from its purview. The glorification and legitimatization of this “plain meaning” in so many different types of court decisions indicates how widespread the abhorrence for transgender individuals is in the law.

One case in the wake of *Ulane* interprets the case to foreclose entirely the possibility that a transgender plaintiff could ever articulate a Title VII claim based on sex. In *Mario v. P & C Food Markets, Inc.*, the court denied the plaintiff, Mark Mario, the ability to claim discrimination based on his status as male or female because he is something else—a transsexual.\(^{69}\) In that case, Marc Mario claimed he was discriminated against because he failed to conform to gender stereotypes, which he argued was a form of sex discrimination actionable under Title VII.\(^{70}\) Specifically, Mario claimed that his employer, having accepted him as a male, denied coverage for medical procedures that are closely identified with being female, and that his claims would have been approved had

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68. See, e.g., Newsom v. Friedman, 76 F.3d 813, 817 (7th Cir. 1996) (interpreting the plain meaning of the Fair Debt Collection Practices Act (FDCPA) by citing *Ulane*’s construction of “sex” in Title VII to support the proposition that “when a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning”); United States v. Bell, 936 F.2d 337, 342 (7th Cir. 1991) (interpreting the plain meaning of a money laundering statute and citing *Ulane* to support the proposition that words should be given their plain meaning); Milton v. Bancplus Mortgage Corp., No. 96 C 106, 1996 WL 197532, at *4 (N.D. Ill. Apr. 19, 1996) (citing *Ulane* to support proposition that the plain language of the Illinois Fairness in Lending Act should be followed); Ayrault v. Pena, 866 F. Supp. 372, 375 (N.D. Ill. 1994) (citing *Ulane* to support the statement that the words of the statute are to be given their ordinary, common meaning and thus an air traffic cooperative program student was not “employee” under section of Civil Service Reform Act (CRSA) defining such term).
69. 313 F.3d 758, 767 (2d Cir. 2002).
70. *Id.*
they been made by female employees. Among other reasons why the court denied Mark Mario's claim, the court cited Ulane to support the contention that, "[i]t is . . . not clear that Mario, as a transsexual, is a member of a protected class." Thus, the court in Mario held, like Ulane, that the transgender plaintiff is not male or female and cannot pursue legal protection under these categories.

Another case, Oiler v. Winn-Dixie Louisiana, Inc., invokes the language of monstrosity in denying Title VII protection to a transgender plaintiff. The court in Oiler relied on Ulane to deny Title VII protection to a transgender plaintiff who was terminated from her job because of "off-duty acts of crossdressing and impersonating a woman." Invoking Ulane, the court concluded: "[T]he Court agrees with Ulane and its progeny that Title VII prohibits employment discrimination on the basis of sex, i.e., biological sex." The court rejected the plaintiff's argument that she was terminated because she failed to conform to a gender stereotype:

Plaintiff was not discharged because he did not act sufficiently masculine or because he exhibited traits normally valued in a female employee, but disparaged in a male employee. Rather, the plaintiff disguised himself as a person of a different sex and presented himself as a female for stress relief and to express his gender identity. The plaintiff was terminated because he is a man with a sexual or gender identity disorder who, in order to publicly disguise himself as a woman, wears women's clothing, shoes, underwear, breast prostheses, wigs, make-up, and nail polish, pretends to be a woman, and publicly identifies himself as a woman named "Donna."

Although feigning to rely on a simple biological model of "sex," or the chromosome test, the court's description of Donna in freakish terms exposes its more sinister agenda. The court discursively undressed Donna and ridiculed her. Her appearance is intimately dissected, including very nonpublic elements of her dress and body such as her breasts and undergarments. The court engaged in even more rigorous dissection in the facts section of the opinion, cataloging the kinds of makeup ("including concealer, eye shadow, foundation, and lipstick"); kinds of women's clothing ("skirts, women's blouses, women's flat shoes . . . women's underwear and bras and silicone prosthesis"); and the places she chooses to shave on her body ("face, arms, hands, and legs"). This court knew what a normal woman is, and it would be damned if it allowed a facsimile to

71. Id.
72. Id.
74. Id. at *3.
75. Id. at *6.
76. Id. at *5.
77. Id. at *1.
78. The court in Ulane considered the possibility that post-operative male-to-female transsexuals may not qualify as females and may be "merely 'facsimiles.'" Ulane v. E. Airlines, Inc., 742
march into its courtroom and receive protection or recognition.

The *Oiler* court’s analysis is troubling on another level. The analysis invokes the idea that transgender people defraud the public in some way by their choice to dress or act in a certain way, and thus discrimination against them may be warranted. Donna’s gender presentation is made suspicious, indeed almost criminalized, as if she is in some sense intentionally defrauding the public—she publicly “disguises” herself,79 “pretends” to be a woman,80 and “publicly . . . impersonates a person of the opposite sex.”81 The defrauding sentiment is not a new one in transgender jurisprudence; a transgender person’s decision to violate gender norms has been criminalized as a form of fraud in a variety of other contexts besides employment discrimination; a transgender person’s decision to violate gender norms has been criminalized as a form of fraud in a variety of other contexts besides employment discrimination, including name-change petitions,82 marriage contracts,83 anti cross-dressing statutes,84 and in defining sexual

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80. Id.
81. Id. at *3.
82. Fraud is frequently cited as a consideration for denying transgender people’s petitions for a legal name change, though the judges and others articulating this concern rarely explain on what basis this concern rests. See *In re Eck*, 584 A.2d 859, 860-61 (N.J. Super. Ct. App. Div. 1991) (listing fraud as a main concern courts should have when evaluating name-change applications); *In re Rivera*, 627 N.Y.S.2d 241, 244 (N.Y. Civ. Ct. 1995) (granting a preoperative transsexual’s request for a name-change as long as she did not use it as evidence that she had successfully completed sex-reassignment surgery); *In re Anonymous*, 587 N.Y.S.2d 548, 548 (N.Y. Civ. Ct. 1992) (noting the court’s responsibility to weigh the possibility of fraud in granting name-change applications); *In re Anonymous*, 293 N.Y.S.2d 834, 838 (N.Y. Civ. Ct. 1968) (finding that concerns of fraud are not realized when a name-change is sought by postoperative, as opposed to preoperative, transsexual); *In re Harris*, 707 A.2d 225, 228 (Pa. Super. Ct. 1997) (evaluating the petitioner’s commitment to living full-time as woman before granting name change).
83. In marriage cases involving a transsexual and a non-transsexual courts have indicated that non-disclosure of biological “sex” is a fraudulent act and can serve as the basis for annulling the marriage. See, e.g., *In re Estate of Gardiner*, 22 P.3d 1086, 1110 (Kan. Ct. App. 2001), aff’d in part, rev’d in part, 42 P.3d 120 (Kan. 2002) (“If fraud be shown, a marriage can always be annulled, under any circumstances. While we find no badges of fraud in the record before us, it remains a potential alternative basis to void the marriage. Here, the evidence in the appellate record to date points to a conclusion that Marshall knew of the transsexual nature of J’Noel, approved, married, and enjoyed a consummated marriage relationship with her.”); *Anonymous v. Anonymous*, 325 N.Y.S.2d 499 (N.Y. Sup. Ct. 1971) (invalidating a marriage because at the time of the marriage the woman did not disclose that she was transsexual).
84. Rules against cross dressing presumably arose (in addition to the pure animus rational) out of the sentiment that cross dressers defrauded the public in some way, for example by using the wrong bathroom or picking up the wrong person at a bar, and that the public had something at stake in preventing this “misrepresentation.” As one scholar points out,

Rules against cross-dressing are a form of gender policing which strengthen gender norms by reinforcing a bipolar understanding of appropriate attire for women and . . . men. Until recently, many states, cities, and towns had laws or ordinances against cross-dressing. Violation of a cross-dressing ordinance was cause for arrest, imposition of a fine, and perhaps even police violence. It was not uncommon, and perhaps still is not uncommon, for cross-dressers to be arrested, beaten, and raped for not wearing articles of clothing appropriate to their biological sex.”

The invocation of fraud language is disconcerting on a number of fronts. It implies that the court and society determine what is “real” and “normal,” and what is not: a transgender person’s expression of his or her gender. This produces a “felicitous self-naturalization” of conventional gender codes and the violent, “repressive discourse” that Bersani describes. Unconventional gender expression becomes synonymous with willful deceit, an act that the law will not protect from the wrath of employers or indulge with name changes, birth certificate alterations, or marriage contracts. The language of fraud links arm-in-arm with the court’s dehumanizing rhetoric, thus shoring up the legitimacy of the court’s prejudice, disgust, and self-affirming conception of what is normal.

Another case, In re Estate of Gardiner, also relied on Ulane and called the humanity of a transgender person into question. In Gardiner, the court held that the marriage between a man who died intestate and his wife, J’Noel Gardiner, was void because the deceased’s wife was a post-operative male-to-female transsexual. As a result, the long-estranged son of the deceased inherited all of his father’s estate. The court explained that “the plain, ordinary meaning of persons of the opposite sex contemplates a biological man and a biological woman and not persons who are experiencing gender dysphoria. A male-to-female post-operative transsexual does not fit the definition of a female.” Thus, the court held that “the legislature has declared that the public policy of this state is to recognize only the traditional marriage between ‘two parties who are of the opposite sex,’ and all other marriages are against public policy and void.”

Here the court decidedly placed J’Noel Gardiner outside of society and civilized discourse. Several basic words used in common language to categorize and understand human beings simply do not apply to her, or, for that matter, transgender people in general—“sex,” “male,” and “female.” The fact that society generally relies on these terms indicates something grave in what the court is saying about the humanity and place (or lack of place) of transgender people in society. Male and female are the only categories courts recognize, and
and Title VII in particular protects on the basis of sex. A transgender person is not a biological man or a biological woman. Thus, transgender people can never fall within the meaning of the phrase “persons of the opposite sex” and are legally nonexistent intermediaries. They literally fall outside of the only categories the court recognizes as human.

Like Ulane, the court couches this plainly prejudiced account of transgender people in the benign language of traditional statutory interpretation. The result, however, is to deny the institution of marriage, like other legal protections, to an entire category of people.

Although Gardiner is a case that does not concern Title VII, the court spends two long paragraphs describing the holding and the complex situation in Ulane. Ulane is relevant to Gardiner only in that it is the most prominent case to place transgender people outside the realm of male and female and therefore outside of the law’s protection. Thus, the Gardiner court cites Ulane in order to support its decision to undermine the humanity and lack of legal subjectivity of transgender people and to lend credence to the proposition that transgender people are never contemplated by the plain language of our laws.

Another way the court in Gardiner dehumanizes J’Noel is to reduce her to a sort of discursive Frankenstein monster. In evaluating medical testimony the court cited the district court’s observation:

The evidence fully supports that J’Noel, born male, wants and believes herself to be a woman. She has made every conceivable effort to make herself a female. Some physicians would consider J’Noel a female; other physicians would consider her still a male. Her female anatomy, however, is still all man-made.

In another moment of “felicitous self-naturalization,” the court professes itself as the ultimate authority on normal sex identification, even overruling medical authority to the contrary. Despite calling J’Noel by female pronouns, using her preferred name, and recognizing that J’Noel identifies as a woman and that some physicians would consider her female, the court insists on reducing J’Noel’s identity to what the court considers the Frankenstein nature of her creation—that she “is still all man-made.” Thus, we see why J’Noel falls outside of the words “sex,” “marriage,” “male,” and “female”—words which “in everyday understanding do not encompass transsexuals.” She is man-made, sub-human, and not a being to whom these basic human categories can apply; nor is she

people from these words indicates its unwillingness to see transgender people as normal or even human.

95. Id. at 129-30 (“[Ulane] noted that the law clearly . . . does not protect a person born with a male body who believes himself to be female or a person born with a female body who believes herself to be male.”).
96. Id. at 124.
97. Id. at 135.
entitled to the legal protections which accompany them. Even if a man falls in love with J’Noel as a woman (as occurred in this case), doctors agree she is a woman, and she makes “every conceivable effort to make herself female,” J’Noel cannot marry and cannot claim the law’s protection as a woman. To do otherwise, the court asserted, “[t]o conclude that J’Noel is of the opposite sex of Marshall [her husband] would require that we rewrite K.S.A.2001 Supp. 23-101 [the Kansas marriage statute].”

The Gardiner court cited a case from Texas that made a similar point by asking the loaded question, “[C]an a physician 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?”

C. Analogy to Other “First Encounters”

The judges in Ashlie, Richardson, Daly, Ulane, Mario, Oiler, Gardiner, Littleton, and many other cases each act in a similar manner: classifying transgender individuals as man-made imitations ineligible for protection, people whose very humanity is undermined in order to deny them legal standing to seek redress. The courts’ fierce protection of its conception of normalcy codifies the long-standing social tradition of identifying transgenderism with monstrosity and perpetuates Bersani’s violent, “repressive discourse” surrounding people who transgress gender norms. This repetition of conventional configurations of gender also fits Butler’s model, consolidating societal hegemony around what is “real” and “legitimate,” and relegating abject, transgender people to categories of “fraud,” “perversion,” and “sub-humanity.”

The courts’ behavior is also eerily familiar in another way. Let’s examine Karen Ulane’s experience one more time in another context. Karen Ulane discovers in the court an unfortunate reflection of the disgust and fear with which the court views her in their moment of first encounter. This phenomenon is not new; moments of first encounter between bodies outside of what the dominant society deems normal and the dominant culture often present this devastating repulsion and ordering.

Take, for example, the anecdote Frantz Fanon presents in Black Skins, White Masks about the moment where he realizes that his physical body does not belong to him and its meaning is determined by forces over which he has no control. Fanon encounters the horror of the young, white boy who recognizes something monstrous and terrifying in Fanon’s body: “Mama, see the Negro!”

98. Id. at 137. A Florida appellate court recently held similarly, invalidating the marriage and therefore the divorce between Michael Kantaras, a post operative female-to-male transsexual, and his former wife. The decision may result in disastrous repercussions for Mr. Kantaras’s ability to retain custody of his children, since he may now be a legal stranger to them. See Kantaras v. Kantaras, 2004 Fla. App. LEXIS 10997 (2004).
99. Id. at 124 (citing Littleton v. Prange, 9 S.W.3d 223 (Tex. Civ. App. 1999)).
I'm frightened!" Fanon later writes, "My body was given back to me sprawled out, distorted, recolored, clad in mourning in that white winter day." He further laments, "I am being dissected under white eyes, the only real eyes. I am fixed. Having adjusted their microtomes, they objectively cut away slices of my reality. I am laid bare.

Karen Ulane is similarly given her body back to her as distorted, sprawled out, and brutalized by a court that determines its meaning for her. The court dissected her, categorized her, fixed her. The court assumed the position of the "real eyes" Fanon describes that designate what is real and therefore normal, and what is a monstrous façade. The court, with claimed objectivity, cut away slices of Karen Ulane's reality. She experiences a moment like Fanon, a colonizing moment where the voice of dominance, power and control gives her body meaning, and in so doing denies her subjectivity and legal protection.

To borrow a little more from the colonial example, the court's behavior reflects other first encounters between new subject and colonizer, where the colonizer's need to de-legitimize the native subject's equal humanity is transparent. The ontological debate over how to classify "new" peoples preoccupied the minds of many colonizers. Questions concerning the definition of what is human and the placement of new "kinds" of people in God's chain of being circulate in almost every account of a first encounter.

Determining the humanity, barbarity, or other classification of native peoples allowed the colonizer to decide how to treat the new people, either enslaving, subjugating, Christianizing, or a combination of these. For example, Columbus sought to depict the native as gentle, simple, unsophisticated, and eminently enslavable:

They were very well built with fine bodies and handsome faces. Their hair is coarse, almost like that of a horse's tail . . . . They are the colour of the Canary Islanders (neither black nor white) . . . . They should be good servants . . . .

Columbus classified what he encountered, including new peoples, so that they would fit within the natural order as he understood it, and this served his personal ends—returning to Europe with some kind of valuable commodity. Although Columbus hoped for more, the only wealth of the country lay in its human inhabitants, who could be forced to work as slaves either in Spain or at

101. Id. at 112.
102. Id. at 113.
103. Id. at 116.
104. See generally AUDREY SMEDLEY, RACE IN NORTH AMERICA: ORIGIN AND EVOLUTION OF A WORLDVIEW (1993) (discussing how as European colonizers encountered new kinds of people, great debates ensued about where to place them on the chain. Those unlucky enough to be branded as savages were assigned a rank above beast and below man. They were seen literally as the missing link between man and beast).
home. Columbus first notes the physical characteristics, then racial, then temperament, cataloging the "new" people in a manner resonant of how one might describe a fine dog or horse before sale. By specifically referencing the horse-like quality of their hair, Columbus positions them outside of a human point of reference. In another encounter, Columbus describes the new people "as simple as animals," further qualifying their humanity relative to the colonizers.

Columbus's ontological classifications were self-serving in a way similar to Freud's classifications of deviance and the law's classifications of transgender people. Some judges, like those in Ashlie and Richardson, also explicitly referenced animals—a donkey and a gargoyle—in service of their dehumanizing rhetoric. Others, like Oiler dissected the bodies of transgender people in intricate detail—"plaintiff was terminated because he is a man with a sexual or gender identity disorder who, in order to publicly disguise himself as a woman, wears women's clothing, shoes, underwear, breast prostheses, wigs, make-up, and nail polish." This rhetorical move parallels Columbus’s careful dissection and classification of the new bodies he encountered, with their "fine bodies," "handsome faces," and "coarse" hair like "a horse's tail." Each had a stake in casting the other as less human than those in the dominant society. Columbus needed to justify his subjugation and enslavement and judges must justify their rejection of transgender people's legal claims. Columbus was motivated by greed; the law is motivated by disgust and a desire to codify a certain kind of normalcy that although unstated, reflects conventional gender and sexuality norms.

The referencing of Frantz Fanon and other colonial encounters, however, does not mean that a facile analogy can be made between sex, transgenderism, and race. This analysis is sensitive to criticisms like that expressed by bell hooks in Ain't I a Woman. Hooks condemns the "constant comparison[s] of the plight of 'women' and 'blacks,'" by white feminists, arguing that such racist and sexist patterns in language "support the exclusion of black women" and represent a "racist-sexist tendency" that pervades the women's liberation movement. Hooks asserts that facile analogies between racial and sexual oppression—particularly when white women "use[] black people as
metaphors"—mask indifference, racism, and opportunism.\(^{116}\)

This analysis does not mean to suggest that people of color in general, white transgender people, and transgender people of color experience discrimination in the same way. Indeed, discrimination in employment and dehumanization in courtrooms is overshadowed by the violence against transgender people. In particular, transgender women of color disproportionately face brutalization and murder, in addition to discrimination based on sexism and transphobia in employment and dehumanization in legal arenas.\(^{117}\) Instead the analysis suggests that the meeting between transgender people and the law is another moment of colonizing. The legal, ontological classification of transgender people as less than human is self-serving in a way analogous to, but different from, that of former colonizers meeting people of color and indigenous people and identifying them as less than human in order to justify their enslavement and subjugation.

Thinking about transgender people's experiences with the law as a colonizing moment is one more lens through which to view courts' behavior. Like Freud and colonizers, members of the modern judiciary often grapple with how to categorize a subject they find revolting or exploitable in a way that codifies their own normalcy and validates their treatment of the "new" subject as other than human. Judges dehumanize transgender people in their opinions as a rhetorical strategy to legitimate their decisions to deny transgender people legal recognition and protection. By unnecessarily focusing on transgender bodies and describing these bodies in freakish, patronizing, and derisive terms, the law relies on social stereotypes and common prejudice to lend credibility to openly hostile treatment of transgender claimants. The dismissal of transgender people allows judges to reinforce judicial and social conceptions of "real" men and women (which, presumably, include the judges themselves) and punish "facsimiles"\(^{118}\) who dare to seek protection from discrimination. And if one court's description of a transgender petitioner's request for a name change as a "freakish rechristening"\(^{119}\) is any indication, fervent judicial rejection of transgender normalcy may also resonate with religious convictions of judges based on a Judeo-Christian conception of normal gender and sexuality. Sadly, it is in the constricted room left by these judicial biases that transgender people must navigate their pursuit of civil rights.

\(^{116}\) Id.

\(^{117}\) See Remembering Our Dead, GENDER.ORG (Gender Education and Advocacy), Feb. 28, 2005, available at http://www.gender.org/remember/# (last visited Feb. 28, 2005); see also Nancy Nangeroni, Stabbing, Bludgeoning Greets Transenders: Report Reflects Extreme Violence Brought to Bear in Transgender Murderers, GENDERTALK 2005 (Oct. 24, 2003), available at http://www.gendertalk.com/comment/political/stabbing.shtml (last visited Feb. 28, 2005) (noting that a "close study of the best available national murder statistics reveals that transgender persons are nearly twice as likely to be stabbed to death as other murder victims, and more than three times as likely to be beaten or bludgeoned to death").

\(^{118}\) Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1083 n.6 (7th Cir. 1984).

\(^{119}\) In re Petition of Richardson to Change Name, 23 Pa. D. & C.3d 199, 201 (1982).
So what about Josh? This article opened by presenting a truthful account of one incident of transgender discrimination. In jurisprudence as hostile as the previous depiction implies, what room is there for a person in Josh’s position to maneuver? Not surprisingly, the space for a successful articulation of Josh’s rights is narrow. Making headway in the face of such overwhelming animus often requires transgender people to articulate claims that indulge the biases of the court—reinforcing elements of the normal regime and compromising their own identities, goals, or politics.

To take one prominent example, winning in court often forces transgender people to “medicalize” their identities under the diagnosis of Gender Identity Disorder (GID) \(^2\) because courts are often open to the authority of medicine. For instance, before the decision was reversed on appeal, \(^1\) a conservative Florida judge found a marriage between a biological female and a female-to-male transsexual valid only after extensive presentation of expert medical testimony that the transsexual was medically male. \(^2\) The couple in that case was seeking a divorce when the non-transsexual wife argued that the marriage was void and that her transsexual husband was a legal stranger to their children and had no claim to seek custody or visitation. \(^2\) As one would expect, this case would likely come out quite differently for Josh, who would have no medical experts or diagnosis to back up his “claim” to be a male deserving legal recognition.

Transgender plaintiffs are also strongly bound to the language of medicine in litigating under disability laws. But many transgender people are reluctant to rely on medicine, and GID in particular, because it reifies a restrictive gender binary (for example, a transgender man may not “qualify” as having GID unless he is sufficiently masculine in a stereotypical way) and because access to diagnoses like GID depends on expensive medical care that many transgender people cannot afford. Also, many transgender people simply do not want to

\(^{120}\) See DSM-IV-TR, § 302.85 supra note 2.
\(^{121}\) Kantaras v. Kantaras, 2004 Fla. App. LEXIS 10997 (2004) (holding on appeal that the 1989 marriage between a woman and a transsexual male was legally invalid because it amounted to a same-sex union barred by state law). This decision may mean that Mr. Kantaras will be denied custody of his children, as homosexuals cannot adopt children in Florida under state law. FLA. STAT. ANN. § 63.042(3) (West 1997).
\(^{123}\) This reasoning may end up prevailing and result in the denial of child custody to Mr. Kantaras since he lost on appeal. Kantaras v. Kantaras, 2004 Fla. App. LEXIS 10997 (2004). On appeal, the Florida court noted that male and female are “immutable traits determined at birth” and that it should be up to the legislature to determine “whether advances in medical science support a change in the meaning commonly attributed to the terms male and female.” Id. at *18.
associate their gender identity with a mental illness, though this objection may rest on prejudice and/or ignorance about disability law.

As this brief overview reveals, the pragmatics of transgender jurisprudence are deeply troubling. The current legal framework rejects the idea that gender and sexuality are what Bersani saw as unstable and mobile concepts, compelling transgender people aggressively to manipulate and compress their identities into legally recognizable categories, or face non-protection. In the exceptional cases where transgender people achieve relief through the law, it is most often by appealing to the self-affirming narrative that the law protects: those who do not transgress conventional gender codes are “healthy” and transgender people are medical abnormalities.

This section will lay out the various legal claims theoretically available to transgender people, including an examination of whether Josh would have had a chance of succeeding, and what might be, for him, the potentially painful, personal costs of articulating a claim in these various ways. Some of the elements that make Josh’s case interesting and distinct from many that actually get litigated are that he is non-operative (meaning he is presently choosing to forego surgery for either personal or financial reasons), he does not take hormones (again, largely for financial reasons but also because of his asthma), he is poor, he lacks an official diagnosis of GID, and he was not “out” as transgender at his job. As explored in the following section, these elements influence his likelihood of success under sex, disability, and sexual orientation discrimination laws.

A. Title VII and State Anti-Sex Discrimination Statutes

The Supreme Court’s decision in Price Waterhouse v. Hopkins\textsuperscript{124} seemed to promise a departure from the trend of federal courts uniformly finding that transsexual people are not protected under Title VII on the grounds that “sex” must be construed to mean a person’s biological sex at birth. In Price Waterhouse the Court held that Title VII prohibits an employer from discriminating against Hopkins, a female accountant denied partnership, because the employer considered her to be too masculine.\textsuperscript{125} The Court cites as evidence the fact that one partner in the accounting firm suggested that Hopkins would increase her chances for partnership if she would “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.”\textsuperscript{126} Another partner suggested that she “take a course at charm school.”\textsuperscript{127} The Court explained its position regarding sex stereotyping as follows:

\textsuperscript{124}. 490 U.S. 228 (1989).
\textsuperscript{125}. \textit{Id.} at 235.
\textsuperscript{126}. \textit{Id.}
\textsuperscript{127}. \textit{Id.}
As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.28

By explicitly extending coverage to sex stereotypes, Price Waterhouse seemed to conclude that the term "sex," as articulated in Title VII, encompassed more than anatomy. Many transgender and queer scholars hoped this would translate into protection for transgender people based on sex stereotypes.129 Yet this hoped for revolution in transgender Title VII jurisprudence has been slow to materialize. In Title VII cases decided since Price Waterhouse, federal courts have almost without exception continued to interpret "sex" to exclude transgender people.130 One of these cases, Oiler, was discussed in detail above.131 Oiler rejected the plaintiff’s arguments that she was discriminated against based on sex stereotypes by intimately dissecting her appearance and holding that the animus she experienced was because she “disguised himself as a person of a different sex.”132 This accusatory language implies that as long as Donna transgresses gender norms, she is responsible for the discrimination she experiences.

In another post-Price Waterhouse decision, Broadus v. State Farm Insurance Co., the court distinguished Price Waterhouse by noting that Ann Hopkins was not a transsexual, unlike the plaintiff in Broadus.133 In that case, a transitioning female-to-male transgender person claimed that his supervisor harassed him because he did not conform to the stereotype of how a woman should look.134 The court commented, “It is unclear . . . whether a transsexual is protected from sex discrimination and sexual harassment under Title VII.”135 Thus even in a hypothetical case where a biologically female person is discriminated against because of not walking or talking femininely, or for not wearing make-up, or for acting too aggressively—that person will not be protected under Title VII. If all of the conditions are identical to Price Waterhouse except for the transgender identity of the plaintiff, the plaintiff’s

128. Id. at 251 (internal citations and quotation marks omitted).
129. See, e.g., Case, supra note 6, at 4 (arguing that after Price Waterhouse, Title VII, if correctly applied, “already provide[s] the necessary protection to both effeminate men and feminine women, as well as their masculine counterparts”).
132. Id. at *5.
134. Id. at *10-*11.
135. Id. at *11.
claim will fail because he or she identifies as transgender. Transgenderism trumps "sex," "male," and "female;" transgenderism trumps *Price Waterhouse*. Implicitly, the court held that women, like the plaintiff in *Price Waterhouse*, are protected because they should not have to embody sex stereotypes, but transgender people are not protected from the same sex stereotype requirements because of their transgender identity.

Only the Sixth Circuit in *Smith v. City of Salem* has held that transgender people are covered by Title VII because of *Price Waterhouse*.\(^\text{136}\) It took fifteen years for a court to apply the logic of *Price Waterhouse* to a transgender person based on impermissible sex stereotypes. Before *Smith*, only the Ninth Circuit in *dicta* had asserted that transgender people ought to receive protection from discrimination based on gender stereotyping.\(^\text{137}\) Optimistically one scholar referred to the Ninth Circuit’s decision in *Schwenk v. Hartford* as "a budding flower in the field of weeds that constitutes transgender case law... [a] map for changes in Title VII transgender jurisprudence."\(^\text{138}\) Crystal Schwenk, a preoperative male-to-female transsexual, sued a state prison guard and other prison officials\(^\text{139}\) under 42 U.S.C §1983\(^\text{140}\) and the Gender Motivated Violence Act (GMVA).\(^\text{141}\) In determining the meaning of "gender" as it is articulated in the GMVA the court analogized to Title VII.\(^\text{142}\) Asserting that the initial judicial approach taken in cases like *Ulane* “has been overruled by the logic and language of *Price Waterhouse*” the court concluded:

"What matters... is that in the mind of the perpetrator the discrimination is related to the sex of the victim: here, for example, the perpetrator’s actions stem from the fact that he believed that the victim was a man who ‘failed to act like’ one. Thus, under *Price Waterhouse*, ‘sex’ under Title VII encompasses both sex—that is, the biological differences between men and women—and gender.\(^\text{143}\)"

Although all of the Ninth Circuit’s Title VII analysis is conducted via analogy, the decision served as a decent model for how to analyze transgender sex discrimination claims. Unlike the *Ulane* line of cases, the *Schwenk* court did not equate the plaintiff’s status as transgender with an absolute bar on Title VII protection. The *Schwenk* court did not dehumanize the plaintiff and locate her outside of categories such as male and female in order to deny her legal protection. Instead, the court focused on the defendant’s motivation and conduct.

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\(^{136}\) *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004).

\(^{137}\) *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000).


\(^{139}\) *Schwenk*, 204 F.3d at 1192.


\(^{141}\) 42 U.S.C. § 13981(d)(1) (2003). This law was struck down by the Supreme Court in *United States v. Morrison*, 529 U.S. 598 (2000).

\(^{142}\) *Schwenk*, 204 F.3d at 1201.

\(^{143}\) *Id.* at 1202 (emphasis in original).
to determine that the defendant’s actions were motivated by the plaintiff’s “assumption of a feminine rather than a typically masculine appearance or demeanor.” As one commentator notes, “In short, the Schwenk court did everything right.”

Relying principally on Schwenk, the Sixth Circuit in Smith held that the plaintiff, Smith, sufficiently pleaded claims of sex stereotyping and gender discrimination under Title VII based on the harassment and treatment she received after expressing a more feminine appearance on a full-time basis at her job as a fireman. The court noted that Smith’s diagnosis of GID was recognized by the American Psychiatric Association, fell within the medical authority of the DSM-IV, and that her decision to dress femininely was “in accordance with international medical protocols for treating GID.” Although the court did not say so explicitly, this medical authority seemed to influence the court in seeing Smith’s behavior as pursuant to trustworthy medical advice, and therefore less her fault or choice.

Then, in what may be the strongest legal repudiation to date of the uneven treatment of transgender people under Title VII, the Sixth Circuit rejected the standard legal reasoning that all discrimination against transgender people, regardless of how obviously tied to gender stereotyping, is nevertheless discrimination based on transsexualism and therefore per se unprotected under Title VII. The court in Smith held that the district court gave insufficient consideration to Smith’s claims concerning her contra-gender behavior, but rather accounted for that behavior only insofar as it confirmed for the court Smith’s status as a transsexual, which the district court held precluded Smith from Title VII protection. In language that firmly rejected this reasoning, Smith held that transsexuals can be covered by Title VII if they are discriminated against because of impermissible sex stereotypes:

[D]iscrimination against a plaintiff who is a transsexual—and therefore fails to act and/or identify with his or her gender—is no different from the discrimination directed against Ann Hopkins in Price Waterhouse, who, in sex-stereotypical terms, did not act like a woman. Sex stereotyping based on a person’s gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as “transsexual,” is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity.

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144. Id.
145. Dunson, supra note 138, at 480.
146. Smith v. City of Salem, 378 F.3d 566, 568 (6th Cir. 2004).
147. Id.
148. Id. at 572-73.
149. Id. at 574-75.
150. Id.
The Sixth Circuit therefore held that Smith had stated a claim for relief pursuant to Title VII’s prohibition of sex discrimination.\textsuperscript{151} Although this case clearly has positive implications for the prospects of transgender people prevailing in sex discrimination suits, the court dealt somewhat of a psychic blow to Smith by referring to her throughout the opinion as a “he,” despite the fact that she was living fully as a woman. The court seemed to say that Smith is really a man who had been discriminated against because of feminine behavior. The victory would be more complete if the court had held that impermissible use of gender stereotypes alone triggered the violation, without needing to place the plaintiff in any gender box. At the state level protection for transgender people is a mixed bag, with the majority of courts following the \textit{Ulane} line of cases\textsuperscript{152} and few moving towards the expansive coverage of \textit{Schwenk}.\textsuperscript{153}

These legal analyses pertaining to sex discrimination can be applied in several different ways to Josh’s situation. Courts recognize and react to the status of the transgender person’s transition and medical diagnosis. In other words, in determining sex discrimination, courts examine the transgender person’s stage of transition, critically analyzing his or her physical body in detail—genitalia, sex reassignment surgery, dress, name, etc.—in order to determine what kind of animus the person experienced. This is because the existence of any transgenderism usually allows the court to nullify the possibility that the discrimination was based on anything else, like sex or disability. \textit{Smith}, however, may indicate a new willingness of courts to consider sex discrimination based on impermissible gender stereotypes against an openly transgender person.

Josh was not “out” as transgender. While he wore attire traditionally worn by the male servers, women were permitted to dress in pants and there was no formal differentiation of the dress code (black pants or skirt, and white blouse or button-down) for men and women. Josh simply looked gender ambiguous; he did not specifically ask for male pronouns or any other accommodation based on his gender.

\textsuperscript{151} \textit{Id.}

\textsuperscript{152} \textit{See, e.g.,} Underwood v. Archer Mgmt. Servs., 857 F. Supp. 96 (D.D.C. 1994) (holding that the District of Columbia Human Rights Act does not protect a person discriminated against because of her status as a transsexual); Dobre v. Nat’l R.R. Passenger Corp., 850 F. Supp. 284 (E.D. Pa. 1993) (holding that the plain meaning of “sex” under the Pennsylvania Human Rights Act did not include individuals who have undergone gender-corrective surgery); Conway v. City of Hartford, No. CV95 0553003, 1997 Conn. Super. LEXIS 282 (Feb. 4, 1997) (holding that given the weight of Title VII precedent, Connecticut’s Fair Employment Practice Act does not prohibit discrimination against transsexuals); Sommers v. Iowa Civil Rights Comm’n, 337 N.W.2d 470, 474 (Iowa 1983) (concluding that the word “sex” in Iowa’s Civil Rights Act did not include transsexuals and that sexual discrimination was intended to prohibit conduct which, had the victim been a member of the opposite sex, would not have otherwise occurred).

\textsuperscript{153} \textit{See, e.g.,} Rentes v. OCE-Office Sys., 1996 U.S. Dist. LEXIS 19060 (S.D.N.Y. Dec. 24, 1996) (holding that discrimination based on sex-change was discrimination based on sex); Maffei v. Kolaeton Indus., Inc., 626 N.Y.S.2d 391 (N.Y. Sup. Ct. 1995) (holding that cases like \textit{Ulane} were unduly restrictive and that derogatory comments related to a sex reassignment surgery constitute discrimination based on “sex”).
Thus perhaps Josh could argue his case under the principles established by *Price Waterhouse*. He could assert that he is a woman, like Ann Hopkins, who was discriminated against because his behavior was too masculine and did not fit stereotypes associated with women. He might evade some of the searching judicial inquiry into his dress, comportment, binding techniques, and other intimate aspects of his body by simply not mentioning his transgender identity and pressing his claim as tightly as possible into the mold created by Hopkins.

*Oiler* and *Broadus*, of course, caution us that if Josh lets the court know he is transgender then he will likely forfeit his claim to Title VII protection. *Oiler* and *Broadus* demonstrate that it is not only post-operative transsexuals who are excluded from Title VII protection, but also non-operative transgender people like the plaintiff in *Oiler* who was legally discriminated against because she “disguise[d] himself as a person of a different sex. . . .”154 If Josh acknowledges that he considers himself transgender and that he intentionally took measures to “pass” as a man then the court might name this “public disguising” as the source of his employer’s animus and find it permissible discrimination, regardless of its basis in sex stereotypes.

If Josh were to encounter a court like the Sixth Circuit in *Smith*, he might be able to succeed under a sex discrimination claim even if he openly acknowledges his transgender identity. The Sixth Circuit held that discrimination based on “gender non-conformity” is actionable under Title VII despite a plaintiff’s transgender identity.155 Thus, Josh might prevail if he could convince a court that he was terminated from his job because he did not meet female gender stereotypes. Of course, since Josh was not open about his transgender identity at his job, and the customers’ complaints stemmed from his ambiguous gender appearance or the fact that to them he looked like a “faggot,” Josh might face the uphill battle of proving that this was not permissible termination based on sexual orientation. Or, he could face the bizarre position of having to pick a “sex” whose stereotypes he was not sufficiently meeting for Title VII purposes, since his boss thought he was female because of his driver’s license, his coworkers thought he was male, and the customers had no idea. Thus, termination due to his ambiguous gender expression—his failure to fulfill the gender stereotypes of either men or women—might work against him in meeting the *Smith* rationale.

All of this puts Josh in an unenviable position. He can either suppress his transgender identity when describing himself to the court in order to articulate a promising claim, or he can acknowledge his transgender identity, try to describe to the court the ambiguous, non-delineated animus he experienced with its attendant overtures to homophobia, and almost certainly lose. When asked about these alternatives, Josh said:

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I think that given the reality of the situation I would go ahead and argue that [I was a woman discriminated against because of sex stereotypes] for the simple and imminent (sic) ramifications on my safety. Ideally I’d go off on some tangent about how I am a boy and they are just blind for not seeing that, but that’s not the reality that I live in right now. It’s sad and frustrating, but it’s life.\footnote{156}

The bias of the court and its frequent deployment of dehumanizing rhetoric towards transgender people forces a person like Josh to make a painful decision about whether or not to create a legal identity that jars with how he actually identifies and compromises his political views about oppressive gender norms.

B. Disability Laws

At the federal level both “transsexualism” and “gender identity disorders not resulting from physical impairments” are explicitly excluded from protection under the Federal Rehabilitation Act (FRA) and from the Americans with Disabilities Act (ADA).\footnote{157} The language of the federal exclusions eliminates the possibility of protection for transgender people under federal disability laws. The federal statutes place transsexualism, gender identity disorders, pyromania, and pedophilia in the same subsection of exclusions thus relegating people with gender differences to the equivalent of some of society’s most abhorred members—child molesters and arsonists.\footnote{158}

The implications of this decision to exclude transgender people at the federal level cannot be understated. State courts rely on the federal language in the ADA when interpreting their own state disability laws to exclude transgender people.\footnote{159} Additionally, now that a significant number of states have interpreted their state laws to exclude transgender people, other state courts examining the issue for the first time sometimes defer to the weight of this precedent when

\footnotetext{156}{E-mail interview with Josh (Feb. 18, 2003, 01:45:40) (on file with author).}
\footnotetext{157}{Federal Rehabilitation Act, 29 U.S.C. § 705(F)(i) (2001) (“The term ‘individual with a disability’ does not include an individual on the basis of—(i) transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders”); Americans with Disabilities Act, 42 U.S.C. § 12211(b)(1) (2003) (“Under this Act, 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”).}
\footnotetext{158}{See 42 U.S.C. § 12211 (2003).}
\footnotetext{159}{See, e.g., Dobre v. Nat'l R.R. Passenger Corp., 850 F. Supp. 284, 289 (E.D. Pa. 1993) (holding that the express language of the Rehabilitation Act undercuts the plaintiff’s claim because it unambiguously excludes transsexualism from the definition of the phrase “individual with a disability”); Conway v. City of Hartford, No. CV95 0553003, 1997 Conn. Super. LEXIS 282, at *10 (Feb. 4, 1997) (“In light of . . . the persuasive authority of federal law . . . in interpreting Connecticut’s antidiscrimination statutes and the express exclusion of coverage of transsexualism in the ADA and the Rehabilitation Act . . . the court believes that the plaintiff’s condition as pleaded could not be found to be a physical disability under Connecticut law”).}
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combined with the federal example.\textsuperscript{160} When state courts do decide to include transgender people under their state disability laws, they first must get over the enormous federal hurdle and explain why their state legislators intended to deviate so profoundly from the ADA, which they used as a model in drafting their state laws.\textsuperscript{161}

As noted above, several state disability laws include exemptions for transgender people similar or identical to those in the ADA and FRA, including Indiana, Iowa, Louisiana, Nebraska, Ohio, Oklahoma, Texas and Virginia.\textsuperscript{162} Even in the absence of specific statutory exclusion, courts in several states have interpreted their disability laws as explicitly excluding GID. For example, in \textit{Holt v. Northwest Pennsylvania Training Partnership Consortium, Inc.}, the court held that transsexualism is not a protected disability under the Pennsylvania Human Rights Act and thus the male-to-female transsexual plaintiff had no recourse when she lost her job because of dress code violations, after being required to dress as a male and use the men’s bathrooms.\textsuperscript{163} Similarly, in \textit{Sommers v. Iowa Civil Rights Commission}, the court held that transsexualism is not a protected disability under the Iowa Civil Rights Act,\textsuperscript{164} leaving Audra Sommers without recourse after she lost her job because an old acquaintance recognized her at work and outed her to her employer as a transsexual.\textsuperscript{165}

Several other states, however, have deemed transgender people eligible for protection under their state disability laws, although only people with a verifiable GID diagnosis qualify.\textsuperscript{166} In California, for example, the Poppink Act of 2000 clarified the disability coverage of the Fair Employment and Housing Act (FEHA) in a number of ways, including the explicit elimination of the ADA gender and transsexuality exclusions.\textsuperscript{167} According to the National Center for

\textsuperscript{160} See Conway, 1997 Conn. Super. LEXIS 282, at *10, *8 (holding that transsexualism is not a disability in light of “the persuasive authority of federal law” and the fact that “other jurisdictions have also held that transsexualism is not a physical disability”); Enríquez v. W. Jersey Health Sys., 777 A.2d 365, 369 (N.J. Super. Ct. App. Div. 2001) (noting that on an issue of first impression, the motion judge granted defendant’s motion relying in part on the fact that other courts had concluded that “transsexualism was not a recognized mental or physical disability under statutes very similar to ours”).

\textsuperscript{161} See, e.g., Enríquez, 777 A.2d at 375 (wrestling with meaning of the federal exclusion and ultimately rejecting it in favor of a more inclusive interpretation of their state law).


\textsuperscript{163} 694 A.2d 1134, 1136 (Pa. Commw. 1997).

\textsuperscript{164} IOWA CODE § 601A, recodified at § 216 (2000).

\textsuperscript{165} 337 N.W.2d 470, 471 (Iowa 1983).

\textsuperscript{166} Similarly, administrative agencies in Florida and Illinois have held that transgender people are protected under state disability laws in those two states. And the Oregon Bureau of Labor and Industry has held that transgender people have some limited protection under Oregon disability law as well, although the scope of this is limited and does not require an employer to provide reasonable accommodations to a transitioning employee. \textit{See} Minter, supra note 162.

\textsuperscript{167} The Fair Employment and Housing Act (FEHA) prohibits discrimination against people with disabilities. The Poppink Act is codified at CAL. GOV’T CODE § 1296 (Deering 1997 & Supp. 2003).
Lesbian Rights, this new law means that “transsexual people who are forced to rely on the law for protection in medically-supervised, on-the-job transitions may claim the condition as a disability or perceived disability and look to this statewide law for support.”\textsuperscript{168} Also, transgender people who may be perceived to have GID, regardless of any medical intervention, could be protected from discrimination in employment and housing on the basis of that perception.\textsuperscript{169}

Additionally, courts and administrative agencies in Massachusetts, New Jersey, Washington, Florida, and New Hampshire have held that transsexual people are protected under state or local disability laws.\textsuperscript{170} In the process of doing so, these state courts and agencies often explicitly rejected the ADA exclusions in favor of a more inclusive interpretation of their state disability laws. For example, in a Massachusetts case, \textit{Lie v. Sky Publishing Corp.}, the plaintiff, a male-to-female transsexual, was terminated from her job as an editorial assistant after she refused to comply with her employer’s written request that she “refrain from ‘dressing as a woman’” and a warning that “‘failure to conform [her] attire may result in disciplinary action and/or termination.”\textsuperscript{171} The plaintiff informed her employer that she had been diagnosed with gender dysphoria and that as a part of her treatment she would continue to dress in female attire, engage in psychotherapy, and take hormones.\textsuperscript{172} The employer urged the court to follow the ADA and FRA and therefore to disallow a claim for protection from discrimination based on

\begin{footnotes}
\item\textsuperscript{168} See Press Release, Jamison Green and Shannon Minter, Transpeople Removed from California Disability Law Exclusions (Oct. 11, 2000) available at http://www.transgenderlaw.org/exclusionover.htm (also on file with author).
\item\textsuperscript{169} Id.
\item\textsuperscript{172} Id.
\end{footnotes}
transsexualism. In rejecting the employer’s argument, the court noted that “[t]hough federal civil rights jurisprudence is often instructive..., this Commonwealth is certainly not bound to follow wherever Washington leads.”

Similarly, the court in *Enriquez v. West Jersey Health Systems* wrestled with the significance of the federal exclusion in the ADA and ultimately held that the New Jersey Law Against Discrimination (LAD) was broader than the ADA and included transgender people. In *Enriquez*, a male-to-female transsexual physician sued after she was terminated from her job as medical director because she refused the order from her employer to “stop all this and go back to [her] previous appearance!” The court noted the federal exclusion in the ADA and examined the split among state courts with regard to whether transgenderism was protected under their statutes. In holding that gender dysphoria was a disability and protected by LAD, the court stated that “[a]s remedial social legislation, the LAD is deserving of a liberal construction, especially with regard to handicaps.”

The previous examples and cases demonstrate that while the ADA and FRA explicitly preclude federal protection, some transgender people may be able to receive protection under state and local disability laws when those states or municipalities do not adopt the exclusions that exist at the federal level. Yet conceptualizing transgenderism as a mental disability and relying on the respectability of medicine in order to gain civil rights protection comes at a cost. In particular, the strategy almost entirely excludes people like Josh who either cannot afford to obtain a psychiatric diagnosis and “treatment,” or who chose not to for personal or political reasons. Disability laws privilege people who can afford to buy the legal identity required for protection. This has particularly devastating consequences for low-income transgender people, who may

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173. *Id.* at *17
174. *Id.*
177. *Id.* at 368.
178. *Id.* at 375.
179. *Id.* at 374.
181. Some transgender people view psychiatry entirely as a tool to gain certain protections and rights, and consequently study the DSM-IV to figure out what to say to psychiatrists to get the “right” diagnosis. I have actually been a part of such practicing with friends. As one person stated:

[Psychiatrists and therapists]... use you, suck you dry, and tell you their pitiful opinions, and my response is: What right do you have to determine whether I live or die? Ultimately the person you have to answer to is yourself and I think I’m too important to leave my fate up to anyone else. I’ll lie my ass off to get what I have to... [surgery].

comprise the majority of transgender people.\textsuperscript{182}

Arguably, the disability model also pathologizes transgender identities and dampens consciousness of transgenderism and the normalizing regime as a political issue.\textsuperscript{183} Courts ambivalent about the naturalness and equal humanity of transgender people seem to find the language of disability and medicine less foreign and unpalatable than identifying the discrimination transgender people experience as a form of sex discrimination. For example, in \textit{Kosilek v. Maloney}, the plaintiff alleged that she was being denied adequate medical care for her gender identity disorder in violation of the Eighth Amendment. The court described the transgender inmate’s transgender identity as a terrible, painful illness:

Kosilek is . . . suffering from a severe form of a rare, medically recognized, major mental illness—gender identity disorder (“GID”). Kosilek is a transsexual. Since at least age three, Kosilek has believed that he is actually a female who has been cruelly trapped in a male’s body. This belief has caused Kosilek to suffer constant mental anguish and, at times, abuse. While incarcerated, it has also caused Kosilek to attempt twice to kill himself, and to try to castrate himself as well.\textsuperscript{184}

Relying on its conception of GID as a “major mental illness” possibly relevant to the application of “the Eighth Amendment to inmates with serious medical needs,”\textsuperscript{185} the court hesitantly found that the transgender prisoner may be entitled to treatment, despite “understandable” public feelings that it is “bizarre” that an imprisoned murderer may have the right to receive female hormones and sex reassignment surgery.\textsuperscript{186}

This court, like others, quelled its own and society’s skepticism that a

\textsuperscript{182} According to a 1999 San Francisco Department of Public Health study the median monthly income for the 392 male-to-female (MTF) transgender people surveyed was $744, while it was $1,100 for the 123 female-to-male (FTM) transgender people surveyed. \textit{SAN FRANCISCO DEP’T OF PUB. HEALTH, THE TRANSGENDER COMMUNITY HEALTH PROJECT (1999), available at }\texttt{http://hivinsite.ucsf.edu/InSite.jsp?doc=2098.461e}. The study also noted that 52\% of the MTFs and 41\% of the FTM did not have health insurance. \textit{Id.} Additionally, 35\% of the MTFs surveyed tested positive for HIV. \textit{Id.} Thus, many if not most transgender people will simply be unable to avail themselves of any potential protection under disability laws because they require a psychiatric diagnosis of GID and medically authorized and supervised treatment.

\textsuperscript{183} It is interesting to compare this use of medical authority to a similar use of the language of “health” by the birth control movement, which spawned the articulation of the right to sexual privacy. \textit{WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, SEXUALITY, GENDER, AND THE LAW 3 (1997).} The birth-control movement “used medical authority to associate itself with the respectability of a conservative and male-dominated profession.” \textit{Id.} at 5. The negative ramifications of this strategy were that it “encouraged the pathologizing of contraception, downplayed the social and economic needs of women,” and “dampen[ed] consciousness of birth control as a political issue.” \textit{Id.} at 6. It also reinforced the income barrier because contraception was only available through a physician. \textit{Id.} Nevertheless, “[d]espite . . . its shortcomings, the ‘doctors-only’ argument worked . . . .” \textit{Id.}


\textsuperscript{185} \textit{Id.} at 160.

\textsuperscript{186} \textit{Id.}
transgender prisoner ought to be entitled to hormones or surgery by relying on the respectability of the language of health and medicine. Yet such reliance comes with a tremendous price. The disability model invests mental health professionals with immense license to define suitable treatment in any given case. In the context of prisons, for example, this can have disastrous consequences. As practitioners in transgender law have noted,

[while some transsexual inmates have won legal cases holding that they have a right to treatment based on a diagnosis of GID, courts have consistently deferred to the professional judgment of prison doctors and held that psychotherapy, tranquilizers, and even “hormone replacement therapy” (i.e., testosterone for male-to-female transsexual prisoners) are sufficient to satisfy this legal right.]

Understandably, some transgender people may be uncomfortable claiming a “major mental illness” that causes “constant mental anguish” in order to gain civil rights protection. Transgender people may want to articulate their identity as independent from medicine and “mental anguish,” to claim a self-defined, non-pathologized identity that is not associated with psychiatry at all.

When asked how he would feel about arguing that he had GID and relying on doctors to demonstrate that a protected disability served as the basis of his discrimination, Josh responded: “I don’t know that I would argue that I was discriminated against for the disability because I don’t think it is a disability . . . .” When I asked him how he felt about the fact that some


Maggert v. Hanks, 131 F.3d 670 (7th Cir. 1997) (recognizing that sex reassignment is the only effective treatment for transsexual prisoners, but holding that it is permissible to withhold treatment from transsexual prisoners in light of the fact that neither public nor private health insurance programs will pay for sex reassignment); Long v. Nix, 86 F.3d 761 (8th Cir. 1996) (holding that a prisoner diagnosed with gender identity disorder had no right to cross-dress or to estrogen therapy); Brown v. Zavaras, 63 F.3d 967 (10th Cir. 1995) (rejecting equal protection claim brought by pre-operative male-to-female transsexual based on evidence that Colorado provided hormone therapy to non-transsexual prisoners with low hormone levels and to post-operative male-to-female transsexuals); White v. Farrier, 849 F.2d 322 (8th Cir. 1988) (holding that a male-to-female transsexual prisoner is not entitled to cross-dress or wear cosmetics and does not have a constitutional right to hormone therapy); Meriwether v. Faulkner, 821 F.2d 408 (7th Cir. 1987), cert. denied, 484 U.S. 935 (1987) (holding that a transsexual prisoner is constitutionally entitled to some type of medical treatment for a diagnosed condition of transsexualism, but she “does not have a right to any particular type of treatment, such as estrogen therapy”); Jones v. Flannigan, 1991 U.S. App. LEXIS 29606 (7th Cir. 1991) (same); Supre v. Ricketts, 792 F.2d 958 (10th Cir. 1986) (same); Lamb v. Maschner, 633 F. Supp. 351 (D. Kansas 1986) (holding that a transsexual prisoner had no right to hormone therapy).


188. E-mail from Josh in response to a series of previously emailed questions from the author
people, unlike him, have access to disability claims because they can afford
doctors, counseling and “treatment” he answered, “Like I said, I don’t see it as a
disability . . . . Even if I had bunches of money, I wouldn’t use my body as my
defense. That’s just me.”

This ambivalence and discomfort with the disability model was also
expressed by Gary Johnson, the first Californian to file a lawsuit against his
employer under the new California state law (the Poppink Act discussed above)
that protects transsexuals from discrimination in housing and employment.
Johnson was uncomfortable identifying transgenderism as a psychiatric
disability:

When I first filed with the Department of Fair Employment, I didn’t even
mark it as a disability claim because I didn’t want to be seen as having a
disability . . . . I find it offensive. At the same time, with the wording of
the new law, if I’m not marked as disabled, then I’m not able to sue
under the law.

Johnson’s feelings resonate with a concern amongst transgender people that GID
promotes the stereotype that transgender people are disturbed or unstable.
Many, like Josh and Gary Johnson, may feel uncomfortable identifying at all
with having a disability.

Yet the premise of disability law is not based on normative arguments that
people with physical, developmental, or mental disabilities are abnormal,
defective, or pathological. On the contrary, the disability rights movement is
based on a socio-cultural model, or civil rights model of disability, which
maintains that if the social and physical environments were structured
differently, then there would be no such thing as disability. The ADA, for
example, requires equal access for persons with disabilities to employment, most
forms of public transportation, and to all sorts of public accommodations and

(February 18, 2003, 01:45:40) (on file with author).

189. Id.
190. Bernice Yeung, Reluctantly Disabled, SN&R NEWSREVIEW.COM (May 10, 2001), at
191. See, e.g., Minter & Frye, supra note 187 (“[L]egal protections based on GID as a psychiatric
disability have some serious drawbacks, not the least of which is the perpetuation of the
stereotype that transgender people are inherently disturbed or unstable”).
192. See Jonathan C. Drimmer, Cripples, Overcomers, and Civil Rights: Tracing the Evolution of
Federal Legislation and Social Policy for People with Disabilities, 40 UCLA L. Rev. 1341,
1355-56 (1993). Drimmer states:
The civil rights model is based largely on the civil rights movement of the 1950s
and 1960s and views society, rather than the individual with a disability, as
defective. In the civil rights model, the barriers facing the disabled community do
not result solely from physical limitations, but from social standards created by an
abilist society, from historic oversight of the disabled population, and from the fears
and prejudice from centuries of discrimination . . . . Above all, the civil rights model
attempts to unmask the false objectivity that allows society to label some of its
members “disabled” and treat those citizens as less than equal.

Id. (footnotes omitted).
services provided by public or private entities. Thus, as one scholar observed, the ADA mandates “that most aspects of public life change to permit the inclusion and equal participation of persons with disabilities.”

With this in mind, Dean Spade, a transgender attorney who practices transgender law, articulates a thoughtful response to the common discomfort expressed by transgender people when the disability model comes up:

There is a gut reaction that occurs, where people feel that using disability law claims means we are arguing that we are somehow flawed people. What is at play in this response is ableism, and this reaction is usually resolved by pointing out that the theory of disability law is not about going into court and arguing for rights based on an idea that people with disabilities are flawed. Instead, the disability rights movement . . . is about pointing out that disabled people are capable of equal participation, but are currently barred from participating equally by artificial conditions that privilege one type of body or mind and exclude others.

Spade notes that transgender people could similarly use the disability rights framework “to argue that we are fully capable of participating equally, but for artificial conditions which bar our participation.” Spade cites examples of artificial conditions that transgender people face like gender segregated facilities and dress codes administered according to birth gender. Like others operating under the disability rights framework, Spade asserts that “trans people are fighting against entrenched notions about what ‘normal’ and ‘healthy’ minds and bodies are, and fighting to become equal participants with equal access and equal protection from bias and discrimination.”

What concerns Spade as an attorney litigating transgender civil rights cases is the inability of people like Josh to afford the requisite diagnoses and the ways in which GID, with its clinical definitions entrenched in gender stereotypes, reinforces coercive, binary gender conceptions. Spade states that he does not want to make transgender rights dependent upon a psychiatric diagnosis of Gender Identity Disorder because such diagnoses are not accessible to many low income people; because [he] believe[s] that the diagnostic and treatment processes for GID are regulatory and promote a regime of coercive binary gender; and

195. Dean Spade, Resisting Medicine, Re/modeling Gender, 18 BERKELEY WOMEN’S L.J. 15, 34 (2003).
196. Id.
197. Id.
198. Id.
199. See id. at 35.
because [he] believe[s] that GID is still being misused by some mental health practitioners as a basis for involuntary psychiatric treatment for gender transgressive people. [He] does not want to legitimize those practices through his reliance on the medical approach to gender nonconformity. 200

Yet the deference that courts give to medical experts makes this route to civil rights protections for transgender people particularly successful when state laws do not adopt the federal exclusion and when transgender people (unlike Josh) have access to the requisite medical treatment and psychiatric diagnoses. 201

C. State Laws Prohibiting Sexual Orientation Discrimination

Fifteen states and the District of Columbia ban employment discrimination on the basis of sexual orientation. 202 Of these, only California, Minnesota, New Mexico, and Rhode Island also expressly include transgender and transsexual people within the law’s protection. 203 Where transgender people are not

200. Id.
201. In fact, Dean Spade recently won a case in New York that involved a young transgender woman in foster care who was moved to a new group home facility where she was not allowed to wear skirts or dresses. Doe v. Bell, 194 Misc. 2d 774, 775 (N.Y. Sup. Ct. 2003). Spade sued the Administration for Children’s Services seeking a change in policy, and brought claims based on gender discrimination, the First Amendment, and disability discrimination. Id. He prevailed in the case based on the disability discrimination claim. Id. at 787. For another recent, extremely powerful example of the power of medical experts see Kantaras v. Kantaras, No. 98-5375CA., (Fla. Cir. Ct. Feb. 31, 2003), available at http://www.ncrlights.org/cases/pdf/kantarasaopinion.pdf. In Kantaras, in an 809 page opinion, conservative Judge Gerald J. O’Brien relied extensively on medical experts in determining that Michael Kantaras was legally male, and thus his marriage valid. Id. at 791-99. Unfortunately, Judge O’Brien was overruled on appeal, and the marriage was annulled. Kantaras v. Kantaras, 29 Fla. L. Weekly 1699 (Fla. Dist. Ct. App. 2004).


203. See CAL. GOV’T CODE § 12926(p) (defining “sex” to include transgender people); MINN. STAT. § 363A.03(44); N.M. STAT. ANN. § 28-1-2(Q); R.I. GEN. LAWS § 11-24-2.1(I). Minnesota passed the first law of this kind in 1993. The Minnesota statute creates protections for transgender people under the scope of sexual orientation by defining sexual orientation to include “having or being perceived as having a self image or identity not
explicitly included in a state’s sexual orientation law, courts routinely reject attempts by transgender plaintiffs to seek protection under the rubric of sexual orientation.204 For example, both Lie and Enriquez, which recognized GID as a disability under their respective state disability laws, rejected the claims that the plaintiffs were protected on the basis of sexual orientation.205

However, courts do not simply identify transgenderism as a distinct category from sexual orientation and operate consistently on this premise. Instead, the categories of transgenderism and sexual orientation are conflated when doing so serves to exclude transgender people from protection and are distinguished when doing so serves to exclude transgender people from protection. This produces what Currah and Minter call the “double bind.”206 For example, in jurisdictions that do not proscribe discrimination on the basis of sexual orientation, courts have stressed the similarity of gay and transgender people in order to rely on decisions that have excluded lesbians and gay men from protection under Title VII as a rationale for also excluding transgender people.207 Yet, simultaneously, courts in jurisdictions that protect gays and lesbians have held that transgenderism is a distinct category from sexual orientation and have dismissed sexual orientation claims by transgender

traditionally associated with one’s biological maleness or femaleness.” MINN. STAT. § 363A.03(44). In 2001, Rhode Island’s non-discrimination statute was amended to expressly incorporate “gender identity or expression” as a protected category. The statute defines “gender identity or expression” to include: “a person’s actual or perceived gender, as well as a person’s gender identity, gender-related self image, gender-related appearance, or gender-related expression; whether or not that gender identity, gender-related self image, gender-related appearance, or gender-related expression is different from that traditionally associated with the person’s sex at birth.” R.I. GEN. LAWS § 11-24-2.1(l). The most recent states to prohibit discrimination on the basis of gender identity or expression are California (by expanding the definition of “sex” in California’s Fair Employment and Housing Act (FEHA) to include a broad definition of gender under CAL. GOV’T CODE § 12920) and New Mexico (N.M. STAT. ANN. § 28-1-2(Q)), both in 2003.


206. Currah & Minter, supra note 4, at 43.

207. See, e.g., Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1084-86 (7th Cir. 1984) (citing failed attempts to enact a federal law prohibiting discrimination on the basis of sexual orientation as a reason to exclude transsexual people from Title VII); Holloway v. Arthur Anderson & Co., 566 F.2d 659, 662 (9th Cir. 1977) (same); Powell v. Read’s, Inc., 436 F. Supp. 369, 370 (D. Md. 1977) (holding that Title VII does not include transsexuals, homosexuals or bisexuals); Voyles v. Ralph K. Davies Med. Ctr., 403 F. Supp. 456, 457 (N.D. Cal. 1975) (same).
plaintiffs on that basis.\textsuperscript{208}

Despite this inconsistency, when transgender people are mistakenly perceived to be lesbian, gay or bisexual, and are discriminated against on the basis of this mistaken belief, then they ought to have a claim in jurisdictions that protect gays and lesbians.\textsuperscript{209} For example, Josh may have been fired because homophobic customers frequently assumed that he was a gay man or a lesbian and reacted negatively to him as a result. Notably, the night before he was fired a group of customers repeatedly called him a “faggot” and his employer permitted the harassment to escalate. As Josh’s experience indicates, harassment or discrimination against transgender people it is not always cleanly delineated as to the specific kind of animating motive. Homophobia, transphobia, sexism, and ableism often intermingle indistinguishably in the persecution, making a claim solely based on one of them more difficult. Josh’s appearance and demeanor rendered his gender and sexuality ambiguous to customers and other employees, thereby inciting an ambiguous kind of animus—customers did not know “what” he was, but they knew they did not like it. His employer fired him accordingly. Yet, despite this clear discrimination, Josh is unlikely to find relief from the law because he simply does not fit in the categories the law chooses to recognize.

CONCLUSION: ALTERNATIVE STRATEGIES TO GAIN TRANSGENDER CIVIL RIGHTS?

When I walk through the anthology of the world, I see individuals express their gender in exquisitely complex and ever-changing ways . . . .

So how can gender expression be mandated by edict and enforced by law? Isn’t that like trying to handcuff a pool of mercury?\textsuperscript{210}

Several scholars have observed the failure of litigation to secure transgender civil rights and proposed a variety of solutions or plans for action. For example, one scholar advocates what she calls a “Charles Hamilton Houston” approach to transgender civil rights: plotting a slow, incremental litigation strategy patterned on that designed by Charles Hamilton Houston for acquiring civil rights protections for people of color leading up to Brown \textit{v.}

\textsuperscript{208} See, e.g., Underwood, 857 F. Supp. at 98 (holding that transsexual people are not included within the definition of sexual orientation in the District of Columbia Human Rights Act).

\textsuperscript{209} See, e.g., Conway \textit{v.} City of Hartford, No. CV75 0553003, 1997 Conn. Super. Lexis 282, at *21 n.2 (Feb. 4, 1997) (“Had the plaintiff failed to allege specifically discrimination based on ‘sexual orientation,’ but rather merely referenced his transsexualism as a basis for discrimination based on sexual orientation, the plaintiff’s claim would have been legally insufficient”).

\textsuperscript{210} Feinberg, \textit{supra} note 9, at 10.
Under this strategy, advocates would initially avoid messy, controversial cases like the right of a transgender person to use the bathroom of his or her choice in favor of more palatable, easier cases such as discrimination in the context of public accommodations, health care, lending, recreational sport, prison, and the “quasi-employment” context where discrimination comes from some non-employer entity. Another scholar advocates pressing for courts to adopt a gender continuum approach that prioritizes the “new” sex of a transsexual who has undergone sex reassignment surgery when determining “sex” for legal purposes, but essentially leaving pre-operative or non-operative transgender people like Josh legally recognized as only their birth or biological sex.

Also, some scholars have looked at the hopeless state of transgender jurisprudence and advocated a legislatively-focused approach, asserting that courts are too hostile and transgender advocates have a far better chance at amending old laws or passing new laws to specifically protect transgender people. In fact, transgender-specific laws and ordinances exist sporadically across the country and are increasing in number. As stated previously, only four states—Minnesota, Rhode Island, California and New Mexico—expressly prohibit discrimination against transgender people. But many local jurisdictions have adopted ordinances prohibiting discrimination against transgender and transsexual people. More than fifty cities and nine counties have enacted ordinances protecting the rights of transgender people, including New York City, San Francisco, Dallas, Philadelphia, Atlanta, Seattle, Tucson, Santa Cruz, Iowa City, Louisville, Ann Arbor, Toledo, and Tacoma. Practically speaking, however, local ordinances that prohibit transgender discrimination do not ultimately carry much weight in the courts since state laws trump local ones.

Another response is to assert that the law’s failure to adequately address the discrimination transgender people face is unsurprising and not terribly depressing because law is an inherently limited arena in which to pursue broad
political and social change. Organizing, cultural work, protests, and education underlie any successful social movement, and transgender advocates can view law as one tool in an arsenal of tools to achieve change. Certainly coalitional work around racism, poverty, homophobia, ableism, and sexism are likely to serve an invaluable role in producing social change for transgender people and ought to be pursued vigorously.

This Article takes a slightly different approach, however, and does not conclude by offering a proposal for remedying the lack of legal justice for transgender people. What underlie the Charles Hamilton Houston, gender continuum, legislative, and activist/education approaches is a tenuous negotiation of society’s and the law’s tendency to cast transgender people as freakish, subhuman, and deeply threatening to the normal regime. This Article observes a deliberate pause in legal discussion to examine the moment and mechanisms of this oppression. The impossible or, at best, highly problematic situation the law has constructed for transgender people literally enforces a moment of pause in their lives: When transgender people are forced to fit into pre-existing categories of “sex” (but then cannot), when they are forced to fit into the categories of “health” and “disability” (but then cannot “prove” a gender disability because of financial constraints or because they cannot or will not conform to the gender stereotypes inherent in the clinical GID model), they have nowhere to go for protection. The fierceness of anti-transgender animus in the law halts rational, scholarly discourse about the law and demands acknowledgment. Josh is in an untenable position based not on a doctrinal legal error but rather on sheer prejudice.

The implications of having a legal system that reinforces societal animus towards transgender people is staggering. Already transgender people live in a world in which discrimination and violence are commonplace. Transgender people, particularly transgender women of color, are regularly murdered because of their gender identity. My home in northern California was recently shaken by the brutal beating, strangulation, and murder of 17-year-old Gwen Araujo on October 3, 2003. In general, 2003 and 2004 have been horrific years in terms of transgender hate crimes and murders. The annual Transgender Day of

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217. See, e.g., Spade, supra note 195, at 35 (“The more I work in law, the more invested I become in the non-legal activism I engage in, because I realize increasingly that the role of law in creating the fundamental shifts that we are demanding is limited”).

218. See Remembering Our Dead, a memorial website dedicated to recording the names and stories of the murders of transgender people, at http://www.gender.org/remember/#. As Gwendolyn Ann Smith states on the website, “When you look at the names here, remember these people. Cry for those who we have lost, and let your anger out for a society that would allow them to die.” Remembering Our Dead: About this Site, at http://www.gender.org/remember/# (last updated Mar. 2, 2005).


Remembrance on November 20, 2003 and 2004, witnessed candle light vigils around the country, filled with a community in mourning.\textsuperscript{221} The need for such vigils does not seem to have an end in sight. This Article examines discrimination against transgender people, particularly employment discrimination, but the backdrop of this pursuit of justice cannot be overlooked: gender variant people are not only being discriminated against, but also beaten, raped, tortured, and murdered.\textsuperscript{222} The legal community, on all levels, must start caring. The law must recognize that transgender people are human, vulnerable, and eminently worth protecting.

\textsuperscript{221} See Gender.org, at http://www.gender.org/remember/day/index.html (last visited Mar. 2, 2005) (listing information on each year's Annual Transgender Day of Remembrance, including a list of our dead).

\textsuperscript{222} See Remembering Our Dead, supra note 218; see also Press Release, GenderTalk Radio, Stabbing, Bludgeoning Greet Transgenders (Oct. 24, 2003) ("A close study of the best available national murder statistics reveals that transgender persons are nearly twice as likely to be stabbed to death as other murder victims, and more than three times as likely to be beaten or bludgeoned to death") (quoting Nancy Nangeroni, executive producer and co-host at GenderTalk Radio), at http://www.gendertalk.com/comment/political/stabbing.shtml.