

The University of New Hampshire Law Review

Volume 6
Number 1 *Pierce Law Review*


Article 3

December 2006

Gender Matters: Making the Case for Trans Inclusion

Nancy K. Knauer
Beasley School of Law, Temple University

Follow this and additional works at: https://scholars.unh.edu/unh_lr

 Part of the [Law and Gender Commons](#), [Lesbian, Gay, Bisexual, and Transgender Studies Commons](#), and the [Sexuality and the Law Commons](#)

Repository Citation

Nancy K. Knauer, *Gender Matters: Making the Case for Trans Inclusion*, 6 *Pierce L. Rev.* 1 (2007), available at http://scholars.unh.edu/unh_lr/vol6/iss1/3

This Article is brought to you for free and open access by the University of New Hampshire – Franklin Pierce School of Law at University of New Hampshire Scholars' Repository. It has been accepted for inclusion in The University of New Hampshire Law Review by an authorized editor of University of New Hampshire Scholars' Repository. For more information, please contact sue.zago@law.unh.edu.

Gender Matters: Making the Case for Trans Inclusion

NANCY J. KNAUER*

I. INTRODUCTION

The transgender communities are producing an important and nuanced critique of our gender system.¹ For community members, the project is self-constitutive and, therefore, has an immediacy that also marks the efforts of other marginalized groups who have attempted to make sense of the world through description, interrogation, and ultimately a program for transformation. The transgender project also has universalizing elements because, existing within the gender system, each one of us embodies a particular gender articulation.² It is through this articulation that we define ourselves in relation to the gender we were assigned at birth, the gender we choose, the gender we create, the gender we reject, the gender we are, and the gender we are assumed to be.

Lesbian and gay advocacy organizations officially began to incorporate transgender issues in the late 1990s, as signaled by the now ubiquitous “T” that appears at the end of the popular acronym “LGBT.”³ However, the resulting alliance has been an uneasy one and the incorporation has been partial.⁴ The feminist reception to transgender issues has been arguably

* Peter J. Liacouras Professor of Law, Beasley School of Law, Temple University. I would like to thank Caleb Arnold, Jennifer Dumin, Dana Katz, Robin S. Maril, Rebecca Schatschneider, Luca Stone, and Bradeley Terebello for their insightful comments on earlier drafts.

1. In its broadest sense, the term *transgender* refers “to individuals whose gender identity or expression does not conform to the social expectations for their assigned sex at birth.” *Introduction to TRANSGENDER RIGHTS* xiv (Pailsey Currah et al. eds., 2006). Within the term transgender there are numerous and continually evolving identity formations, such as transwoman, transman, FTM, MTF, genderqueer, genderfuck, trannyfag, trannydyke, bois. In short, “[t]ransgender is an expansive and complicated social category.” *Id.* at xv.

2. Eve Kosofsky Sedgwick has written on the universalizing and minoritizing aspects of homosexuality. EVE KOSOFSKY SEDGWICK, *EPISTEMOLOGY OF THE CLOSET* 1 (1990).

3. The largest lesbian and gay advocacy organization, the Human Right Campaign (HRC), did not officially incorporate transgender issues until 2002. Aaron H. Devor & Nicholas Matte, *One Inc. and Reed Erickson: The Uneasy Collaboration of Gay and Trans Activism*, in *THE TRANSGENDER STUDIES READER* 389 (Susan Stryker & Stephen White eds., 2006). The National Gay and Lesbian Task Force added transgender issues in 1997. *Id.*

4. For example, HRC resisted repeated calls to lobby for the inclusion of the categories of gender identity and expression in the proposed Federal Employment Nondiscrimination Act (ENDA) that would bar discrimination in employment based on sexual orientation. Julie Greenberg, *Intersex and Intra-sex Debates: Building Alliances to Challenge Sex Discrimination*, 12 *CARDOZO WOMEN’S L.J.* 99, 106 (2005).

even less successful and, at times, has been marked by outright hostility.⁵ This article, written largely for an audience who does not identify as transgender, makes the case for greater inclusion of transgender issues by identifying and examining various points of resistance, outlining commonalities, and proposing action steps.

At the outset, it is critical to acknowledge that what might strike us as a relatively esoteric adventure in gender theory represents the lived experience of transgender individuals.⁶ Although theory can certainly help to illuminate life, and I personally believe that my life has been made richer by it, theory is something we produce to serve the living. All the theory in the world will not erase the fact that one of the greatest health risks facing transgender individuals is violence.⁷ This violence is often fueled by transphobic claims of fraud and deception.⁸ These charges are echoed by the law that also speaks in terms of “gender fraud” and carefully polices the binary gender system in an effort to maintain an objective and knowable gender truth.⁹ The burdens of the binary fall disproportionately on the most vulnerable segments of society: the poor, the homeless, and the incarcerated. It is imperative to make space within the law and within society for individuals to live and express their gender identity as they experience it and choose to define it. Considerations of how transgender identities and embodiments challenge and expand our own understanding of gender are necessarily tertiary to these pressing issues of safety and legal reform.

Given the manifest injustice experienced daily by transgender individuals, it is vexing that many otherwise progressive thinking individuals continue to dismiss transgender issues—saying they just don’t “get it.” These same progressive thinkers might advocate all manner of non-traditional pursuits for both men and women and generally applaud instances of gender variance. However, when faced with a person who seeks bodily modification or a change in gender markers or a name change or

5. See generally JANICE G. RAYMOND, *THE TRANSSEXUAL EMPIRE: THE MAKING OF THE SHE-MALE* (1994) (providing incendiary indictment of male-to-female transsexuals from a purportedly feminist perspective).

6. See JACOB HALE, *SUGGESTED RULES FOR NON-TRANSSEXUALS WRITING ABOUT TRANSSEXUALS, TRANSSEXUALITY, TRANSSEXUALISM OR TRANS ____*, <http://www.sandystone.com/hale.rules.html> (last visited June 15, 2007).

7. NAT’L COAL. FOR LGBT HEALTH, *AN OVERVIEW OF U.S. TRANS HEALTH PRIORITIES*, <http://www.nctequality.org/HealthPriorities.pdf> (last visited June 15, 2007).

8. See Kate Bornsetin, *Gender Terror, Gender Rage*, in *THE TRANSGENDER STUDIES READER*, *supra* note 3, at 237 (noting revulsion at trans embodiments often followed “by a physical attack”).

9. For example, in 2004 a transwoman in Kansas who had changed her legal gender markers was arrested and charged with “false swearing” when she indicated that she was female on an application for a marriage license. David Ranney, *Judge Finds Transsexual Did Not Intentionally Mislead Authorities*, *LAWRENCE JOURNAL-WORLD (KAN.)*, Nov. 17, 2004, available at http://www2.ljworld.com/news/2004/nov/17/judge_finds_transsexual.

2007 GENDER MATTERS: MAKING THE CASE FOR TRANS INCLUSION 3

new pronouns, their immediate response is: “Why would anyone want to do *that*?” Despite their best efforts, these progressive individuals succumb to the “ick” factor.¹⁰

The progressive refusal to embrace transgender issues has caused considerable pain in certain transgender communities, and it has squandered opportunities for coalition and alliance building.¹¹ I attribute much of the progressive resistance to the transgender narrative to a particular form of post-feminist agnosticism regarding gender that served as a central tenet of identity formation for many of us who were born in the 1960s and 1970s. Growing up, we were told that we could be anything we wanted to be and gender didn’t matter. In college, we faithfully repeated the mantra that gender was a social construct.¹² On some elemental level, we were raised to believe that gender is not real and, therefore, it is difficult for us to fathom how one could take gender so seriously that it literally redefines the person.¹³ Thus, the first step toward understanding transgender issues is to shed this utopian view of gender. Of course, gender matters. We have been living and advocating an aspirational view of gender. When we stubbornly say that gender does not matter, what we really mean is that gender *should* not matter.

Once we allow that gender matters, the transgender truth claims regarding the press and weight of gender no longer ring of false consciousness. This opens the space to explore commonalities. For example, my early “tomboy” narrative reads much like the stock transman narrative necessary to secure a diagnosis of Gender Identity Disorder and the attendant access to medical resources.¹⁴ This commonality represents an irrefutable degree of kinship. The fact that my personal narrative stops short of somatic dissonance and desire for bodily modification does not prove that I

10. This is also known as the “yuck factor.” See Leon R. Kass, *The Wisdom of Repugnance*, June 2, 1997, available at http://www.catholiceducation.org/articles/medical_ethics/me0006.html.

11. See RICKI ANNE WILCHINS, READ MY LIPS: SEXUAL SUBVERSION AND THE END OF GENDER 109–14 (1997) (describing controversy over Michigan Womyn’s [sic] Music Festival trans admission policy).

12. See generally PETER L. BERGER & THOMAS LUCKMANN, *THE SOCIAL CONSTRUCTION OF REALITY: A TREATISE IN THE SOCIOLOGY OF KNOWLEDGE* (1966) (introducing the concept of social construction).

13. For example, Annalee Newitz asserts that transgender individuals live out a “compensatory fantasy” that “generates forms of satisfaction that reality does not provide.” Annalee Newitz, *Gender Slumming*, BAD SUBJECTS, Sept. 1993, <http://bad.eserver.org/issues/1993/07/newitz.html>.

14. The DSM-IV classifies GID as a mental disorder. GID is the diagnosis given to transgender and other gender-variant individuals. GID replaced the prior term of “gender dysphoria.” Because GID is classified as a mental disorder, some transgender individuals consider it offensive. However, the diagnosis is often necessary to secure medical intervention to further bodily modification. Dean Spade, *Resisting Medicine, Re/Modeling Gender*, 18 BERKELEY WOMEN’S L.J. 15, 18 (2003) (discussing the “oppressive relationship between medicine and gender transgressive people”). In addition, there has been considerable criticism of the use of a GID diagnosis to label gender non-conforming children. JUDITH BUTLER, UNDOING GENDER 97 (2004).

am well adjusted and the transman is delusional. The fact that I have not experienced that desire does not invalidate it.

From a position of commonality within our difference, it is then possible to consider how transgender identities and embodiments challenge and enhance our understanding of existing identity formations. What possibilities exist within the categories of man/woman once the gender assigned at birth is no longer an inexorable command? Are the terms heterosexual/homosexual now hopeless incoherencies? These questions (and others) have produced considerable anxiety in certain identity-based communities, particularly lesbian communities.¹⁵ Regardless of any personal feelings of loss or dislocation, I believe that we have a responsibility to engage these challenges rather than dismiss them.

Many of us probably share a healthy skepticism of stable identities and various forms of essentialism. Although we may know that identities are historically contingent, the limits of that knowledge might be tested when the identity in question happens to be the one we are currently using. For example, we may have no difficulty discussing the myth of the transhistorical homosexual subject,¹⁶ but may bristle at the assertion that someone who was a lesbian and who now identifies as male (and perhaps always did) can still maintain the identification of “dyke” while pursuing relationships with other male-identified individuals (who may or may not have been assigned that gender at birth).¹⁷ If you had to read that last sentence several times, then I invite you to spend some time on a social networking site with active trans communities, such as LiveJournal.¹⁸ The twenty-something generation is presently engaged in a redefinition of gender and sexuality that is guaranteed to make your queer head spin.

The fact that the transgender movement has particular resonance to the twenty-something generation (i.e., Generation Y) underscores the historical contingency of identity and places an even greater responsibility on the resistant Baby Boomers and Gen Xers to get with the program of trans

15. Gayle Rubin notes “many lesbian[s] are antagonistic toward transsexuals, treating male-to-female transsexuals as menacing intruders and female-to-male transsexuals as treasonous deserters.” Gayle Rubin, *Of Catamites and Kings: Reflections on Butch, Gender, and Boundaries*, in *THE PERSISTENT DESIRE: A FEMME-BUTCH READER* 474 (Joan Nestle ed., 1992); see also Zachary I. Nataf, *Lesbians Talk Transgender*, in *THE TRANSGENDER STUDIES READER*, *supra* note 3, at 439.

16. See EDWARD STEIN, *THE Mismeasure of Desire: The Science, Theory, and Ethics of Sexual Orientation* 93–116 (1999) (discussing essentialist/constructionist debate).

17. See Jason Cromwell, *Queering the Binaries: Transsituated Identities, Bodies, and Sexualities*, in *THE TRANSGENDER STUDIES READER*, *supra* note 3, at 515–17 (discussing “subversive sexual desires”); see also Rubin, *supra* note 15, at 475–76 (arguing lesbian community should not ostracize FTMs).

18. LiveJournal Home Page, <http://www.livejournal.com> (last visited Aug. 17, 2007). A recent search on LiveJournal.com for communities interested in the key word “transgender” produced 402 results.

2007 GENDER MATTERS: MAKING THE CASE FOR TRANS INCLUSION 5

inclusion.¹⁹ This is especially true given the fact that we are the folks currently assuming positions of power within the academy, the bench, and the bar. Certainly, the notion of a generation gap is a familiar one. It is a common tension running through families, as often reflected for our amusement, in novels, movies, and television sit-coms.²⁰ However, the ramifications of a generation gap are very different when it occurs in identity-based communities as opposed to traditional families.²¹ Within your family of origin, generational miscommunication and conflict mark a rite of passage. Absent a particularly egregious lapse, the youth does not get thrown out of the house nor does the youth dispossess the parents. Within an identity-based community, a generational redefinition can mark a complete schism. Resources are wasted, alliances are lost, and inevitably some of the participants are pilloried for their positions. When we remember that an identity-based community often represents an individual's chosen family, the threat of expulsion or rejection is especially harsh and can have devastating consequences on both the individual and the group.²²

We have the tools to prevent the schism. The first step is to admit that gender matters, although we can certainly remain convinced that it *should* not matter. Second, we should explore commonalities without invalidating difference. We all experience gender and participate in the gender system. Third, we have to face our anxiety and re-examine our own identity formations in light of emerging transgender identities and embodiments. We owe it to ourselves and to the new generation of creative and fearless individuals who are trying to make sense of the gender binary while fashioning new ways to live and love. They deserve our support. Besides, the family resemblance is undeniable.

19. See generally WILLIAM STRAUSS & NEIL HOWE, *THE FOURTH TURNING* (1997) (classifying Anglo-American generational archetypes). According to Strauss and Howe, Baby Boomers were born from 1943 until 1960. Gen Xers, also referred to as the Thirteenth Generation, were born from 1961 to 1981. Generation Y, also referred to as the Millennial Generation, consists of individuals born from 1982 to 2003.

20. The term generation gap was popularized in the late 1960s to reflect the tension between the youth culture of the Baby Boomers and their parents' generation who had fought in World War II.

21. Gay and lesbian communities are examples of identity-based communities. Given that homophobia may complicate relations with an individual's family of origin, these identity-based communities may serve as the base for an individual's "chosen family." See KATH WESTON, *FAMILIES WE CHOOSE: LESBIANS, GAYS, KINSHIP* (1997).

22. Rubin notes, "[a] woman who has been respected, admired, and loved as a butch may suddenly be despised, rejected, and hounded when she starts a sex change." Rubin, *supra* note 15, at 475.

II. THE NECESSARY LIE: GENDER DOESN'T MATTER

The progressive resistance to transgender narratives is rooted in a post-feminist agnosticism regarding the nature of gender as a social construct.²³ In many instances, this understanding of gender has served us well. However, our preoccupation with the temporal nature of gender and gender expression has discounted its present social meaning and ignored the basic fact that, as a social *construct*, gender matters. It has also led us to misinterpret historical transgender identities and embodiments as wholly instrumental deployments of gender, exemplified by the label “passing women.”²⁴ Accordingly, the chimera that gender doesn't matter has outlived its usefulness, and it is time to leave the comfort of its lie.

When our parents and teachers and mentors and classmates told us that gender did not matter, what they really meant was that gender *should* not matter. In other words, there are no biological or other objective considerations that would bar women from excelling in certain professions or prevent men from being nurturing stay-at-home parents. However, the fact that gender could not thus constrain us as it had prior generations did not mean that gender would not continue to define us. The transgender narratives report first-hand the contemporary significance of gender in the social and political struggle for legibility.²⁵

23. See JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF GENDER 7–9 (1990) (discussing cultural construction of gender).

24. JONATHAN NED KATZ, GAY AMERICAN HISTORY: LESBIAN AND GAY MEN IN THE U.S.A. (rev. ed. 1992).

25. Some of the first transgender narratives were compiled by medical researchers who worked to define and diagnose transsexualism. For example, Harry Benjamin's 1966 book THE TRANSSEXUAL PHENOMENON detailed his experience with hundreds of transgender patients. Dallas Denny, *Changing Models of Transsexualism*, in TRANSGENDER SUBJECTIVITIES: A CLINICIAN'S GUIDE 26 (Ubaldo Leli & Jack Descher eds., 2004). As discussed *infra*, these early iterations of the transgender experience became the standard for diagnosis and transgender individuals who desired medical intervention modeled their personal narratives to comply with Benjamin's early case studies. See *infra* text accompanying notes 89–91. In addition to these clinical collections, throughout the 1960s and 1970s, transgender individuals produced autobiographies detailing their individual journeys, largely in terms that conformed to the accepted medical model. See PAT CALIFIA, SEX CHANGES: THE POLITICS OF TRANSGENDERISM 11–48 (1997) (discussing “first wave” of transsexual autobiography written by of Christine Jorgensen, Jan Morris, and Mario Martino). The 1980s saw a new wave of transgender autobiography that departed the prevailing medical model and laid the groundwork for transgender activism. *Id.* at 163–92 (discussing autobiographical work by Renee Richards, Leslie Feinberg, and Kate Bornsetin). In recent years there has been an explosion of transgender autobiographical works, including full-length book projects, anthologies, and first-person articles. JENNIFER FINNEY BOYLAN, SHE'S NOT THERE: A LIFE IN TWO GENDERS (2004) (autobiography); CROSSING SEXUAL BOUNDARIES: TRANSGENDER JOURNEYS, UNCHARTED PATHS (J. Ari Kane-DeMaio & Vern L. Bullough eds., 2006) (anthology); HOLLY DEVOR, FTM: FEMALE-TO MALE TRANSSEXUALS IN SOCIETY (1999) (sociological study); GENDERQUEER: VOICES FROM BEYOND THE BINARY (Joan Nestle et al. eds., 2002) (anthology); JAMISON GREEN, BECOMING A VISIBLE MAN (2004) (autobiography); VIVIANE K. NAMASTE, INVISIBLE LIVES: THE ERASURE OF TRANSSEXUAL AND TRANSGENDERED PEOPLE (2002) (sociology); THE PHALLUS PALACE: FEMALE TO MALE TRANSSEXUALS (Dean Koluta ed., 2002); SEXUAL

2007 GENDER MATTERS: MAKING THE CASE FOR TRANS INCLUSION 7

This section explores the nature of the progressive resistance to transgender narratives. It first parses the progressive characterization of any form of gender reassignment as a reactionary measure that re-inscribes the gender binary. It then demonstrates the difficulty of incorporating transgender narratives in a world view where gender is *merely* a social construct. It concludes with a discussion of how feminist and gay and lesbian histories have erased or demonized transgender identities and how the continued currency of these histories serves to invalidate the contemporary transgender experience.

A. Transgender Identities as Reactionary

The first stumbling block to accepting, or at least not dismissing, transgender narratives is a lack of empathy. Perhaps this is because many non-trans-identified progressive individuals do not have a particularly strong sense of being gendered. Or perhaps it is because our sense of gender is in harmony with our assigned and perceived gender, and therefore, gender does not represent a friction point in our lives. An analogous example could be the white person who does not have an active awareness that s/he is raced.²⁶

In the course of many conversations, I have heard otherwise progressive and open-minded people report that when it comes to transgender issues, they just “don’t get it.” Until recently, I could be counted as among those otherwise progressive folks for whom transgender issues seemed at best foreign and at worst reactionary. During these, at times, heated conversations, a commonly heard refrain is: “Why would anyone want to do *that*?” The word *that* can be used as a stand in for any number of steps that indicate a repudiation of the gender assigned at birth: a name change, different pronouns, a change in legal gender markers, hormone treatment, surgical modification, or sex reassignment (aka confirmation) surgery.²⁷

METAMORPHOSIS: AN ANTHOLOGY OF TRANSSEXUAL MEMOIRS (Jonathan Ames ed., 2005); WILCHINS, *supra* note 11 (autobiography). In addition, the Internet and the opportunity for online social networking has greatly enhanced the availability of transgender autobiographical writing. See Stephen Whittle, *Forward* to THE TRANSGENDER STUDIES READER, *supra* note 3, at xii (noting that “Internet development was crucial to the development of a new, geographically dispersed, diverse trans community in the 1990s”).

26. RUTH FRANKENBERG, WHITE WOMEN, RACE MATTERS: THE SOCIAL CONSTRUCTION OF WHITENESS 142 (1993) (describing color-blind thinking as the “polite language of race”). Attempts by white people to muster empathy often fail because the analogies white people draw regarding race result in trivialization or create “false empathy.” See RICHARD DELGADO, THE COMING RACE WAR? 4–36 (1996) (discussing dearth of empathy and abundance of “false empathy”).

27. For example, Dean Koluta notes, “I object to the term *transgender* when applied to transsexuals, since we are not changing our gender . . . but are instead changing our body’s sex.” Dean Koluta, *Introduction* to THE PHALLUS PALACE, *supra* note 25, at xx.

Many of the same people who dismiss the relevancy, or even legitimacy, of transgender issues might be proud of their own episodes of gender variance and go to great lengths to make sure that their children have a range of non-traditional toys, books, and role models. Under this worldview, gender variance is desirable, but only provided the individual remains moored to the gender assigned at birth. Indeed, the transgressive qualities of gender variance are only legible if the individual starts with an identifiable and knowable gender. There can be no meaningful variance without an original position.

Moreover, efforts to jump gender and assert gender self-definition through some form of reassignment—whether social, legal, and/or physical—are branded as the antithesis of the otherwise admired gender variance. According to this reasoning, taking steps to secure gender recognition is regressive because such actions reinforce the binary gender system which, we all know, is an oppressive social construct at the root of much inequality and human suffering. This last rhetorical flourish allows the progressive thinker to retain the title of “progressive” while the transgender individual is dismissed as reactionary.²⁸ The progressive thinker is more evolved because s/he sees past the restrictive gender system. The reasoning is self-flattering and nicely maintains the status quo. It goes something like this:

After all, gender is *just* a social construct. For goodness sake, we have known that since Margaret Mead got back from Samoa. How sad that some people get trapped by gender and can't see any other way out. I've never let my gender stop me from doing anything. Are there *still* people out there who think you have to change sex in order to act in a certain way? Is it *really* worth self-mutilation? I guess if it causes them such horrendous psychic harm, then medical intervention might be warranted—like the amputee people. What a shame. I don't think medicine should encourage this.²⁹

Obviously, this mode of thinking dismisses the transgender demand for gender recognition consistent with gender identity. It ignores the fact that transgender individuals report an intense desire for such recognition and denies their claim for the right to gender self-definition. It also fails to

28. Newitz asserts that “[t]ransgender could . . . be understood as a form of nostalgia for traditional gender.” Newitz, *supra* note 13.

29. Joanne Meyerowitz notes: “From the 1920s on, Margaret Mead and others had argued that sex roles which varied across cultures, resulted from social learning.” JOANNE MEYEROWITZ, HOW SEX CHANGED: A HISTORY OF TRANSSEXUALITY IN THE UNITED STATES 114 (2002). Susan Stryker relates a similar line of reasoning. Susan Stryker, (*De*)Subjugated Knowledges: An Introduction to Transgender Studies, in THE TRANSGENDER STUDIES READER, *supra* note 3, at 1 (describing “a line of thinking . . . that passed at the time for a progressive point of view among many on the cultural left”).

acknowledge the simple fact that innumerable transgender individuals report that the harmonization of gender recognition and gender identity can greatly enhance their individual sense of self-fulfillment and happiness.

B. *Gender Doesn't/Shouldn't Matter*

Unfortunately, this gender agnosticism or outright disbelief in gender might be difficult to shake, given that it has provided many of us with a much needed coping mechanism as we set about the process of self-definition. As a child of the second wave of feminism, I am the classic post-feminist gender agnostic, and I can't say that I have ever particularly felt the press or pull of gender. I suspect that there are a good number of you out there who, like me, go about your daily business secure in the belief that anatomy is not destiny and that gender is a social construct.³⁰ We teach this to our children and try to model it for our students. Indeed, for the women of my generation, many of the steps we took and the life choices we made were only possible because we believed that the traditional concept of woman could not constrain us. We are the proof that Freud was wrong and Larry Summers be damned.³¹

For women who grew up in the late 1960s and 1970s, gender and gendered expectations could at times be a bit of a drag.³² Our refusal to believe in gender, or be limited by it, did not mean that we escaped the gender system or necessarily rejected gender entirely. In the space between disbelief and rejection, we theorized our participation in terms of individual agency. As a result, many of us wear our gender lightly—feeling free to pick and choose from a broad range of gender expression. Some of us wear our assigned gender aggressively, but when we do so, we say that we affirmatively *choose* it. As one of my colleagues is fond of saying, “feminism gives me the ability to *choose* to wear pink spike-heeled shoes.” She then mentions the Emma Goldman (mis)quote about the need to have dancing at the revolution.³³ Personally, I have never quite graduated from

30. Both Simone de Beauvoir and Betty Friedan took issue with Freud's assertion that “anatomy is destiny.” SIMONE DE BEAUVOIR, *THE SECOND SEX* 42 (1949); BETTY FRIEDAN, *THE FEMININE MYSTIQUE* 18 (1963). For a discussion of the meaning of the phrase, see Tori Moi, *Is Biology Destiny? Freud and Biological Determinism*, in *WHOSE FREUD? THE PLACE OF PSYCHOANALYSIS IN CONTEMPORARY CULTURE* 72 (Peter Brooks & Alex Woloch eds., 2000).

31. See Sam Dillon & Sara Rimer, *No Break in Storm over Harvard President's Words*, N.Y. TIMES, Jan. 19, 2005, at A14 (discussing statements made by Summers concerning women and science).

32. Patti Smith once remarked, “[a]s far as I'm concerned being any gender is a drag.” Cliff Jahr, *Patti*, NEW TIMES MAG., Dec. 26, 1975, <http://www.oceanstar.com/patti/intervus/751226nt.htm>.

33. The (mis)quote frequently attributed to Emma Goldman and printed on t-shirts is: “If I can't dance, I don't want to be in your revolution.” Alix Kates Shulman, who wrote an early biography of Goldman, has explained that the quote is a distilled version of an incident reported by Goldman in her

the angry sartorial splendor of Queer Nation kids, although I am increasingly thankful to Ellen DeGeneres for providing a role model who wears V-neck sweaters and flat shoes.³⁴ Ms. Goldman would also approve of her dancing.³⁵

For those of us committed to maximizing such personal agency, Judith Butler's notion of gender as the performative made intuitive sense of our daily, and often uneasy, negotiations within the gender system.³⁶ What some derided as elliptical jargon,³⁷ reads to many of us as an astute and insightful treatment of our lived experience—that sometimes truly elliptical race to distance ourselves from the category of “woman” as it existed when Betty Friedan published *The Feminine Mystique*.³⁸ Of course, to us, it was imperative that we believe that there was nothing real or true about that category.³⁹ In this way, we understood—through our lived experience—that all gender was a copy for which there was no original.⁴⁰

Transgender narratives represent a much more fundamental engagement of the gender system. Our source of friction with the gender system was largely centered on the restrictive socially constructed categories of man and woman (circa 1963).⁴¹ While remaining gendered, we rejected the prescribed content of these categories and increased the range of available role options and acceptable expression for each gender. This changed and expanded the gender system, but it did not dismantle it. Legal reforms

autobiography. Alix Kates Shulman, *Dances with Feminists*, WOMEN'S REV. OF BOOKS, Dec. 1991, http://sunsite3.berkeley.edu/Goldman/Features/dances_shulman.html.

34. Alessandra Stanley, *Bringing a Touch of Daytime to Hollywood's Biggest Night*, N.Y. TIMES, Feb. 26, 2007, at E1.

35. Jacques Steinberg, *Miss Congeniality Wants the Oscars to be Fun*, N.Y. TIMES, Oct. 5, 2006, at E1 (explaining DeGeneres' habit of dancing through the audience).

36. BUTLER, GENDER TROUBLE, *supra* note 23, at 140. Butler writes:

Gender ought not to be constructed as a stable identity or locus of agency from which various acts follow; rather, gender is an identity tenuously constituted in time, instituted in an exterior space through a *stylized repetition of acts*. The effect of gender is produced through the stylization of the body and, hence, must be understood as the mundane way in which bodily gestures, movements, and styles of various kinds constitute the illusion of an abiding gendered self. This formulation moves the conception of gender off the ground of a substantial model of identity to one that requires a conception of gender as a constituted *social temporality* . . . a performative accomplishment which the mundane social audience, including the actors themselves, come to believe and to perform in the mode of belief.

Id. at 140–41.

37. Martha Nussbaum, *The Professor of Parody*, NEW REPUBLIC, Feb. 22, 1999, at 45.

38. FRIEDAN, *supra* note 30.

39. BUTLER, GENDER TROUBLE, *supra* note 23, at 141. Butler writes: “Genders can be neither true nor false, neither real nor apparent, neither original nor derived. As credible bearers of those attributes, however, gender can also be rendered thoroughly and radically *incredible*.” *Id.*

40. *Id.* at 138. Discussing drag performances, Butler writes: “The notion of gender parody defended here does not assume that there is an original which such parodic identities imitate. Indeed, the parody is *of* the very notion of an original.” *Id.*

41. Betty Friedan published *THE FEMININE MYSTIQUE* in 1963. Margalit Fox, *Betty Friedan, Who Ignited a Movement with ‘The Feminine Mystique’ Dies at 85*, N.Y. TIMES, Feb. 6, 2006, at A20.

2007 *GENDER MATTERS: MAKING THE CASE FOR TRANS INCLUSION* 11

declared considerations of gender irrelevant in employment, housing, education, and the like.⁴² Increasingly, the gender of one's romantic partner is no longer of consequence.⁴³ These efforts at legal reform set about to outlaw the opinions and prejudices that perpetuated the categories we had already rejected as unreal and unreasonable. However, the reforms left in place a binary gender system that the law continues to police with considerable zeal. As discussed below in Part IV.C., I believe many non-transgender individuals would be shocked at the extent to which gender remains an important part of our public life. Gender may be legally irrelevant for most purposes, but in order to be a recognizable legal subject, you must first *have* a legible and legally sanctioned gender. In this way, the legal reforms instituted in the wake of the second wave of feminism never addressed the fundamental concept of being gendered because it was not something that we ever questioned.

It would be a shame to stop our interrogation of the gender system simply because we have managed to carve out sufficient breathing space for ourselves. Although gender may be a social construct, its danger, and the reason we rail against its limitations, is precisely because we render ourselves socially, politically, and legally legible through gender. If we are not going to dismantle the gender system, then it is imperative to create sufficient breathing space within the system for everyone—regardless of how they experience gender. Continued resistance to transgender narratives and their demand for gender self-definition robs us of potential allies and abnegates our responsibility to the next generation to continue to act as agents for progressive social change.

C. Come to Find Out—Our Histories Often Reflect the Present

The same gender agnosticism that helped us navigate difficult life choices also influenced the way we interpreted history and fashioned our role models. As the second wave of feminism exploded the myth that anatomy was destiny, it looked to history for examples of remarkable women who defied gender barriers.⁴⁴ The first wave of the related lesbian and gay civil rights movement also mined history to find inspirational examples of same-sex relationships and individuals who risked everything

42. For example, Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment “because of . . . sex.” 42 U.S.C. § 2000e-2 (2006). The Federal Fair Housing Act forbids discrimination in housing based on sex. 42 U.S.C. § 360 (2006). Title IX prohibits discrimination in education “on the basis of sex.” 20 U.S.C. § 1681 (2006).

43. For example, it is no longer constitutionally permissible to criminalize consensual adult homosexual conduct. *See* *Lawrence v. Texas*, 539 U.S. 558 (2003).

44. *See* Shulman, *supra* note 33 (explaining how Emma Goldman became a “hero of women’s liberation”).

for their right to love.⁴⁵ These histories greatly influenced identity formation for those of us coming of age in the 1970s and 1980s and helped forge our conviction that issues of sexuality and desire are distinct from gender.⁴⁶ Upon review of some of the basic texts, it is startling to see that many of these histories were premised on a complete negation of transgender possibilities.⁴⁷ Thus, overcoming the progressive resistance to the transgender narrative also involves unlearning some of our basic history lessons—lessons that in retrospect we can see were crafted as much to counter the prevailing views of womanhood as they were to educate.

These histories have long since passed into the revisionist canon and have been retold to new generations as morality tales where the individual triumphs over the life-denying constraints of gender. The heroes who emerge tell a consistent story of gender, as exemplified by the stock character of the “passing women.”⁴⁸ Prior to the second wave, as the story goes, gender roles were so rigid and impermeable that some women had no choice but to pass as men in order to pursue their dreams. Sometimes these dreams involved practicing medicine. Other times, the goal was simply to live openly with a female partner. In either event, these “passing women,” as they were called, chose to masquerade as men to secure male privilege and material advantage.⁴⁹ Under this retelling, their repudiation of the gender they were assigned at birth was a wholly instrumental decision as opposed to a fundamental need. Their actions were necessitated by the widely-held false belief that the gender assigned at birth determined an individual’s abilities. The “passing women,” we learned, were motivated by career goals and/or sexuality—not an overwhelming organic knowledge that they did not belong to the gender they were assigned at birth.

It is easy to see how this understanding of “passing women” directly informs the progressive resistance to contemporary transgender narratives. First and foremost, “passing women” are always women, referred to by their female name and female pronouns.⁵⁰ Their chosen lives are presented as an elaborate illusion or ruse; the result of a well-executed and completely self-aware performance or masquerade. They do not represent a

45. See generally LEILA J. RUPP, *A DESIRED PAST: A SHORT HISTORY OF SAME-SEX LOVE IN AMERICA* (1999).

46. For a discussion of the connection that gay men and lesbians feel for history, see SCOTT BRAVMANN, *QUEER FICTIONS OF THE PAST: HISTORY, CULTURE, AND DIFFERENCE* 4 (1997) (asserting that queer fictions of the past [are] important social/cultural texts in the articulation of lesbian and gay identities and differences).

47. See, e.g., KATZ, *supra* note 24, at 209–10.

48. Jonathan Katz coined the term “passing women” in his seminal 1976 book on lesbian and gay history. *Id.* at 209.

49. *Id.* at 209–10.

50. *Id.*

2007 GENDER MATTERS: MAKING THE CASE FOR TRANS INCLUSION 13

historical variation of trans identifications but instead are driven, career-oriented, and sexually-variant women who were willing to go to great lengths to achieve their goals.

If one accepts “passing women” as sexually variant career-minded gals who were ahead of their time, then contemporary conditions with respect to gender role options and the recognition of same-sex relationships arguably eliminate the need to jump gender. If gender is no longer a barrier to entry to the professions and same-sex couples can live openly in relative safety, then there remains no cognizable reason for individuals to repudiate their gender assigned at birth. Under this reasoning, individuals who still express a desire to do so are clinging to outmoded notions of gender. They are sadly misguided, hopelessly reactionary, and perhaps guided by the corrosive compulsions of internalized homophobia.

This portrayal of “passing women” spoke directly to the goals of the second wave of feminism and the related gay rights movement. As noted in the above section, the two main gender friction points experienced by non-trans identified individuals are gender role limitations and the condemnation of same-sex relationships. Just as it is not surprising that the most successful social and legal reforms have concentrated on these areas, it is understandable that the new histories constructed narratives that revolved around these flashpoints. By privileging career aspirations and sexuality, the histories established an immediate commonality between the travails of the “passing women” and modern day women. In addition, the fact that the “passing women” were skilled illusionists reflected a non-essential view of gender as something that can be consciously deployed and adopted instrumentally as may be required by the situation.

The seminal characterization of “passing women” as proto-lesbian-feminists was Jonathan Katz’s 1976 highly influential *Gay American History*.⁵¹ Describing the phenomenon of “passing women,” Katz explained that “[d]espite their masculine masquerade, the females considered here can be understood not as imitation men, but as real women, women who refused to accept the traditional, socially assigned fate of their sex, women whose particular revolt took the form of passing as men.”⁵² In order to reclaim the “passing women” as “women-loving women,” Katz indulged in some striking feats of psychoanalysis that, albeit popular at the time, were exactly the type of phantasmagorical machinations that secured a listing for

51. *Id.*

52. *Id.* at 209. Katz defended his characterization as follows: “In a most radical way, the women whose lives are recounted here rejected their socially assigned passive role; they affirmed themselves as self-determined, active, assertive, powerful—in the way they knew, the guise of men. These passing women can only be understood within the framework of a feminist analysis.” *Id.* at 211.

homosexuality in the *Diagnostic Statistical Manual* until 1973.⁵³ For example, Katz theorizes that when Dr. Alan Hart (née Alberta Lucille Hart) requested a hysterectomy in 1918,⁵⁴ his decision “was socially coerced”⁵⁵ and he was “clearly express[ing] her need to neutralize guilt about Lesbianism.”⁵⁶ Influenced by French post-structuralism, Katz explains that “passing women” did not actually desire bodily modification.⁵⁷ Rebuffing even the slightest whiff of penis envy, Katz writes: “[T]he ‘passing woman’ does not identify herself as of the male gender. She does not wish to possess a male body; she wants to play ‘the role of a male,’ not be male. It is not the male’s penis she covets, but the male’s socially given power.”⁵⁸

In recent years, trans activists have challenged this view of historical figures, including Dr. Hart. In 1982, a lesbian and gay advocacy group in Oregon inaugurated a service award in the name of Lucille Hart that was presented at a dinner bearing the same name.⁵⁹ Consistent with Katz’s treatment of Hart as a female-identified lesbian, information the organization prepared about Hart used his birth name, referred to him with female pronouns, and described him as “Oregon’s most famous lesbian.”⁶⁰ This prompted protests from trans activists who urged the organization to set the record straight—Dr. Alan Hart was a transman.⁶¹ Under pressure, the gay organization finally relented in 1996 and stopped using Hart’s name entirely.⁶²

Other examples of this (mis)understanding of trans identities include the way the media reported the 1996 murder of Brandon Teena⁶³ and the 1989 revelation that the deceased jazzman Billy Tipton was born female.⁶⁴ In the case of Brandon Teena, much of the press coverage used female

53. For a discussion of the fight to declassify homosexuality as a mental disorder, see RONALD BAYER, *HOMOSEXUALITY AND AMERICAN PSYCHIATRY: THE POLITICS OF DIAGNOSIS* (1987). Although homosexuality was deleted in 1973, ego-dystonic homosexuality remained until 1987. *Id.* at 176.

54. For a trans-centric view of Dr. Hart’s life, see Ken Morris and Kay Brown, *The Alan Lucille Hart Story*, available at http://www.transhistory.net/history/TH_Alان_Hart.html (last visited Mar. 4, 2007). See also Margaret Deirdre O’Hartigan, *Alan Hart*, in *THE PHALLUS PALACE*, *supra* note 25, at 157–66.

55. KATZ, *supra* note 24, at 279.

56. *Id.* at 278.

57. *Id.* at 277.

58. *Id.*

59. O’Hartigan, *supra* note 54, at 158.

60. *Id.* at 160.

61. *Id.* at 161.

62. Tom Bates, *Decades Ago: An Oregon Doctor Tried to Redefine Gender*, *SUNDAY OREGONIAN*, July 14, 1996, at B1.

63. CALIFIA, *supra* note 25, at 230.

64. See generally DIANE WOOD MIDDLEBROOK, *SUITS ME: THE DOUBLE LIFE OF BILLY TIPTON* (1999).

2007 GENDER MATTERS: MAKING THE CASE FOR TRANS INCLUSION 15

pronouns, described him as a lesbian, and explained that his choice to pass as a boy in rural Nebraska was necessitated by homophobia.⁶⁵ Billy Tipton on the other hand was reported as a historical example of what women had to do in order to get a break in certain professions. As his biographer explained in 1998, “Billy was not unique in solving an economic problem or seizing a tempting opportunity just by donning trousers.”⁶⁶

In addition to retelling these heroic tales of instrumental gender variance, the emerging fields of women’s history and gay and lesbian history also addressed the question of gender roles within the gay and lesbian communities. Unlike the individual tales of gender variance, the adoption of group-wide gender standards was not valorized.

Instead, it was the brave souls who resisted community gender norms who were lauded for their vision and fortitude. This reflected the concerted effort to distance the contemporary gay rights movement from images of gender inversion and what was referred to as “role playing.”⁶⁷ The continued association of homosexuality with cross-gender performance was denounced as the result of either false consciousness exhibited by some community members who reflexively aped hetero-patriarchy or an unfortunate and persistent stereotype that originated with the early sexologists.⁶⁸ Drag queens were asked not to participate in early Gay Pride Parades, and the vibrant butch/femme communities of the 1950s were condemned as nothing more than a stifling facsimile of post-war gender roles and expectations.⁶⁹ The hostility directed at gender-atypical deployments of homosexuality undoubtedly helps to explain the sometimes uneasy and tumultuous incorporation of the “T” portion of LGBT.⁷⁰

Two very influential nonfiction books, published ten years apart, provide an excellent example of how feminist and gay and lesbian histories treated community-wide atypical gender norms. Both books told the story of equality-minded young lesbians who felt alienated and excluded from the 1950s bar culture due to their unwillingness to assume a butch or

65. CALIFIA, *supra* note 25, at 230.

66. MIDDLEBROOK, *supra* note 64, at 6. The term “transsexual” warrants one reference in the index and a cross reference to cross dressing performative.

67. CALIFIA, *supra* note 25, at 230.

68. Foucault asserted that homosexuality was “characterized . . . less by a type of sexual relations than by a certain quality of sexual sensibility, a certain way of inverting the masculine and the feminine in oneself.” 1 MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY* 43 (Robert Hurley trans., 1978); *see also* SEDGWICK, *supra* note 2, at 45–47 (discussing Foucault’s views on inversion).

69. *See* Devor & Matte, *supra* note 3, at 388 (noting that “[b]ull daggers, drag queens, transgendered and transsexual people, were largely treated as embarrassments in the “legitimate” fight for tolerance, acceptance, and equal rights”).

70. Kenji Yoshino notes that gender atypical behavior remains “a marker for homosexuality” and discusses the “force of the straight-acting homosexual—the butch gay man or the lipstick lesbian.” Kenji Yoshino, *Covering*, 111 *YALE L. J.* 769, 844 (2002).

femme gender role in order to be legible within that community. The 1972 book *Lesbian/Woman*⁷¹ was one of the first lesbian-affirming books put out by a mainstream publisher for a general audience. Authored by Del Martin and Phyllis Lyon, founders of the pre-Stonewall homophile group the Daughters of Bilitis, the book was widely popular and reissued in a twentieth anniversary edition.⁷² Written when homosexuality was still classified as a mental disorder, the book directly refuted the psychoanalytic understanding of the female homosexual as a “pseudo male”⁷³ with a feminist interpretation of women-identified-women.

Lesbian/Woman had nothing good to say about the butch/femme culture, except that it was on the wane. Clear that “[l]esbians are women who are attracted to women,”⁷⁴ the authors explained that lesbians often fell into butch/femme behavior due to cultural “brainwashing,”⁷⁵ noting that many “[l]esbians are caught up in the myths and stereotypes so prevalent in our society.”⁷⁶ According to Martin and Lyon, all lesbians who engaged in “role-playing” suffered from false consciousness.⁷⁷ In this way, the authors were not merely attempting to establish women-loving-women as distinct from butch/femme identifications; they were attempting to discredit butch/femme identities in their totality. For example, the authors include the first person narrative of a stone butch, but they roundly dismiss the narrator’s assertion that desire, for a stone butch, is “heterosexual.”⁷⁸ Using psychoanalytic terms similar to the ones they purport to reject, Martin and Lyon explain that the truth claims made by stone butches are simply “the way they have rationalized their feelings against the inferior status of being a woman.”⁷⁹ The authors then continue to connect the dots between butch behavior and the patriarchy, noting, “[s]trangely, it is those women who feel they were ‘born butch’ who tend to ape all the least desir-

71. DEL MARTIN & PHYLLIS LYON, *LESBIAN/WOMAN* (1972).

72. DEL MARTIN & PHYLLIS LYON, *LESBIAN/WOMAN* (rev. ed. 1991).

73. MARTIN & LYON, *supra* note 71, at 66. For example, Martin and Lyon rejected the psychoanalytic claim that certain sexual practices designed to “gratify the Lesbian’s thwarted maternal instinct.” *Id.*; see also Nancy J. Knauer, *Science, Identity, and the Construction of the Gay Political Narrative*, 12 *LAW & SEXUALITY* 1, 18–23 (2003) (summarizing American Freudian psychoanalytic view of homosexuality).

74. MARTIN & LYON, *supra* note 71, at 17. The first chapter gets right to the point and is entitled “The Lesbian—Myth & Reality” because, as Martin and Lyon explain, “[s]o little is known about the Lesbian.” Stressing the folly of role playing, Martin and Lyon note that many young lesbians “emulated the heroine, Stephen Gordon [the protagonist from *THE WELL OF LONELINESS*], only to find that their lover, like Phyllis, was not looking for a male substitute. For Lesbians are women who are attracted to women.” *Id.*

75. *Id.* at 6, 74.

76. *Id.* at 5.

77. *Id.*

78. *Id.* at 76.

79. MARTIN & LYON, *supra* note 71, at 76.

2007 GENDER MATTERS: MAKING THE CASE FOR TRANS INCLUSION 17

able characteristics of men.”⁸⁰ On a positive note, Martin and Lyon observe that thanks to women’s liberation, the days of butch/femme role playing were largely over by 1972.⁸¹ In their estimation: “The minority of Lesbians who still cling to the traditional male-female or husband-wife pattern in their partnerships are more likely old-timers, gay bar habituées or working class women.”⁸²

Audre Lorde’s memoir, *Zami: A New Spelling of My Name*, was quickly added to the Women’s Studies canon when it was published in 1982, and it remains there today.⁸³ Lorde’s lyrical retelling of her experiences with the gay-girl scene in New York City in the 1950s includes a damning description of the repressive and obligatory butch/femme identities adopted by gay bar habituées.⁸⁴ Like Martin and Lyon, Lorde reports that she did not fit neatly within the butch/femme universe. Lorde explains that she and a small handful of friends were “part of the ‘freaky’ bunch of lesbians who weren’t into role-playing, and who the butches and femmes . . . disparaged with the term Ky-Ky or AC/DC. Ky-Ky was the same name that was used for gay-girls who slept with johns for money. Prostitutes.”⁸⁵

However, unlike Martin and Lyon, Lorde does not bother to psychoanalyze why the butches were butchy and the femmes were femmy. To Lorde, the link between role-playing and hetero-patriarchy was clear:

For some of us, however, role-playing reflected the depreciating attitudes toward women which we loathed in straight society. It was a rejection of these roles that had drawn us to “the life” in the first place. Instinctively, without particular theory or political position or dialectic, we recognized oppression as oppression, no matter where it came from. But those lesbians who carved some niche in the pretend world of dominance/subordination, rejected what they called our “confused” life style, and they were in the majority.⁸⁶

Although later histories would re-examine the butch/femme lesbian communities of the 1950s through queer eyes, these early histories remain a searing indictment of group-held atypical gender norms.⁸⁷ Like the sto-

80. *Id.*

81. *Id.* at 80.

82. *Id.*

83. AUDRE LORDE, *ZAMI: A NEW SPELLING OF MY NAME* (1982).

84. *See generally id.*

85. *Id.* at 178.

86. *Id.* at 221.

87. For a more sympathetic reading of the butch/femme bar communities, see ELIZABETH KENNEDY & MADELINE DAVIS, *BOOTS OF LEATHER, SLIPPERS OF GOLD: THE HISTORY OF A LESBIAN*

ries of the historical “passing women,” these first-hand accounts of butch/femme culture invalidate and deny transgender identities and embodiments. Butch/femme identities are not seen as anything more than gender *play*, with butches and femmes merely “aping” heterosexual behavior. As with the “passing women,” the deployment of gender was a conscious choice, but in the case of butch/femme norms it lacked any liberatory value.

III. COMMON GROUND

As explored in the last section, a combination of personal experience, liberation ideology, and historical understanding can conspire to silence transgender truth claims. Contemporary transgender narratives provide a first-hand account of gender as it is lived and experienced by some individuals at the beginning of the twenty-first century. The fact that these narratives may ultimately have a different trajectory than our own gender narratives simply makes them different, not invalid. We all have stories of navigating the gender system. Being gendered, either by self or others, is an experience we all share, and there is likely no single truth to be born of that shared experience. In this age of subjectivity, a charge of false consciousness rings of hubris and carries its own disturbing pretense of hegemony.

This section examines the commonality of gender narratives. Borrowing from my own gender atypical childhood, it examines the similarities between the stock transman narrative and that of a standard “tomboy” narrative and asks whether perhaps we aren’t all a little genderqueer?⁸⁸ It then discusses gender identity formation on the binary and the ways in which greater room for gender variance may actually facilitate transgender identifications rather than render them obsolete as maintained by the progressive critique. It concludes with a brief discussion of the integral role gender variance continues to play in gay and lesbian communities, despite the persistent efforts to establish sexuality as unrelated to or separate from gender or gender expression.

A. *Hello GenderQueer or Are You Talking About Me?*

As discussed above in Part II, the same progressive thinkers who dismiss transgender truth claims often value gender variance and the willing-

COMMUNITY (1994). For a transhistorical discussion of transgender identities, see LESLIE FEINBERG, *TRANS GENDER WARRIORS* (1996).

88. See generally GENDERQUEER, *supra* note 25.

2007 GENDER MATTERS: MAKING THE CASE FOR TRANS INCLUSION 19

ness to transcend gender barriers. However, the price of this gender variance is continued allegiance to the gender assigned at birth. Gender variance that leads to bodily modification, a repudiation of the gender assigned at birth, or a desire to jump gender legally or socially, steps over a line and is deemed reactionary. In this way, the progressive critique of gender allows us to choose to wear our assigned gender aggressively, lightly, or even with a measure of dissonance, but we must wear it in order to be legible. Thus, when we tell our female children, “you can be anything you want in the whole wide world,” the promise carries an unspoken caveat—“except, of course, a boy.”

When I first began my self-education process regarding transgender issues, I was surprised to learn that my gender atypical childhood closely tracked the standard transman narrative prescribed by the most widely accepted standards of care.⁸⁹ These standards regulate access to certain medical interventions and produce what Judith Butler refers to as the “dramaturges of transsexuality.”⁹⁰ The politics of diagnosis are outside the scope of this article, and much has been written regarding the gate keeping function of the standards as well as the self-perpetuating nature of the required narratives, which individuals must repeat in order to gain the desired access.⁹¹ However, the key factors of the gender atypical childhood *actually* described my childhood. I would not have had to engage in any embellishment to satisfy the following elements of gender identity conflicts in childhood: “[C]ross dressing, playing with games and toys usually associated with the gender with which the child identifies; avoidance of the clothing, demeanor and play usually associated with the child’s sex and gender of assignment, preference for playmates or friends of the sex and gender with which the child identifies.”⁹²

When I was a little girl, my family encouraged me to engage in non-traditional rough and tumble play. Although I had both “boys” and “girls” toys, the “girls” toys stayed on the shelf. Barbie could not hold a candle to G.I. Joe, and who would possibly want to play in a “Dream House” when

89. HARRY BENJAMIN INT’L GENDER DYSPHORIA ASS’N, STANDARDS OF CARE FOR GENDER IDENTITY DISORDERS (6th ed. Feb. 1, 2001), http://www.wpath.org/publications_standards.cfm [hereinafter HBIGDA SOC]. The organization has recently changed its name to the World Professional Association for Transgender Health, Inc. The International Conference on Transgender Law and Employment Policy, Inc. has promulgated alternative standards of care. HEALTH LAW PROJECT, INTERNATIONAL CONFERENCE ON TRANSGENDER LAW AND EMPLOYMENT POLICY, INC., HEALTH LAW STANDARDS OF CARE FOR TRANSSEXUALISM, http://www.transgendercare.com/guidance/resources/ictlep_soc.htm (last visited Mar. 4, 2007).

90. JUDITH BUTLER, UNDOING GENDER 71 (2004); Dean Spade, *Mutilating Gender*, in THE TRANSGENDER STUDIES READER, *supra* note 3, at 325–27 (discussing “strategic deployment of transsexual narrative”).

91. See Dean Spade, *supra* note 14, at 15 (critiquing gate keeping function of diagnosis).

92. HBIGDA SOC, *supra* note 89.

there were castles to storm and battles to choreograph?⁹³ I was told that I could be a doctor or a lawyer or even an astronaut. No one in my family raised an eyebrow when I donned my Batman outfit, peered out from under the hood, and proclaimed that I would be a senator one day.⁹⁴

As I read the transgender childhood summaries, I kept waiting to find one that would turn out like mine—one where the protagonist who was assigned female at birth grew up comfortable in her body and visibly female, but continued some of her tomboy pursuits and bought the occasional item of clothing on the “wrong” side of the GAP.⁹⁵ I never found that ultimate flash of recognition because I was reading about a different experience of gender. I was reading transgender narratives, and my childhood story was missing one of the primary elements of gender identity disorder in childhood: the “stated desire to be the other sex.”⁹⁶

It is difficult to comprehend that desire when you have no personal experience with either internal or external gender dissonance. I have never felt out of place in my female body, and I have never been mistaken for a man (as far as I know). For me, gender is not a friction point in my life. My preference for gender neutral clothing is a relatively mild one. Although I value that I have a job where every day is casual Friday, I enjoyed my high femme years at a law firm and have never given up the purse habit. My time as a power bow femme could be described as a form of drag, in that I was engaged in a self-conscious deployment of gender, but it did not feel like a *cross*-gender performance, nor was it necessarily intended as a parody.⁹⁷ My aim was transgressive. As one of the few self-identified lesbians at the law firm in the 1980s, I had decided I could best disrupt the partners’ understanding of the category of “lesbian” by looking, or trying to look, just like their WASPy wives. I have since been told that

93. Jennine Head Miller, Curator of Domestic Life, Leisure, and Entertainment, at the Henry Ford museum, explains: “Introduced in 1962, the Barbie Dream House was a perfect backdrop for Barbie’s lifestyle of leisure and consumption of up-to-date goods.” Jennine Head Miller, Henry Ford Museum: Pic of the Month, <http://www.thehenryford.org/exhibits/pic/2001/01.jan.html> (last visited Mar. 4, 2007).

94. Of course, my Batman was the 1960s campy tights-wearing television hero played Adam West. See Hilary de Vries, *Batman Battles for Big Money*, N.Y. TIMES, Feb. 5, 1989, at 11 (comparing “campy” 1960s television to Michael Keaton’s Batman).

95. The Gap offers a unisex shopping experience, but organizes its “male” and “female” clothing on opposite sides of the store. No signs direct customers to the “men’s department.” Instead, customers must rely on visual clues provided by the clothing and related displays. The potential for confusion is reminiscent of the *Seinfeld* episode where George unwittingly selects a pair of “ladies frames” for his new glasses. *Seinfeld: The Glasses* (NBC television broadcast May 30, 1993), available at <http://www.seinfeldscripts.com/TheGlasses.html> (last visited Mar. 18, 2006).

96. HBIGDA SOC, *supra* note 89.

97. Butler notes that “[t]he performance of drag plays upon the distinction between the anatomy of the performer and the gender that is being performed.” BUTLER, *supra* note 23, at 137.

2007 GENDER MATTERS: MAKING THE CASE FOR TRANS INCLUSION 21

my gender romp was a disservice to butch lesbians.⁹⁸ In retrospect, I can see how my actions, and indeed my very concept of what was transgressive, were directly informed by negative views regarding cross-gender community norms discussed above in Part II.C. By asserting myself as not male, I thought I was helping to destroy the “myth of the mannish lesbian.”⁹⁹

Despite the different endings, I found it exceedingly enlightening to see the similarities between my childhood and that of many transgender individuals, and I resisted the impulse to reject the transgender stories as my own simply because they did not share a common outcome. I had weathered a gender-atypical childhood without experiencing the desire to modify my body or otherwise repudiate the gender I was assigned at birth. Did this mean that I was better adjusted than the transman because I could navigate the cultural construct of gender without becoming a victim to its literal demands? Or, was it just as possible that, unlike the transman, I was hopelessly domesticated as illustrated by my not-so-transgressive shenanigans at the law firm—socialized to the point where everything is possible except living in a gender different from the one assigned at birth?

These dueling propositions are both built on claims of false consciousness paired with transformative vision. In the first instance, I am possessed of great vision whereas the transman is trapped in a literal application of gender. In the second, I suffer from a copious lack of vision whereas the transman is able to see beyond labels. Neither is necessarily true. The way I choose to define myself in the world and within the gender system is simply different from that of someone who identifies as transgender. The important thing I learned, however, was that no matter how fundamental that difference might be, it is rooted in a basic commonality that provides an undeniable degree of kinship.

Indeed, gender variant behavior has served as a longstanding bridge between the transgender and gay and lesbian communities. The standards for care quoted above note that in actuality, relatively “few” gender variant children grow up to be transsexuals, although “many eventually develop a homosexual orientation.”¹⁰⁰ This makes one wonder about the efficacy of diagnosis or perhaps it suggests that I actually am transgender. According to the early sexologists, “contrary sexual feelings” were the result of a form of sexual inversion that was marked by same-sex libidinal object choice, as well as a penchant for wearing pants and an aversion to needle-

98. At the time, I only understood “butch” to be an adjective. *Contra* S. BEAR BERGMAN, BUTCH IS A NOUN (2006).

99. Esther Newton, *The Mythic Mannish Lesbian: Radclyffe Hall and the New Woman*, in HIDDEN FROM HISTORY: RECLAIMING THE GAY & LESBIAN PAST 281, 282 (Martin Duberman et al. eds., 1989).

100. HBIQDA SOC, *supra* note 89.

work.¹⁰¹ I plead guilty on all counts and discuss the connection between gender variance and homosexuality further in section C below.

In some circles, the term “genderqueer” has emerged as an umbrella category that is distinguished by its oppositional stance to gender and its critique of the binary.¹⁰² The tensions existing between the terms genderqueer and transsexual and their associated communities are beyond the scope of this article and far exceed my level of expertise, but for the purposes of this discussion, it can be said that genderqueer is a subset of transgender.¹⁰³ Genderqueer’s oppositional stance may represent a point of entry for many who otherwise suffer from the progressive resistance to transgender truth claims. In its broadest sense, genderqueer embraces a fluidity of gender roles and behaviors that encompasses the type of gender variance generally approved within the progressive understanding of gender. However, genderqueer parts company with the progressive critique in that it rejects not simply the gender role behavior and expectations associated with one’s gender assigned at birth, but the act or meaning of that assignment.¹⁰⁴ In this way, genderqueer advances a greater degree of gender self-definition and individual agency than the progressive critique.

Genderqueer also marks the generation gap between the twenty-somethings and the rest of us. On more than one occasion, I have been read as genderqueer by students. I believe their characterization is based on my clothing choices, absence of stereotypical feminine grooming habits (i.e., make-up), and the open knowledge that I’m a lesbian. The first time this happened, my own transphobia got the best of me, and I literally went running to the shoe department at Bloomingdale’s looking for something “a little less clunky.” On reflection, I believe that the descriptor genderqueer provides a potentially useful connection between my own post-feminist gender agnosticism and the contemporary transgender narrative. Although the identity category genderqueer carries no personal resonance for me, it does provide a strategic location for theorizing gender that is not overly consumed with slaying the long-dead dragons of Freudian thought.

101. I am not making this up. Havelock Ellis specifically noted that female inverts sometimes display a “dislike and . . . incapacity for needlework and other domestic occupations, while there is often capacity for athletics.” HAVELOCK ELLIS & JOHN ADDINGTON SYMONDS, *SEXUAL INVERSION* (1897), excerpted in *NINETEENTH-CENTURY WRITINGS ON HOMOSEXUALITY: A SOURCEBOOK 100* (Chris White ed., 1999).

102. Wilchins, *Queerer Bodies*, in *GENDERQUEER*, *supra* note 25, at 46 (noting that “[g]enderqueerness is by definition unique, private, and profoundly different”).

103. For a taste of the tension existing between the transsexual communities and those who identify as genderqueer, see Pauline Park, *GenderPAC, the Transgender Rights Movement and the Perils of a Post-Identity Politics Paradigm*, 4 *GEO. J. GENDER & L.* 747 (2003).

104. Wilchins notes that the challenge of genderqueerness is to question “the whole narrow, outdated notion of applying binary norms to bodies and genders.” Wilchins, *supra* note 102, at 44.

2007 *GENDER MATTERS: MAKING THE CASE FOR TRANS INCLUSION* 23

Genderqueer recognizes that gender matters. It rejects but does not deny the binary. In this way, the notion of genderqueer differs dramatically from the aspirational view of gender discussed in Part II. Whereas the latter maintains that the binary is not real and, therefore, cannot define you, genderqueer allows for the realness of gender but declares it to be ultimately malleable and fluid. Despite its intellectual appeal, I know many folks my age that would be uncomfortable with the identity category of genderqueer precisely because of the way it foregrounds gender. The label genderqueer signals an oppositional stance to gender as a primary mode of identification. As a gender agnostic, this personally places too much emphasis on gender, but I recognize that on this point I am just being stubborn. My partner/wife likens my resistance to Radclyffe Hall's insistence that she was a congenital invert long after the sexologists' ship had sailed.¹⁰⁵ This has prompted me to repeatedly ask her whether I really look genderqueer, to which she will only reply, "if the shoe fits."

B. *We All Experience Gender*

Even if you reject the proposition that we are all a little genderqueer, you will have to allow that we all experience gender, and to varying extents we all participate in the gender system.¹⁰⁶ I recall making this point during a meeting regarding student public interest and pro bono work. When the topic turned to transgender advocacy, a colleague remarked that s/he "wasn't feeling it" because the topic was too limited, it affected too few people, and, indeed, it might alienate students who would otherwise be interested in working in the public interest. Several months later, another colleague voiced a similar concern when s/he expressed skepticism over my new research agenda (i.e., transgender legal issues), stating: "I don't know how much of a social problem this is actually going to turn out to be." Both of these comments emphasize the minoritizing nature of transgender issues, and they both fail to apprehend the universal, albeit culturally contingent, experience of gender.¹⁰⁷

This minoritizing view of gender is consistent with the notion that there is something hopelessly myopic and conventional in the way transgender individuals cling to gender and desire gender recognition. It seems

105. See *infra* text accompanying notes 150–55.

106. Wilchins argues that "[i]n a society where femininity is feared and loathed, all women are genderqueer. In a culture where masculinity is defined by having sex with women and femininity by having sex with men, all gay people are genderqueer." Wilchins, *A Continuous Nonverbal Communication*, in *GENDERQUEER*, *supra* note 25, at 12–13.

107. Eve Kosofsky Sedgwick has written on the universalizing and minoritizing aspects of homosexuality. See *SEDGWICK*, *supra* note 2, at 1.

to present an intractable divide with the stated progressive agenda to transcend gender role limitations and expectations. How can we reconcile, the reasoning goes, the fact that many of us bristle at the restraints of gender whereas as others actively seek refuge within the very system we hope to render obsolete?¹⁰⁸ It seems that at the end of the day, the only thing to say with a shrug is: gender: some of us can't live within it—others can't live without it.

When faced with this double bind, the natural reaction seems to be to dismiss the transgender assertions regarding the importance of gender because it is not possible for gender to be *both* a restrictive life-denying force *and* a necessary pre-condition for human flourishing.¹⁰⁹ I believe that this double bind has been overstated and neglects our core commonality of being gendered—whether by self or by others. The characterization that transgender individuals are running back into the embrace of gender perpetuates the notion of the transgender individuals as reactionary, as opposed to the visionary individuals who are committed to seeing past gender.

Although at first glance it might seem that the two groups are working at cross purposes, when viewed from a slightly different angle it can just as easily be said that both of us are trying to achieve escape velocity from the expectations and limitations imposed on us by virtue of the assignment of gender at birth. Ultimately, trans and non-trans alike are attempting to navigate the gender system in the hope of finding space to live. This is a primary unifying force, and it is the primary reason (beyond a basic and unwavering commitment to human rights) that transgender issues are of importance to every one of us. Unfortunately, non-trans individuals often fail to see the extent of this commonality because, for us, it is often easy to forget that we are actively gendered.¹¹⁰ Indeed, this is precisely the problem; for many of us gender is simply a non-issue. It is not a source of daily friction and discomfort.

One of the things that seems particularly perplexing to non-trans individuals is why transgender narratives move *across* the binary. As dis-

108. Butler writes: “[A] livable life does require various degrees of stability. In the same way that a life for which no categories of recognition exist is not a livable life, so a life for which these categories constitute unlivable constraint is not an acceptable option.” BUTLER, UNDOING GENDER, *supra* note 90, at 8.

109. Butler writes:

The normative aspiration at work here has to do with the ability to live and breathe and move and would no doubt belong somewhere in what is called a philosophy of freedom.

The thought of a possible life is only an indulgence for those who already know themselves to be possible. For those who are still looking to become possible, possibility is a necessity.

Id. at 31.

110. RUTH FRANKENBERG, WHITE WOMEN, RACE MATTERS: THE SOCIAL CONSTRUCTION OF WHITENESS 142 (1993).

2007 GENDER MATTERS: MAKING THE CASE FOR TRANS INCLUSION 25

cussed in the immediate prior section, some individuals who identify as transgender and genderqueer eschew gender and actively try to create a legible subjectivity without gender markers. However, a significant portion of transgender individuals experience distress and difficulty when they repudiate the gender they were assigned at birth and attempt to secure a different set of gender markers. Although non-trans progressive individuals support the repudiation of the set of expectations assigned at birth via the proxy of gender, they often fail to grasp why the repudiation of one's assigned gender necessarily leads to identification as a different gender. You can almost hear the progressive thinker ruminating: "I didn't jump ship. No sir-ree. I stayed the course and worked to change the system from *within* my assigned gender. I stayed true to my assigned gender."

Of course, this begs the question of why an assignment of gender at birth based on a series of visual and physical cues continues to carry such weight. If it is an irrelevancy and it cannot control our destinies, then why not respect the right of individuals to choose or to define their own gender? Scarcely any of the progressive thinkers uncomfortable with transgender requests for gender self-definition would argue the same in the case of individuals who are intersexed.¹¹¹ The intersexed are different, the argument goes, because they experience incongruence between physical gender and the gender assigned at birth.¹¹² This reasoning privileges the physical as the true situs of gender. An individual is required to maintain loyalty to the gender assigned at birth unless there are verifiable physical anomalies that put the assignment in question *ab initio*. The intersex dilemma also reveals that the assignment of gender at birth is an imperfect practice that is not above putting a thumb on the scale to tip the balance by way of surgical intervention.¹¹³ The progressive critique maintains that the desire to repudiate the gender assigned at birth cedes too much power to the socially constructed gender system, but it fails to question the act of initial assign-

111. See generally SUZANNE J. KESSLER, LESSONS FROM THE INTERSEXED (1998) (defining intersexuality and the medical construction of gender). There are many genetic, hormonal, or anatomical variations which make a person's sex ambiguous, such as Klinefelter Syndrome and Adrenal Hyperplasia. Julie Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 ARIZ. L. REV. 265, 278-90 (1999). Medical professionals usually assign intersex infants a sex and surgically alter the infant's body to conform to that designation. *Id.* at 272. An increasingly vocal intersex movement denounces this form of surgical intervention as genital mutilation. Cheryl Chase, *Hermaphrodites with Attitude: Mapping the Emergence of Intersex Political Activism*, in THE TRANSGENDER STUDIES READER, *supra* note 3, at 300. The intersex movement opposes surgical intervention until the intersex individual is old enough to make an informed choice. *Id.* at 306-07.

112. Butler notes a slightly different distinction when she writes: "[T]echnology is a resource to which some people want access, it is also an imposition from which others seek to be freed." BUTLER, UNDOING GENDER, *supra* note 90, at 11.

113. For a discussion of the types of surgical procedures performed on infants, see KESSLER, *supra* note 111, at 33-51.

ment. In this way, it denies individual agency and cedes the ultimate power of naming to a set of purportedly “objective” physical criteria that are nonetheless a socially constructed component of the gender system.¹¹⁴

To the non-trans-identified, the apparent increase in the number of individuals who desire to move *across* the binary seems counter-intuitive given that there is currently considerable social room to express gender variant behavior.¹¹⁵ Under this rationale, the gender assigned at birth now, more than ever, is an irrelevancy because the categories of woman and man—to the extent that they are stable categories—are greatly expanded. Although it is certainly true that one’s gender assigned at birth allows for greater freedom of expression, it is also true that one’s target gender also provides greater freedom. Thus, a movement across the binary need not be seen as the exchange of one too-small identity for another. Provided neither category is prohibitively constraining, and either category can be conducive to human flourishing, then a movement between categories would seem neutral. When the progressive critique asserts that such movement reinforces an oppressive gender system, it denies agency in the name of greater freedom but also accepts the initial process of categorization as beyond challenge.

The progressive bewilderment with movement across the binary reflects the larger belief that gender doesn’t matter, but it also reveals a specific rejection of a binary spectrum of behavior that ranges from male to female. For many of us born in the 1960s and 1970s, the gender we had been assigned at birth was small and confining. Although the life choices we made often placed us outside of the traditional definition of “woman” (or “man”), we did not believe that every step we took beyond our assigned gender necessarily propelled us toward the other gender. For example, when I was born in 1961, Betty Friedan had yet to publish her manifesto, *Ozzie and Harriet* was still on the air, and women made up 3.5% of the nation’s law students.¹¹⁶ There was no Title VII, no maternity leave, help

114. ANNE FAUSTO-STERLING, *SEXING THE BODY: GENDER, POLITICS, AND THE CONSTRUCTION OF SEXUALITY* (2000).

115. Dylan Vade offers a “non-linear” view of gender that rejects a spectrum that runs from male to female. Dylan Vade, *Expanding Gender and Expanding the Law: Toward a Social and Legal Conceptualization of Gender That’s More Inclusive of Transgender People*, 11 MICH. J. GENDER & L. 253 (2005).

116. Betty Friedan published *THE FEMININE MYSTIQUE* in 1963. Fox, *supra* note 41. The book is credited with starting what is referred to as the second wave of feminism. *Id.* “The Adventures of Ozzie and Harriet” premiered on television in 1952 and ran for fourteen seasons, ending in 1966. Museum of Broadcast Communications, *The Adventures of Ozzie and Harriet*, <http://www.museum.tv/archives/etv/A/htmlA/adventuresof/adventuresof.htm> (last visited Mar. 5, 2007). The American Bar Association maintains law school enrollment figures based on gender. AM. BAR ASS’N, SECTION OF LEGAL EDUC. AND ADMISSION TO THE BAR, FIRST YEAR AND TOTAL J.D. ENROLLMENTS BY GENDER, <http://www.abanet.org/legaled/statistics/charts/stats%20-%206.pdf> (last visited Aug. 12, 2007).

2007 GENDER MATTERS: MAKING THE CASE FOR TRANS INCLUSION 27

wanted ads were segregated based on sex, and women attended college in order to secure a “Mrs.” Degree.¹¹⁷ By the time I entered law school in 1981, women made up 35.8% of the law students nationwide and Sandra Day O’Connor had just been appointed to the U.S. Supreme Court.¹¹⁸

In the space of twenty years, the changes that had taken place in terms of role options for women (at least white middle class women) were extraordinary.¹¹⁹ As the commercial said, we had “come a long way,” but I never understood that journey to be unidirectional.¹²⁰ With each non-traditional choice we made, we increased the distance between our lives and that restrictive category of “woman” to the point where the early 1960s category of “woman” was largely historical. However, the range of possibilities that we explored outside the traditional category of “woman” were not coded “man” and our actions did not take place on a tightly drawn spectrum that ran from male to female. We were not rushing to become men and, besides, we knew plenty of people who were actively trying to break out of that equally moribund and confining category. The space outside “woman” belonged to the realm of the human yet to be defined.

My insistence—that women who sought greater role options were not trying to become men—echoes a particular sensitivity on the part of second wave feminists to the masculine-baiting that historically dogged efforts to secure greater rights for women. Early arguments against allowing women access to higher education stressed the masculinizing effects of education on the female form.¹²¹ Later, the popularized version of penis envy provided a psychoanalytic explanation for women who sought full

117. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2007); The Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601–2654 (2007). The desegregation of “help wanted” ads was one of the first goals established by the National Organization for Women (NOW) when it was formed in 1966. Nat’l Org. for Women, *Highlights from NOW’s FORTY Fearless Years*, <http://www.now.org/history/timeline.html> (last visited Mar. 5, 2007). The Equal Employment Opportunity Commission (EEOC) issued revised guidelines in 1968 clarifying that gender-segregated job listings violated Title VII. EEOC – Milestones, <http://www.eeoc.gov/abouteeoc/35th/milestones/1968.html> (last visited Mar. 5, 2007).

118. AM. BAR ASS’N, *supra* note 116. Justice O’Connor was appointed to the U.S. Supreme Court by President Ronald Reagan in 1981 and was confirmed by a unanimous Senate. Linda Greenhouse, *Justice O’Connor Seated on Nation’s High Court*, N.Y. TIMES, Sept. 26, 1981, § 1, at 8.

119. See David Leonhardt, *Scant Progress on Closing Gap in Women’s Pay*, N.Y. TIMES, Dec. 24, 2006, § 1, at 1.

120. In 1968, Philip Morris introduced a cigarette for women with an advertising campaign that touted the liberating effects of smoking and announced that “you’ve come a long way.” See E. Michael Jones, *The Torches of Freedom Campaign: Behaviorism, Advertising and the Rise of the American Empire*, CULTURE WARS, Apr.–June 1999, <http://www.culturewars.com/CultureWars/1999/torches.html>.

121. See, e.g., Edward H. Clarke, *Sex in Education or, A Fair Chance for Girls* 11–14, 125–34 (1873), reprinted in ROOT OF BITTERNESS: DOCUMENTS OF THE SOCIAL HISTORY OF AMERICAN WOMEN 330, 331 (Nancy F. Cott et al. eds., 1996) (arguing exposure to education damages female reproductive health).

inclusion in public life.¹²² Betty Friedan responded to the specter that liberation would lead to a masculine race of cigar-chomping, skirt-chasing women when she initially turned her back on lesbian members of NOW, referring to them as the Lavender Menace.¹²³ As explained in Part II.C above, Martin and Lyon went to considerable lengths to address and dismiss the psychoanalytic view of lesbians as “pseudo men.”¹²⁴ Even today this sort of argument figures prominently in right-wing Hillary-bashing and the caricature of the emasculating “femi-nazi.”¹²⁵

Obviously, this well-worn denial that feminists secretly want to become men is complicated by the fact that, come to find out, some individuals who are assigned female at birth actually do desire to be socially and legally recognized as male.¹²⁶ Moreover, some desire bodily modification that may or may not include a constructed penis which, of course, seems to open up that old bugaboo of penis envy that feminism has spent so much time debunking.¹²⁷ Indeed, during the early days of the second wave, Freudian psychology was singled out as a primary font of gender role stereotyping and oppression.¹²⁸ Although feminism generally dismissed a stripped down version of penis envy as the egomaniacal ranting of a typical male, the French post-structuralists rehabilitated Freud by emphasizing the metaphorical or symbolic qualities of the penis.¹²⁹ Rejecting the actual desire for a penis as nonsensical, they theorized that women didn’t crave a penis, but rather the symbolic power represented by the penis in a male-dominated capitalist society.¹³⁰ As discussed above in Part II.C, Katz accepts this as an explanation for “passing women” whom he tells us coveted merely the representational “phallus” and certainly not the physical penis.¹³¹ To the non-trans individual, this reworking of penis envy made sense. It stood up to the misogynist masculine-baiting by denying the

122. See Susan J. Douglas, *Personal Influence and the Bracketing of Women’s History*, 608 ANNALS 41, 44 (2006) (noting women who failed to relinquish jobs at the end of World War II were branded as neurotics who suffered from “penis envy”).

123. See KARLA JAY, *TALES OF THE LAVENDER MENACE: A MEMOIR OF LIBERATION* (2000).

124. See MARTIN & LYON, *supra* note 71.

125. David Brock, *The Slur Against Hillary Clinton*, N.Y. TIMES, July 20, 2000, at A25 (discussing the “Hillary bashing gravy train”). Erik Eckholm, *From Right, a Rain of Anti-Clinton Salvos*, N.Y. TIMES, July 26, 1994, § 1, at 1 (noting Rush Limbaugh as responsible for the term “femi-nazi”).

126. Wilchins, *Deconstructing Trans*, in GENDERQUEER, *supra* note 25, at 56 (noting feminists had to explain they were “not trying to be men”).

127. As noted earlier, both deBeauvoir and Friedan challenged Freud’s assertion that “anatomy is destiny.” See *supra* note 30. More generally, Freud has been characterized as “the forefather of modern misogyny” and “among the foremost inventors of modern homophobia.” Paul Robinson, *Freud and Homosexuality*, in WHOSE FREUD?, *supra* note 30, at 144.

128. *Id.*

129. See generally CHRIS WEEDON, *FEMINIST PRACTICE & POSTSTRUCTURALIST THEORY* 42–70 (1997).

130. KATZ, *supra* note 24, at 209.

131. *Id.*

premise that liberated women wanted to become men and accurately reflecting the then-current demands of the second wave of feminism for increased role options for women. Who wouldn't envy power?

Both the feminist rejoinder to penis envy and the post-structuralist reworking of penis envy reject out of hand the possibility that an individual assigned female at birth could desire bodily modification that would include a penis. According to the feminist, the desire for a penis is a lie. According to the post-structuralist, the desire may be true, but only on a symbolic level because the penis is a metaphor. In the face of these theoretical claims, some transgender narratives report the desire for bodily modification and severe distress when access to such modification is impeded. This presents a clear challenge for individuals who, like me, have been raised on the notion that gender is an extended metaphor. The challenge is to integrate the reality of transgender experiences into our understanding of the gender system and our own relationship to gender.

The first step is to recognize that many of the insights that we received as enlightened wisdom in our Women's Studies courses were historically specific, in that they were aimed squarely at displacing then-predominant views regarding gender in general and the feminine in particular. As illustrated by the case of Lyon and Martin, well-meaning efforts in the 1970s to establish new identities had the direct effect of silencing and repudiating alternative trans identities. Second, we have to admit that gender matters and it carries real life consequences—for all of us. Gender is not the result of massive Cold War brainwashing used to such great effect in the Manchurian Candidate nor is it a trendy French metaphor.¹³² In real life, some individuals report that their gender assigned at birth does not coincide with their internal sense of gender. They also report a desire to express their internal gender in ways that may or may not include bodily modification. A necessary corollary of this expression is the need for their internal gender to be recognized socially and legally. When the progressive critique denies the right to gender self-definition, it diminishes all of us who participate in the gender system. We all experience gender, but we do so in different ways and to different degrees.

132. Jack Hitt, *Return of the Brainwashing Defense*, N.Y. TIMES, Dec. 15, 2002, § 6, at 116 (explaining plot of 1962 film and noting "brainwashing is back").

C. “God Save the Nellie Queens”¹³³

As noted above, both my early tomboy narrative and my experience as a woman born during the second half of the twentieth century at a time of rapidly expanding role options produce points of commonality with contemporary transgender narratives. There remains one additional and undeniable point of convergence. Despite efforts to distance gay and lesbian identities from cross gender stereotypes, drag and other forms of gender bending remain an integral cultural component of many gay and lesbian communities. Indeed, the early sexologists considered homosexual object choice to be one component of a larger, naturally occurring phenomenon of gender inversion where women acted (and felt) like men and men acted (and felt) like women.¹³⁴ At the time, the inherent heterosexual nature of desire was so strongly presumed that when a female-assigned person reported a female sexual object choice, she was necessarily exhibiting cross gender behavior.¹³⁵ According to Krafft-Ebing’s scale of inversion, same-sex object choice without any other cross-gender behavior would warrant classification on the first rung of inversion.¹³⁶ The gradations of inversion increased in severity as homosexual desire was joined with ever greater degrees of cross-gender behavior and identification until the subject reported total repudiation of the gender assigned at birth and active identification with the target gender.¹³⁷

The presumption that sexual desire was naturally heterosexual is used to illustrate the heteronormative bias of the sexologists, and they are often

133. *Interview with George*, in *THE WORD IS OUT: THE STORIES OF SOME OF OUR LIVES* 73 (Nancy Adair & Casey Adair, eds., 1978) (the title of a song sung to the tune of “God Save the Queen” by patrons at a gay bar in the 1950s).

134. Krafft-Ebing characterized “inversion” as a process of development of the psycho-sexual character which manifests as “a sexual instinct . . . which is the exact opposite of that characteristic of the sex to which the individual belongs.” R. VON KRAFFT-EBING, *PSYCHOPATHIA SEXUALIS: A MEDICO-LEGAL STUDY* 187 (Charles Gilbert Chaddock trans., F.A. Davis Co. 7th ed. 1920).

135. A German physician, Karl Westphal, who is generally identified as the author of the first medical article on homosexuality published in 1869, referred to homosexuality as “contrary sexual feeling.” JENNIFER TERRY, *AN AMERICAN OBSESSION: SCIENCE MEDICINE, AND HOMOSEXUALITY IN MODERN SOCIETY* 36, 45 (1999).

136. See Nancy J. Knauer, *Homosexuality as Contagion: From THE WELL OF LONELINESS to the Boy Scouts*, 29 *HOFSTRA L. REV.* 401, 415–16 (2000) (restating four stages of “psychical hermaphroditism,” “homo-sexual individuals, or urnings,” “effemination and viraginity,” and “androgyny and gynandry”).

137. The first two of the four stages on Krafft-Ebing’s inversion scale measured the degree of non-normative objective choice. *Id.* at 416. In the first stage, “contrary sexual feeling” is primary, but there is some heterosexual attraction. KRAFFT-EBING, *supra* note 134, at 230 (describing “psychical hermaphroditism”). In stage two, the “contrary sexual feeling” is exclusive. *Id.* at 255 (describing “homo-sexual individuals or Urnings”). Only in stages three and four does the inversion manifest itself with respect to the individual’s “character and mental personality.” *Id.* at 255, 279, 304 (describing stages two, three, and four).

2007 GENDER MATTERS: MAKING THE CASE FOR TRANS INCLUSION 31

blamed for erroneously and inextricably linking homosexuality with gender variant behavior.¹³⁸ As noted above, the desire on the part of many gay advocates to distance themselves from gender variant behavior reflected the perceived need to counter prevailing scientific views regarding homosexuality. In addition, cross-gender behavior forms the core of many homophobic stereotypes and animates homophobic violence.¹³⁹

We all know that homophobic slurs are frequently used not to signal actual homosexual activity or desire but to indicate that the object of the slur has stepped beyond the acceptable role for her/his assigned gender.¹⁴⁰ For example, a strong assertive woman who excels in business may be called a dyke, whereas the sensitive artistic man may be dismissed as a fag. Indeed, some legal scholars have gone as far as to suggest that discrimination against homosexuals is most appropriately (and productively) analyzed as gender discrimination.¹⁴¹ For example, when the law prohibits a man from marrying another man, it is discriminating on the basis of gender because the man would be able to marry a man if he were a woman.¹⁴² Unfortunately, efforts to combat these slurs and stereotypes have often focused on a denial of cross-gender behavior as opposed to a condemnation of the fact that it remains acceptable to respond to such behavior with ridicule, disgust, and violence.

Although the sexologists have been credited with linking (erroneously, some would argue) homosexuality with gender variant behavior, it is important to remember that their act of naming and mapping the homosexual was not an entirely top down endeavor.¹⁴³ Inverts participated in the re-

138. Foucault asserted that under the sexologists' theories the newly minted homosexual "was characterized . . . less by a type of sexual relations than by a certain way of inverting the masculine and the feminine in oneself." 1 FOUCAULT, *supra* note 68, at 43; see also SEDWICK, *supra* note 2, at 45-47 (1990) (discussing Foucault's critique of inversion). Foucault noted that "[h]omosexuality appeared as one of the forms of sexuality when it was transposed from the practice of sodomy onto a kind of interior androgyny, a hermaphroditism of the soul." 1 FOUCAULT, *supra* note 68, at 43.

139. See 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 (1995).

140. See Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187 (1988) (attributing disapproval of homosexuality to "reaction to the violation of gender norms").

141. See Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994) (arguing in favor of equal protection claim based on gender).

142. *Id.* See, e.g., *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993) (ruling Hawaii marriage law discriminates on its face based on gender and, therefore, implicates the equal protection clause of the Hawaii Constitution).

143. Foucault described "reverse discourse as the ability of the subjects of study to appropriate the language and pronouncements of their elite observers and use it to articulate a program for reform." 1 FOUCAULT, *supra* note 68, at 43. Foucault argued that the sexologists made possible the formation of a "reverse" discourse: "[H]omosexuality began to speak [o]n its own behalf, to demand that its legitimacy or 'naturalness' be acknowledged, often in the same vocabulary, using the same categories by which it was medically disqualified." *Id.*

search and the production of the resulting description of populations, communities, and practices.¹⁴⁴ In this way, the addition of the “T” to the already existing LGB in the late 1990s was not a random coalition. It reflects a deep historical affiliation, shared cultural space, and a common source of oppression.¹⁴⁵

It is now well-known that transgender individuals were instrumental in the early gay liberation period immediately following Stonewall but were increasingly marginalized and displaced by both feminism and identity politics.¹⁴⁶ We have seen how efforts at positive identity formation in the 1970s obliterated and invalidated transgender realities in their rush to repudiate Freudian theories and counter destructive stereotypes. This negation of transgender realities influenced both how we understood history and how we understood ourselves. Contemporary gay identity politics constructed a “straight-acting” gay subject who was gender conforming in all respect but desire (assuming desire has a gender).¹⁴⁷ The continuing resistance to transgender issues within the mainstream lesbian and gay advocacy organizations and within the lesbian and gay communities in general is not surprising given this decades-long denial and marginalization of transgender identities.¹⁴⁸ However, the formal inclusion of transgender issues represents an important step toward embracing our common history and our common (albeit not uncomplicated) connection to gender.

IV. IDENTITIES AND THE LAW

Transgender narratives reject the unassailable congruence between the gender assigned at birth and gender identity. They assert and attest to the reality of gender and the degree of security that can be produced by an easily legible gender. Most forcefully, they demand a right to gender self-

144. Henry Minton has published a comprehensive study of the relationship. See HENRY L. MINTON, *DEPARTING FROM DEVIANCE: A HISTORY OF HOMOSEXUAL RIGHTS AND EMANCIPATORY SCIENCE IN AMERICA* (2002) (describing relationship between homosexual activists and science in the United States from the 1930s until the 1973).

145. Much of the early writing on sexuality contained themes relating to the “third sex.” Magnus Hirschfeld, who is most widely associated with his Institute for Sexual Science and his efforts to decriminalize sodomy in Germany, was deeply interested in what he referred to as “intermediaries.” In his 1910 book *TRANSVESTITES* in 1919, he distinguished transvestites from homosexuals. MAGNUS HIRSCHFELD, *TRANSVESTITES* (Michael A. Lombardi-Nash trans., 1991). His institute performed its first genital surgery in 1922. MEYEROWITZ, *supra* note 29, at 19.

146. For an anthropological discussion of shared cultural space see Esther Newton, *Mother Camp*, in *THE TRANSGENDER STUDIES READER*, *supra* note 3, at 121–30.

147. Yoshino, *supra* note 70, at 844.

148. See *supra* note 4 (discussing refusal of HRC to advocate for addition of sexual identity to ENDA).

definition that challenges existing categories of man/woman and necessarily calls into question what we mean when we talk about same-sex desire.

Some progressive resistance to transgender truth claims has been rooted in the perceived threat to existing identity categories. Lesbian communities in particular have had difficulty incorporating transgender possibilities despite the common experience of gender discussed in the prior section. This section first reminds us that identity formation is historically contingent and urges us to heal the generational divide by furthering a process of identity formation that can articulate both commonality and difference.

It also discusses the potential opportunities represented by the use of queer as a strategic position of alliance and argues that, at base, we are all probably a little bit queer. Finally, it asks us to imagine what types of legal reform would be necessary to create space for the type of gender self-definition envisioned and demanded by the transgender narrative—one that respects internal gender identity, gender expression, and gender embodiment.

A. *The Shifting Sands of Identity*

My initial interest in transgender issues arose while I was doing research for an article on the obscenity trials of the 1928 novel by Radclyffe Hall, *The Well of Loneliness*.¹⁴⁹ *The Well* is frequently described as the most influential lesbian novel of all time.¹⁵⁰ As I busily explored the similarities between the arguments used to condemn *The Well* and contemporary anti-gay rhetoric, a series of online searches revealed to me the extent to which the book also resonates within certain transgender communities.¹⁵¹ In retrospect, the duality of the book and its author is obvious, but I was so accustomed to denying the reality of gender that I interpreted the gender expression of the protagonist as some form of art deco lesbian chic. Indeed, in my article I had refused to cite an early biography of Hall that had identified her as a “transvestite” because I considered its perspective compromised by an unreflective acceptance of gender inversion.¹⁵² I never consider whether *my* unreflective denial of gender inversion had comprised *my* perspective.

149. Knauer, *supra* note 136.

150. See REBECCA O’ROURKE, REFLECTING ON THE WELL OF LONELINESS (1989) (reporting results of surveys regarding impact of THE WELL on individual women).

151. See Heather K. Love, *Selections from “Spoiled Identity”: Stephen Gordon’s Loneliness and the Difficulties of Queer History*, in THE TRANSGENDER STUDIES READER, *supra*, at 521 (discussing historically shifting identities).

152. LOVAT DICKSON, RADCLYFFE HALL AT THE WELL OF LONELINESS: A SAPPHIC CHRONICLE (1975).

As noted above in Part III, it is curious that Hall chose to base her novel on the Victorian taxonomies of the sexologists rather than the modern psychoanalytic model of human sexuality.¹⁵³ Although I had always thought that Hall's continued identification as a "congenital invert" was somewhat old-fashioned, I reasoned that it was a superior strategic choice.¹⁵⁴ Clearly, it was easier to craft a platform for tolerance and acceptance on a "born that way" argument than on any insight that could be garnered from either Oedipus or Electra.¹⁵⁵ It did not occur to me that perhaps Hall did not adopt the label homosexual because she did not see herself as a homosexual.

It was not until I experienced my own personal *frisson* at the term genderqueer that I began to look sympathetically on individuals, such as Hall, whose identity formations took place under a prevailing historical model only to have that model overtaken by newer and more culturally relevant models. In terms of a contemporary example, Susan Sontag comes to mind as an individual who may have existed on this sort of historical cusp.¹⁵⁶ She staunchly refused to identify as lesbian or gay despite wide reports indicating the contrary.¹⁵⁷ Like many, I had attributed Sontag's refusal to self-identify as simple homophobic denial that she tried to justify in the name of preserving (or obscuring) authorial voice.¹⁵⁸ It never occurred to me that she might have refused to identify as lesbian or gay simply because she didn't identify as lesbian or gay.¹⁵⁹ My reaction reflects an odd feature

153. The sexologist Havelock Ellis provided a "Commentary" to *THE WELL* that was published in the novel's earlier editions. Havelock Ellis, *Commentary to THE WELL OF LONELINESS* (Covici Friede 1932) (1928). Hall also incorporated the work of Krafft-Ebing in the text of *THE WELL*. The protagonist turns to one of his books, most likely *PSYCHOPATHIA SEXUALIS*, to learn about her true nature. RADCLYFFE HALL, *THE WELL OF LONELINESS* 202 (Anchor Books 1990) (1928). Before writing *THE WELL*, Hall and her partner, Una Troubridge, read aloud from Ellis's *STUDIES IN THE PSYCHOLOGY OF SEX* and Krafft-Ebing's *PSYCHOPATHIA SEXUALIS*. DIANA SOUHAMI, *THE TRIALS OF RADCLYFFE HALL* xix (1999).

154. Hall referred to herself as an "invert." Letter from Radclyffe Hall to Gorham Munson (June 2, 1934), <http://www.dataounge.net/network/pages/lha/pblct/intrhall.htm#Letter>.

155. The psycho-analytic model of homosexuality "understood homosexuality not in terms of a hereditary or congenital defect that manifested itself in sexual inversion but as *perversions* of the normal sex drive caused by the stresses and strains of psychosexual development." TERRY, *supra* note 135, at 56.

156. Margalit Fox, *Susan Sontag, Social Critic with Verve Dies at 71*, N.Y. TIMES, Dec. 29, 2004, at A1.

157. Janny Scott, *Life, and Death, Examined*, N.Y. TIMES, Oct. 6, 2006, at E29 (explaining Sontag was "a private person").

158. Michael Bronski, *Notes on 'Susan': Would Susan Sontag have Been as Famous if She'd Come Out as a Lesbian? Doubtful*, GULLY, Feb. 19, 2005, http://www.thegully.com/essays/gaymundo/050219_sontag_lesbian.html (noting obituaries did not acknowledge Sontag's longtime relationship with photographer Annie Leibovitz).

159. In her posthumously released journals, Sontag wrote about being "queer" and about her "homosexuality." *On Self*, N.Y. TIMES, Sept. 10, 2006, § 6, at 36 (writing in 1959, "[b]eing queer makes me feel vulnerable").

2007 GENDER MATTERS: MAKING THE CASE FOR TRANS INCLUSION 35

of the relationship between self-understanding and group affiliation in this age of identity-based politics. There is a tipping point where a new identity category achieves sufficient political valence that the question of *self-identification* becomes irrelevant and refusal to self-identify is read as untruthful denial. In this way, an identity category that was initially self-constitutive becomes a higher truth that others can declare on your behalf without your assent.¹⁶⁰

These observations regarding the historical contingency of identity did not come as a surprise to me. I am well-versed in the myth of the transhistorical homosexual and have written about the evolution of the invert to the homosexual to the homophile to gay men and lesbians.¹⁶¹ I know that this evolution did not take place *seriatim*, in that new understandings of same-sex desire did not neatly and completely displace the prior ones.¹⁶² Through a complex process of asymmetric collaboration between the elites and the subject population, the competing theories vied for acceptance, achieved varying degrees of professional validity, and eventually infiltrated conventional wisdom.¹⁶³ They became part and parcel of how individuals saw themselves and the world around them. None of this knowledge was new to me, but it was decidedly dislocating to realize that the identity marked as contingent and waning was one that, despite my ambivalence discussed in section B below, I was still using. It is one thing to watch historical contingent identity formations march across the pages of a book or the frames of a documentary; it is quite another to experience it in the here and now.

The emergence of transgender communities and their compelling truth claims represent a new subjectivity that uniquely configures questions of gender, identity, and self-determination. Transgender realities, therefore, challenge existing progressive gender and sexuality identity formations to jettison the gender taboo, admit to the weight of embodiment, and attempt to articulate an understanding of self and others that exist in the present. As discussed in earlier sections, the second wave of feminism and the first wave of gay liberation set about to construct identities that were self-consciously oppositional in that they directly engaged and refuted the prevailing and exceedingly damaging psychoanalytic model of gender and sexuality. A central feature of this oppositional stance was an abstraction of gender and a denial of the physical. Gender variant behavior was en-

160. MICHELANGELO SIGNORILE, *QUEER IN AMERICA: SEX, THE MEDIA, AND THE CLOSETS OF POWER* 84–93 (1994) (describing emergence of outing).

161. Knauer, *supra* note 73, at 10–32.

162. *Id.* at 27.

163. *Id.* at 10–11.

couraged in order to disprove gender roles and expectations, but the gender assigned at birth established a line that was not to be crossed.

This extreme oppositional stance is no longer a pre-requisite to a positive identity. I was frankly astonished when I reread *Lesbian/Woman and Gay American History* in preparation for this article.¹⁶⁴ They were two of my favorite texts in high school, and I remember them being exceedingly foundational. However, thirty years after the fact, I was offended by their blunt attempts to harness liberation ideology to clear huge swaths of territory with blanket claims of false consciousness. I emerged with a new appreciation for the term “baggage.” If these texts would fail to persuade me today, why should I let them continue to influence my world view? Freud is dead, and it is time to move on.

After the shock wears off, being faced with impending obsolescence can prove invigorating. The emergence of transgender issues represents a historical shift in identity as well as a potential generational struggle. However, in this case, any resulting generational divide would have to be driven by sheer intransigence given that we have just established that the internalized taboo regarding the reality of gender was a historical device that is no longer needed. Generational struggles are never pretty, but they can be devastating when they occur in an identity-based or political community.¹⁶⁵ For example, the reports of the Lavender Menace debacle of the early 1970s still sting with a sense of betrayal.¹⁶⁶ I have my own memories of the heated Sex Wars of the 1980s and even now shudder when I remember the scene at the Women and the Law Conference in 1985 when Catherine MacKinnon’s speech was interrupted by pro-sex hecklers and all manner of nastiness ensued.¹⁶⁷

Flash points between gay and lesbian communities and transgender communities have also led to claims of betrayal and double dealing.¹⁶⁸ Perhaps the most disturbing skirmishes have occurred between feminists and transgender communities in connection with the definition “women-only space.”¹⁶⁹ The longstanding dispute centered on the admission poli-

164. KATZ, *supra* note 24; MARTIN & LYON, *supra* note 71.

165. Rubin, *supra* note 15, at 475.

166. JAY, *supra* note 123; *see also* MARTIN & LYON, *supra* note 71, at 280–302.

167. LISA DUGAN & NAN HUNTER, *SEX WARS: SEXUAL DISSENT AND POLITICAL CULTURE* (1995)

168. For example, in a 2003 law review article transgender lawyer Phyllis Frye discussed protesting outside HRC fundraisers and characterized the HRC, along with Barney Frank and Ted Kennedy, as the major reason gender identity and expression were not included in ENDA. Phyllis Randolph Frye, *Transgenders Must Be Brave in Forging This New Front on Equality*, 4 *GEO. J. GENDER & L.* 767, 771 (2003).

169. In one of the most publicized disputes over women-only space, a rape crisis center in British Columbia refused to permit a transwoman, Kimberly Nixon, to volunteer as a counselor. Shannon Rupp, *Transsexual Loses Fight with Women’s Shelter*, *THE TYEE*, Feb. 7, 2007, <http://theyee.ca/News/2007/02/03/Nixon>. The transwoman was removed from a volunteer training session when it became

2007 GENDER MATTERS: MAKING THE CASE FOR TRANS INCLUSION 37

cies adopted by the Michigan Womyn's Festival¹⁷⁰ produced a series of regrettable quotes that mimic the tone and substance of Janice Raymond's incendiary *Transsexual Empire*, where she asserts that "all [MTF] transsexuals rape women's bodies by reducing the real female form to an artifact, appropriating the body for themselves."¹⁷¹ Of course, transgender embodiments are not a metaphor for anything. They are lived experiences which deserve our respect and support. Historically, transgender narratives were silenced in the rush to create positive feminist and gay identities, but building your life on the backs of others is never a noble endeavor, and the result is always marred by negation.

B. *Can't We Call Everything "Queer" and Call It a Day?*

A quick answer to this generational dilemma could be to dust off the catchphrase "queer" and label our attempt to articulate new and inclusive subjectivities as simply "queer."¹⁷² In popular usage, queer has been increasingly deployed as hip shorthand for LGBT issues and people—particularly those that push the cultural envelope.¹⁷³ Although the non-category "queer" offers a potential vantage point to explore commonalities and differences with respect to gender and gender identification, queer theory may ultimately be ill-equipped to respond to certain transgender legal and political demands.

The anti-identity coalition building of Queer Nation and the alternative positionalities envisioned by queer theory emerged from the turbulent HIV/AIDS activism associated with those dreadful years when the epidemic was unchecked and the government and the world seemed indifferent to the loss of gay lives.¹⁷⁴ During this period, gay men and lesbians and allies began to collaborate in historically unprecedented ways in the face of a historically unprecedented sense of calamity.¹⁷⁵ Coalitions

known that her sex assigned at birth was male. The rape crisis center stated that its policy of retaining only female-born counselors barred the transwoman from participation. The court of appeals reversed an administrative decision that had found in favor of the transwoman, and the Supreme Court declined to hear Nixon's appeal. The litigation took ten years.

170. Nan Alamilla Boyd, *Bodies in Motion: Lesbian and Transsexual Histories*, in THE TRANSGENDER STUDIES READER, *supra* note 3, at 428–29.

171. RAYMOND, *supra* note 5. Unlike Raymond, the advocates of the "womyn born womyn" policy did not assert "that the problem of transsexualism would best be served by morally . . . outlawing its existence." *Id.* at 178. However, they remained resolute that MTF transsexuals were not women, despite their claims otherwise. If a MTF transsexual were to sleep with a lesbian without disclosing the fact that she had been assigned male at birth, it would be rape. Nataf, *supra* note 15, at 443.

172. ANNAMARIE JAGOSE, *QUEER THEORY: AN INTRODUCTION* 1 (1996).

173. *Id.* at 4.

174. DAVID M. HALPERIN, *SAINT FOUCAULT: TOWARDS A GAY HAGIOGRAPHY* 27–28 (1995); *See also* Stryker, *supra* note 29, at 7.

175. HALPERIN, *supra* note 174, at 62–63.

reached across barriers of class, race, and gender.¹⁷⁶ Not surprisingly, given its genesis, the primary focus of queer theory was the construction and regulation of sexuality, albeit in the face of intersecting identities or positionalities.¹⁷⁷

Queer theory provides an inclusive framework which does not attempt to privilege or foreground one form of political or social identification to the exclusion of others.¹⁷⁸ In this way, it offers a potential antidote to the silencing of transgender identities that occurred in the 1970s. It denies the fixity of identity which it sees instead as historically contingent and provisional.¹⁷⁹ Although the original focus of queer theory was heteronormativity (i.e., denaturalizing the hetero-homo binary), its multivalent gaze has been just as productively turned to the gender binary.¹⁸⁰ An example of this would be the anti-category of genderqueer which rejects the organizational imperative of the gender binary.

However, the anti-identity stance of queer theory may have limited utility for some transgender individuals who strongly desire to embody a particular gender category. In this way, queer theory may be able to advance transgender issues generally insofar as it denaturalizes the gender binary, but it does not provide the space for stable identities that may be at the root of some transgender legal demands. For example, queer theory did not construct an alternative identity to gay and lesbian.¹⁸¹ Instead, it offered a position against the normal or the normative—a vantage point

176. See Douglas Crimp, *Right On, Girlfriend!*, in *FEAR OF A QUEER PLANET: QUEER POLITICS AND SOCIAL THEORY* 316–17 (Michael Warner ed., 1993) (noting “new political identifications began to be made”).

177. Although informed by feminist work on gender, queer theory recognizes sexuality or sexual orientation as distinct from, although related to, gender. Queer theory rejects feminism (i.e., gender) as the privileged site of a theory of sexuality. Gayle S. Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, in *THE LESBIAN AND GAY STUDIES READER* 1, 32 (Henry Abelove et al. eds., 1992) (theorizing a study of sexuality). In turn, transgender studies challenge sexuality as the only prism through which to view gender diversity. See Stryker, *supra* note 29, at 1.

178. Brett Beemyn & Mickey Eliason, *Queer Theory in Practice*, in *QUEER STUDIES: A LESBIAN, GAY, BISEXUAL, AND TRANSGENDER ANTHOLOGY* 165 (Brett Beemyn & Mickey Eliason eds., 1996). Queer theory offers the potential within its perspective to acknowledge the differences and distinctions related to issues or identities, such as race, gender, class, ethnicity. *Id.* Beemyn and Eliason describe this as queer theory’s *potential* to be inclusive of race, gender, sexuality, and other areas of identity by calling attention to the distinctions between identities, communities, and cultures, rather than ignoring these differences or pretending that they don’t exist, as it often does now. *Id.*

179. For a discussion of the influence of post-structuralism on queer theory see generally SHANE PHELAN, *GETTING SPECIFIC: POSTMODERN LESBIAN POLITICS* 152 (1994); Ki Namaste, *The Politics of Inside/out: Queer Theory, Poststructuralism, and a Sociological Approach to Sexuality*, in *QUEER THEORY/SOCIOLOGY* 194 (1996).

180. See, e.g., RICKI WILCHINS, *QUEER THEORY, GENDER THEORY: AN INSTANT PRIMER* (2004).

181. Halperin explains: “Queer is by definition *whatever* is at odds with the normal, the legitimate, the dominant. *There is nothing in particular to which it necessarily refers.* It is an identity without an essence. Queer then demarcates not a positivity but a positionality vis-a-vis the normative” HALPERIN, *supra* note 174, at 62.

that was available regardless of libidinal object choice and that equipped one not to see any subject as simply gay or lesbian, but ideally as any subject who is outside or opposite the normal.¹⁸² Applied to transgender issues and the gender binary, genderqueer would not construct an alternative identity to (trans)man or (trans)woman. It would simply provide an oppositional stance—a position from which to critique the binary from an outsider perspective. Queer is the view from the margin.

However, establishing a position from which one can critique the binary does not necessarily enable one to live within it. As established earlier, the post-feminist critique of gender largely ignores the real life implications of the binary, whereas genderqueer evinces a choice to live outside the binary. Both overlook the pragmatic and urgent demand from some transgender individuals for a particular kind of gender legibility.¹⁸³ Going forward, coalitional theory and alliance building must allow sufficient room for gender self-definition that includes a choice to move within the gender binary and not simply to choose to exit from it. When pushed, queer theory will concede that stable gender identities can be transgressive where they are affirmatively chosen and crafted in defiance of assigned gender.¹⁸⁴ However, this begrudging concession underscores the shortcoming of queer theory—not all transgender individuals have a desire to be transgressive. To the contrary, some would argue that they are not engaged in an act of self-definition as much as one of self-recognition.¹⁸⁵ Their actions are not repudiating their gender assigned at birth but rather confirming the gender that they have always been.¹⁸⁶ For these individuals, queer theory may be of limited usefulness, as they would not satisfy its prerequisite for stable gender recognition because they do not report a desire to subvert the prevailing paradigm.

When queer theory examines the hetero-homo binary, its goal is to destabilize the categories of heterosexual and homosexual and denaturalize heteronormativity.¹⁸⁷ The system of sexuality itself is not contested—only

182. *Id.*

183. See Jay Prosser, *Judith Butler: Queer Feminism, Transgender, and the Transubstantiation of Sex*, in THE TRANSGENDER STUDIES READER, *supra* note 3, at 264 (noting some transsexuals “seek very pointedly to be nonperformative, to be constative, quite simply, to *be*”).

184. *Id.* at 262–65.

185. *Id.*

186. See, e.g., Koluta, *supra* note 27.

187. See, e.g., INSIDE/OUT: LESBIAN THEORIES, GAY THEORIES 1 (Diana Fuss ed., 1991) (equating “philosophical opposition between heterosexual and homosexual with other conventional binaries”); Michael Warner, *Introduction* to FEAR OF A QUEER PLANET, *supra* note 176, at xxi (defining heteronormativity “as the elemental form of association, as the very model of intergender relations, as the indivisible basis of community, and as the means of reproduction without which society wouldn’t exist”).

its regulation and ordering.¹⁸⁸ However, in the case of gender a queer critique can have a slightly different impact. Assuming we recognize that individuals should have the ability to define themselves as either outside or within the binary, then the gender system itself is put into play—not simply its regulation and ordering. The critique extends beyond the construction of stable gendered subjects and the question of whether there can be man without the oppositional (or complimentary) category of woman. The disruption goes to the fact of gender, rather than to the content of the gender system. If an individual is no longer inextricably bound to the gender assigned at birth, what does it mean to say someone is a man or a woman? What does it mean to say that someone is neither? Can someone be both? How do we account for the multidimensional nature of gender self-definition?

Gender is assigned at birth in response to specific visual or physical cues, and there is a considerable body of scholarship regarding the physical markers of gender that inform the assignment of gender.¹⁸⁹ Commentators generally point to six different physical measures of gender that precede the gender assigned at birth or gender of rearing.¹⁹⁰ These measures are: (1) genetic or chromosomal sex; (2) gonadal sex (reproductive sex glands)—testes or ovaries; (3) internal morphologic sex—seminal vesicles/prostate or vagina/uterus/fallopian tubes; (4) external morphologic sex (genitalia)—penis/scrotum or clitoris/labia; (5) hormonal sex—androgens or estrogens; and (6) phenotypic sex (secondary sexual features).¹⁹¹ Gender assigned at birth is typically considered the seventh measure of gender followed by the eighth and last measure—gender identity.¹⁹²

This breakdown of gender emphasizes the various physical attributes associated with gender. It is often used to argue that gender classification is potentially very complex and, therefore, assignment at birth may be later contradicted by other physical characteristics.¹⁹³ Although this observation reveals the assignment of gender at birth to be an imperfect science, it continues to privilege the scientific or objective assignment of gender. Of the eight listed measures of gender, only one—internal gender identity—goes to the question of gender self-definition. An individual's gender identity is her/his strong internal sense of either being male or female.¹⁹⁴ However,

188. See, e.g., Rubin, *supra* note 177.

189. See, e.g., Greenberg, *supra* note 111, at 271.

190. *Id.* at 279.

191. *Id.*

192. *Id.*

193. *Id.* at 291.

194. MEYEROWITZ, *supra* note 29, at 99 (describing evolution of theory of gender identity).

2007 GENDER MATTERS: MAKING THE CASE FOR TRANS INCLUSION 41

individuals often desire to articulate internal gender identity through two important vectors of gender self-definition: gender expression and gender embodiment.¹⁹⁵ Although it is possible that an individual who was assigned female at birth, but identifies as male, may continue to present as female and not seek bodily modification, transgender narratives report that, in many instances, pursuing gender expression and embodiment that is congruent with internal gender identity is essential to an individual's sense of contentment and well-being. Thus, when we speak of gender self-definition, it must include room for gender expression and gender embodiment consistent with gender identity.

This form of gender articulation and self-definition can be particularly difficult and, indeed dangerous, when it contradicts gender assigned at birth.¹⁹⁶ As explained in section C below, one way to address this is to provide legal recognition for the right to gender self-definition. The law recognizes an individual's gender assigned at birth and generally will only sanction gender reassignment where the individual has taken specific physical steps to alter her/his gender embodiment.¹⁹⁷ The inability to secure legal gender markers that conform to an individual's internal gender identity can greatly increase her/his vulnerability to transphobic violence and discrimination, particularly when gender expression and/or embodiment do not coincide with her/his gender assigned at birth (i.e., her/his legally recognized gender).¹⁹⁸

The multidimensional nature of gender self-definition directly implicates our understanding of the categories of heterosexual and homosexual—two instances where gender remains a defining factor.¹⁹⁹ Indeed, much of the resistance to transgender issues in the gay and lesbian communities has focused on controlling the definition of the identity classifications of gay and lesbian to the exclusion of transgender realities. Just as heteronormativity naturalizes cross-gender (i.e., heterosexual) desire, the gay and lesbian communities assume homosexual desire as a threshold requirement for group membership. In both cases, the hetero–homo distinction rests on a fundamentally one-dimensional understanding of gender that assumes gender is determined by assignment at birth. Accordingly, the hetero–homo distinction becomes much more difficult to articulate if gender definition is seen as multi-dimensional. For our purposes, it is instructive to consider four points of gender definition. The first point is the

195. Nataf, *supra* note 15, at 445.

196. See San Francisco Human Rights Commission, *infra* note 221 (citing prevalence of violence).

197. See *infra* text accompanying notes 230–38 (discussing legal gender markers).

198. See, e.g., Bornsetin, *supra* note 8.

199. Stryker, *supra* note 29, at 7 (noting very concept used to distinguish “hetero” from “homo” sexuality loses coherence”).

gender definition made for us, namely the gender we are assigned at birth. The other three points all involve questions of gender *self*-definition: internal gender identity, gender expression, and gender embodiment.

What does it mean to say that one experiences homosexual desire when we acknowledge these four different points of gender definition? What does it mean to say that one is a lesbian? Is self-identification as a lesbian sufficient or is there a lesbian litmus test?²⁰⁰ Must all four points of gender be in congruence for both the subject and the object of the subject's desire? What about the transwoman who post-transition identifies as a lesbian? To some feminists, the transwoman cannot be a lesbian because her gender assigned at birth was not female and, therefore, she was not a "womyn born womyn."²⁰¹ Where does this leave the transman who was "womyn-born," but has transitioned and now identifies as male or perhaps has always identified as male? Has he ceased to be a lesbian and, if so, when? Is his desire for someone who is a congruent female on all four gender points considered heterosexual? Would we say that the transman was a gay man if he were attracted to someone who is a congruent male on all four gender points? What about someone who was only male on three gender points? Two? What about transmen who are primarily attracted to other transmen? Shifting the focus for a moment, what happens to *your* sexual identity if your partner transitions? What about someone who is a congruent female on all four gender points, but her husband who was assigned male at birth transitions to female?²⁰² What about the congruent woman whose female assigned at birth partner transitions to male? If the relationship continues, is it still a lesbian relationship? What if the partner reports he always identified as male? If so, was it ever a lesbian relationship?

Personally, I have always thought that the category of lesbian was rather confining. Carved out from the umbrella term "gay" in order to underscore the different needs and obstacles facing women, the "L" was eventually moved to the front of the "G" in order to remedy what was perceived as the silencing of women's voices and their contributions within the gay liberation movement.²⁰³ I chose to self-identify as a "lesbian" largely for the ease of political and social legibility, as opposed to an internal sense that it conveyed any essential truth about my nature.²⁰⁴ With the

200. Nataf, *supra* note 15, at 446 (discussing "woman-born-women").

201. Devor & Matte, *supra* note 3, at 389.

202. See, e.g., HELEN BOYD, SHE'S NOT THE MAN I MARRIED (2007).

203. Some organizations still use the GLBT formation, such as the National Gay and Lesbian Task Force. See, e.g., National Gay and Lesbian Task Force, <http://www.thetaskforce.org> (last visited Mar. 2007).

204. See Fadi Hanna, *Gay Self-Identification and the Right to Political Legibility*, 2006 WIS. L. REV. 75, 126 (2006) (discussing "political legibility").

2007 GENDER MATTERS: MAKING THE CASE FOR TRANS INCLUSION 43

exception of close friends, attempts to nuance the label always seemed pointless and, indeed, risked bombarding my audience with, what the kids refer to as, TMI (too much information).

My self-inclusion in the group did not instill me with any great sense of belonging, and I was hard-pressed to identify a point of commonality that I necessarily shared with all other self-identified lesbians. The best I could say was that we shared the same historical context where same-sex libidinal object choice carried great social meaning and, as a result, a specific set of expectations and/or disabilities could be imposed on me by virtue of my self-inclusion in the category of lesbian.²⁰⁵ Despite my personal unease with the identity category “lesbian,” no one has ever questioned whether I had the bona fides to qualify for group membership. There could be a debate over whether I was a “good” lesbian, but that determination relates to how I perform my lesbianism not to *whether* I was a lesbian. Today, a transwoman who self-identifies as a lesbian is often presented with a threshold challenge that goes directly to whether she can *be* a lesbian.

As a result of my abiding skepticism regarding stable lesbian and gay identities, I have always preferred to use the descriptive term “same-sex” in lieu of the L, G, and B.²⁰⁶ This means that I have written in the past about “same-sex relationships” and “same-sex desire.”²⁰⁷ I did this because I thought the construction was more accurate. It included individuals who would not necessarily self-identify as L, G, or B. It also shamelessly underscored the sexuality that was often obscured by adjectives like gay or lesbian. I wanted to write about same-sex relationships and same-sex desire, not those mythical creatures called gay men and lesbians.²⁰⁸

In retrospect, my prior scholarship was exclusionary in that it left no room for specifically transgender experiences. Beyond that, it now seems to have been built on an internal incoherency. With the integration of transgender narratives and the acceptance of transgender truth claims regarding the lived experience of gender, what does same-sex mean? Does same-sex desire only occur when all four gender points are in convergence for both object and subject? Or does scholarship on same-sex desire primarily concern the social meaning of same-sex desire, in which case the determining measure would be the external perception of the desire? In other words, a transman who is in a relationship with a congruent four

205. BUTLER, *supra* note 23, at 140–41.

206. *See, e.g.*, Nancy J. Knauer, *The September 11 Relief Efforts and Surviving Same-Sex Partners*, 26 WOMEN’S RGTS. RPT. 79 (2005).

207. *See, e.g.*, Knauer, *supra* note 73 (discussing regulation of “same-sex desire”).

208. Nancy J. Knauer, *Lawrence v. Texas: When ‘Profound and Deep’ Convictions Collide with Liberty Interests*, 10 CARDOZO WOMEN’S L. J. 325, 326 (2005).

point man would be perceived as being in a homosexual relationship and, therefore, should be counted as such. Perhaps same-sex desire is fundamentally unknowable because one of the points of gender definition is internal gender identity? Or is gender simply a positive command of the sovereign in which case same-sex desire is defined ultimately by reference to the legal status of the participants? In this case, the transman who had not changed his gender markers would still be legally female and, therefore, his relationship with a four point congruent man would be considered heterosexual.

The recognition of different points of gender definition opens up considerable space to explore a host of non-normative relationships and desires that would not otherwise fall within the category of same-sex desire. It may also expose degrees of heterosexual desire in relationships that otherwise would have been identified as same-sex relationships. For example, assume a relationship between two individuals who were both assigned female at birth. What does it mean if one of the partners is a four point congruent female but the other partner has a gender expression that is male or even an internal gender identity that is male? Does this make the relationship a little bit heterosexual, say seventy-five percent homosexual and twenty-five percent heterosexual? What if one of the partners identifies as genderqueer? Can there be a homosexual relationship if one party does not identify as a gender?

Indeed, if each one of us truthfully takes a gender inventory of her/himself and her/his partner (or desired love object), how many of us would score one hundred percent heterosexual or one hundred percent homosexual?²⁰⁹ How many of us would find all four points of gender definition in congruence for both partners? In addition to (or as a result of) each of us being a little genderqueer, perhaps we are all just a little bit queer?

C. Legal Reforms

I have previously advocated the production of a “scholarship of articulation” where both commonalities and differences are recognized and spoken.²¹⁰ The incorporation of transgender realities and experiences will no doubt further this goal as it will not only complicate, but also enrich future scholarship regarding gender and sexuality. Although making our scholarship more representative of the lived experience of gender is an important

209. For assistance constructing your personal gender inventory see, for example, KATE BORNSTEIN, *MY GENDER WORKBOOK: HOW WE BECOME A REAL MAN, A REAL WOMAN, THE REAL YOU, OR SOMETHING ELSE ENTIRELY* (1997).

210. Nancy J. Knauer, *Heteronormativity and Federal Tax Policy*, 101 W. VA. L. REV. 129, 138 (1998).

2007 GENDER MATTERS: MAKING THE CASE FOR TRANS INCLUSION 45

goal, as noted above in the Introduction, at the end of the day we produce theory to serve the living. In the case of transgender individuals, this means that we must address the ever-present threat of violence and the legal barriers to gender self-definition and agency.²¹¹

Part II.A notes that gender legal reforms have addressed the two main points of friction experienced by non-transgender individuals—gender role expectations/stereotypes and the regulation of same-sex relationships and associated sexuality. In both instances, legal reforms have made significant steps toward the formal elimination of gender-related bias.²¹² The prohibition against discrimination on account of sex has even been expanded to include non-normative gender expression.²¹³ In the case of same-sex relationships, marriage remains out of reach for federal purposes as well as in the vast majority of states, but many of the other legal disabilities imposed on account of the gender of one's partner have been removed.²¹⁴ There can be no doubt that such legal reforms have been exceedingly important and have greatly enhanced many lives.

These reforms have largely ignored transgender identities with the exception of some courts and legislatures, which have extended anti-discrimination protection and hate crimes sentence enhancement to include gender identity and gender expression.²¹⁵ On a fundamental level, these reforms failed to address transgender concerns because they failed to question the underlying primacy of the gender system and its reliance on the physical measures of gender. Accordingly, in addition to promoting non-discrimination norms, the next generation of legal reforms must grapple with ways to recognize gender self-definition and provide transgender individuals with an elemental level of security that is currently absent. Transgender individuals need access to identity documents that do not contradict or place into question their articulated gender self-definition. In today's security-conscious society, many transgender individuals lack the

211. See *infra* note 221 (discussing prevalence of violence).

212. See *supra* text accompanying notes 42–43.

213. See, e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

214. See, e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003).

215. The First, Sixth, and Ninth Circuits have extended Title VII protections to include transgender individuals. See, e.g., *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004); *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213 (1st Cir. 2000); *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000). According to the Human Rights Commission, nine states (and the District of Columbia) have anti-discrimination laws that include gender identity or gender expression. Human Rights Campaign – Your Community Homepage, <http://www.hrc.org/> (last visited Mar. 19, 2007) (follow “Laws in Your State” under “Get Informed”). Ten states (and the District of Columbia) have hate crime laws that include the gender identity or gender expression of the victim. *Id.*

basic identity documents necessary for safe passage through certain public spaces and past certain state actors.²¹⁶

For non-transgender individuals, the extent to which gender continues to matter and the law continues to enforce and police the binary may be surprising. Like most non-trans-identified individuals, I generally go through my days blissfully unaware of the number of times that my gender is read by acquaintances, strangers, and officials of the state. For example, in Philadelphia the monthly pass for the local transportation system (aka “TransPass”) loudly declares the holder as either F or M with a large color-coded sticker affixed at point of sale.²¹⁷ I don’t worry that a police officer is going to accuse me of using a stolen TransPass because s/he concludes that my gender expression does not conform with my F sticker. I do not think twice when I enter sex-segregated spaces, such as a public restroom. Nor am I cognizant of all the different legal documents that report my gender as an essential part of my official legal identity: driver’s license, social security records, voter registration card, birth certificate, passport, or bank records.²¹⁸

To the contrary, a transgender individual can be subject to ridicule, harassment, and violence when her/his gender expression and/or embodiment does not match her/his legal gender. While attempting to traverse sex-segregated public spaces, s/he can be denied services, provided services in a gender-inappropriate space, and reported to (and arrested by) the police for being in the “wrong” place.²¹⁹ The ubiquitous public restroom is the most familiar form of sex-segregated public space. No doubt, we have all experienced the anxiety produced by a frantic search for a public restroom when one is needed and none appears on the immediate horizon. This anxiety is markedly different if, in addition to finding a public restroom, you then have to assess the risk associated with your choice of *which* restroom to enter.²²⁰ Transgender individuals report considerable distress over restroom issues, and it is easy to see how denial of safe and reliable

216. See Viviane K. Namaste, *Genderbashing: Sexuality, Gender, and the Regulation of Public Space*, in THE TRANSGENDER STUDIES READER, *supra* note 3, at 584–89 (discussing use of violence to enforce gender boundaries in public space).

217. Even when you order your TransPass online, you have to designate your gender. See Shop.SEPTA.org, https://shop.septa.org/index.php?target=categories&category_id=9 (last visited Mar. 5, 2007).

218. In addition, there are other important documents that I am not required to have that also require gender, such as Selective Service Registration and Immigration documents.

219. For example, Dean Spade was arrested for using a men’s room in Grand Central station. Spade, *supra* note 14, at 17 n.5. Spade spent twenty-three hours in jail on a trespassing charge. *Id.*

220. See, e.g., Patricia Leigh Brown, *A Quest for a Restroom that’s Neither Men’s Room Nor Women’s Room*, N.Y. TIMES, Mar. 4, 2005, at A14.

2007 GENDER MATTERS: MAKING THE CASE FOR TRANS INCLUSION 47

access to public restrooms can effectively exclude some transgender individuals from full participation in public life.²²¹

In addition to public restrooms, many sex-segregated spaces are not immediately obvious because they typically serve the disadvantaged and the poor. These spaces include homeless shelters, domestic violence shelters, foster care facilities, and correctional facilities.²²² In this way, the burden of the gender binary can be said to disproportionately fall on the most vulnerable segments of our society.²²³ Even for the privileged, contradictory identity papers can produce difficulties in a wide range of unexpected venues. For example, a confrontation with a transphobic state actor can run the gamut from a life saving/life threatening encounter with a police officer or emergency medical technician to bureaucratic torture exacted by a clerk at the motor vehicle office.²²⁴

Air travel is an excellent example of a normal everyday activity that can produce considerable stress and discomfort for transgender individuals. Although we may gripe and complain about long lines and the futility of putting our toothpaste in a clear Ziploc bag, the general public has largely accepted the enhanced security measures as part and parcel of post-September Eleventh reality.²²⁵ However, for transgender individuals, these

221. In 2001, the San Francisco Human Right Commission conducted a large scale survey regarding transgender issues of bathroom safety where fifty percent of trans people reported that they had been harassed or assaulted in a bathroom. See S.F. HUMAN RIGHTS COMM'N, GENDER NEUTRAL BATHROOM SURVEY (2001), available at http://www.transgenderlawcenter.org/pdf/sbac_survey.pdf. The most common form of harassment is questioning by police or security guards. *Id.* For trans people who are also poor or homeless and must rely on public bathrooms, the inability to use a public bathroom without fear deprives them of a place to meet the most basic of human needs.

222. Trans people are disproportionately represented in the homeless population. See THE NATIONAL GAY AND LESBIAN TASK FORCE, TRANSITIONING OUR SHELTERS (Dec. 15, 2003), available at http://www.thetaskforce.org/reports_and_research/trans_homeless. Most homeless shelters in the United States are segregated by sex. *Id.* This segregation has proven unsafe for transgender persons who are provided services based on their sex assigned at birth, rather than on their gender identity. *Id.* In addition, transgender youth in foster care or juvenile detention face a number of disabilities, including access to medical care, autonomy regarding dress and expression, and safety issues in sex-segregated facilities. See, e.g., *Doe ex rel. Pumo v. Bell*, 754 N.Y.S.2d 846 (N.Y. Sup. Ct. 2002) (holding N.Y. Human Rights Law required reasonable accommodation for minor in foster care).

223. Prisons raise questions of both physical safety and access to medical treatment. The only U.S. Supreme Court case to discuss transsexuality involved an Eighth Amendment claim of cruel and unusual treatment where prison officials placed a transwoman in the general male prison population, and she was savagely beaten. See *Farmer v. Brennan*, 511 U.S. 825 (1994) (describing transsexuality as “[a] rare psychiatric disorder in which a person feels persistently uncomfortable about his or her anatomical sex, and who typically seeks medical treatment, including hormonal therapy and surgery, to bring about a permanent sex change”).

224. A 2002 survey conducted in San Francisco revealed a large percentage of respondents experienced harassment at the hands of police officers. See TRANSGENDER L. CTR., TRANS REALITIES: A LEGAL NEEDS ASSESSMENT OF SAN FRANCISCO'S TRANSGENDER COMMUNITIES, <http://www.transgenderlawcenter.org/tranny/pdfs/Trans%20Realities%20Final%20Final.pdf> (last visited Apr. 23, 2006).

225. See, e.g., Alan Cowell, *Terror Plot Foiled: Airports Quickly Clamp Down*, N.Y. TIMES, Aug. 11, 2006, at A1.

new security measures have made air travel a complicated and, at times, perilous proposition.²²⁶ Transgender advocates have prepared advice sheets for transgender individuals who are planning to fly and recommend that transgender individuals report to the airport well in advance of a flight in order to leave sufficient time for all the questions to be answered and addressed.²²⁷ A transgender individual whose gender expression and/or embodiment does not match her/his identity documents will be subject to increased scrutiny and questioning.²²⁸ Even transgender individuals whose identity documents are congruent may find the more intrusive physical screening threatening and invasive.²²⁹

One solution to the problems created by contradictory identity documents would be to abandon gender markers as a form of identification or make them optional. This seems unlikely in the short-term as the law has given no indication that it intends to move in the direction of gender blindness. The controversial Federal Real ID Act of 2005, which set forth uniform rules for state-issued driver's licenses and other forms of identification, specifically prescribes gender as part of the required identity data.²³⁰ Moreover, the spate of same-sex marriage legislation that has swept the United States in recent years has served to increase the extent to which gender factors into the administration of our laws.²³¹

Short of abandoning gender, another solution would be to change the laws regarding legal gender markers to more accurately reflect the process of gender self-definition. Currently, legal gender is assumed to be the gender assigned at birth. In order to overcome this very strong presumption, an individual who wishes to change legal gender markers generally must assert that the original assignment was in error or s/he has taken irreversible physical steps toward somatic gender reassignment.²³² The federal government and the states have enacted different rules and regulations governing under what circumstances an individual can change which gender markers.²³³ These rules are far from uniform and present a confusing

226. NAT'L CTR. FOR TRANSGENDER EQUAL., AIR TRAVEL TIPS FOR TRANSGENDER PEOPLE (Dec. 6, 2004), <http://www.nctequality.org/travel.asp>.

227. *Id.*

228. *Id.*

229. *Id.*

230. 49 U.S.C. § 30301 (2006) (enacted as part of the larger spending bill, Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief of 2005, H.R. 1268, 109th Cong. (2005) (enacted)).

231. Nancy J. Knauer, *The Recognition of Same-Sex Relationships*, 28 U. HAW. L. REV. 23, 45–49 (2005).

232. *In re Estate of Gardiner*, 42 P.3d 120, 122–123 (Kan. 2002).

233. A request to amend or correct a birth certificate must be made to the state in which the person was born and often requires a court order. LAMBDA LEGAL, AMENDING BIRTH CERTIFICATES TO REFLECT YOUR CORRECT SEX, <http://www.lambdalegal.org/our-work/issues/rights-of-transgender->

array of contradictions and silly distinctions.²³⁴ For example, in Kansas it is possible to change official gender markers after sex-reassignment surgery, but such change is not effective for the purposes of marriage.²³⁵

The stated rationales for this bright-line approach—that privileges physically verifiable manifestations of gender—are twofold: the need for certainty, and the desire to prevent the rampant fraud that could result if individuals were permitted to jump gender at will.²³⁶ This strict either/or approach to gender fails to address the lived experiences of many transgender individuals who, for a variety of reasons, may not have access to or may not desire irreversible bodily modification.²³⁷ It rests on the notion that a change in legal gender markers is a *reassignment* of gender to correct an erroneous assignment at birth, rather than an act of self-definition. Legal gender markers are not changed to reflect internal gender identity unless an individual's internal sense of gender is accompanied by an objective physical change in embodiment.²³⁸ Although gender embodiment can be an aspect of gender self-definition, it is not an essential one. Moreover, in the United States, access to bodily modification is heavily regulated by the medical profession. In this way, whether a transgender individual can change legal gender markers is fundamentally a question of diagnosis—not agency.

A legal gender change regime that would recognize an individual's right to gender self-definition would allow an individual to *declare* her/his legal gender. Although it is easy to imagine traditional due process or equal protection arguments asserting such a right, or even a First Amendment free speech argument,²³⁹ political will expressed through legislation would offer the greatest level of uniformity. In terms of models, the United Kingdom has implemented the Gender Recognition Act which, to some extent, recognizes an individual's right to declare her/his gender.²⁴⁰

people/amending-birth-certificates.html (last visited Apr. 23, 2006). The procedures used by the states are too diverse to summarize, but only three states specifically disallow the issuance of a corrected birth certificate: Idaho, Ohio, and Tennessee. *Id.* Conversely, twenty-one states and the District of Columbia expressly permit a change in the sex designation on a birth certificate following medical sex reassignment. *Id.* In many instances, it is not clear what quantum of medical intervention is required. *Id.*

234. See Julie A. Greenberg & Marybeth Herald, *You Can't Take It with You: Constitutional Consequences of Interstate Gender Identity Ruling*, 80 WASH. L. REV. 819, 837 (2005) (outlining the approaches of different jurisdictions).

235. *In re Estate of Gardiner*, 42 P.3d at 122–23.

236. See Brian Maffly, *Male 'Wife' is Guilty of Fraud*, SALT LAKE TRIB., Sept. 6, 1995, at B1 (man plead guilty to defrauding “naïve” husband).

237. The National Center of Transgender Equality estimates that ninety percent of transgender people do not undergo genital surgery. Andy Bromage, *Born Identity*, NEW HAVEN ADVOCATE.COM, Mar. 7, 2007, <http://www.newhavenadvocate.com>.

238. Greenberg & Herald, *supra* note 234, at 837.

239. *Id.* at 863–84 (discussing equal protection and due process claims).

240. *Id.* at 823 (noting British response consistent with EU treatment of transgender rights).

Although it continues to involve medical professionals, it does provide uniform guidelines pursuant to which an individual can choose to switch genders for all legal purposes.²⁴¹ This would represent a considerable improvement over the current situation in the United States, which is a decidedly piecemeal affair with different rules and procedures existing on the state and federal levels, the vast majority of which emphasize gender reassignment surgery over other acts of gender self-definition.²⁴²

V. ACTION STEPS

In lieu of a traditional conclusion, I think that it would be more productive to suggest a series of action steps appropriate to try at home. As I mentioned in the Introduction, although transgender issues raise fascinating questions of theory, it is imperative not to lose sight of the individuals involved who remain, to a large extent, outside the protection of the law. Here, I have in mind our students. For the last several years, I have served on the Admissions Committee at my law school, and we have seen a considerable increase in the number of applicants who are “out” as transgender.²⁴³ Given the generational nature of this issue, we should expect to see more transgender students going forward.²⁴⁴ Many of these students are coming from undergraduate schools where transgender issues are at the forefront.²⁴⁵ Based on our experience, I suggest the five following steps to further trans inclusion:²⁴⁶

1. Educate yourself;

241. Robert E. Rains, *Legal Recognition of Gender Change for Transsexual Persons in the United Kingdom*, 33 GA. J. INT'L & COMP. L. 333 (2005).

242. Nat'l Ctr. for Transgender Equal – Federal Documents, http://nctequality.org/Issues/Federal_Documents.asp (last visited Mar. 19, 2007).

243. A 2003 survey of U.S. colleges and universities found a surprisingly high percentage of LGBT students reporting violence and harassment on account of their sexual orientation and/or gender identity. Susan R. Rankin, *Campus Climate for Lesbian, Gay, Bisexual and Transgender Students: A National Perspective*, Apr. 2003, available at http://thetaskforce.org/downloads/reports/Campus_Climat.pdf. Twenty percent of the respondents reported that they had feared for their physical safety in the past year. *Id.* Fifty-one percent of the students surveyed said that they concealed their sexual orientation and/or gender identity to avoid intimidation. *Id.* Thirty-four percent reported that they avoided disclosing their sexual orientation and/or gender identity to a faculty member or administrator due to fear of harassment or discrimination. *Id.*

244. Marilyn Elias, *Gay Teens Coming Out Earlier to Peers and Family*, USA TODAY, Feb. 8, 2007, at 1A (reporting on a study of LGBT teenagers).

245. The Transgender Law & Policy Institute reports that eighty-one colleges and universities have amended their non-discrimination policies to include gender identity. TRANSGENER LAW & POLICY INST., WAYS THAT COLLEGES AND UNIVERSITIES MEET THE NEEDS OF TRANSGENDER STUDENTS, <http://www.transgenderlaw.org/college/index.htm#practices> (last visited Mar. 19, 2007).

246. The Transgender Law & Policy Institute has prepared a list of “best practices” for colleges and universities.

2007 GENDER MATTERS: MAKING THE CASE FOR TRANS INCLUSION 51

2. Educate your colleagues, staff, and students;
3. Amend your institution's anti-discrimination policies to include gender identity and gender expression;²⁴⁷
4. Adopt internal policies to further gender self-definition (e.g., name change rules, uni-sex bathrooms, removal of gender markers); and
5. Consider ways to include transgender issues throughout the curriculum.

Although most of these steps are self-explanatory, I would like to underscore that the first step should be a program of self-education concerning transgender issues. By this, I mean that you should not rely on transgender individuals whom you may encounter to provide you with a private tutorial. In my experience, folks with majority identifications often do not understand how disrespectful this can be, not to mention how tedious it is for the person with the minority identification to have to explain her/himself over and over to each new and curious acquaintance. Transgender individuals, particularly our students, do not exist to educate us out of our ignorance and prejudice. We should not assume that they will carry the laboring oar on our road to enlightenment.

In the 1990s, my faculty grappled with ways to integrate lesbian and gay issues through the curriculum, and many of my colleagues explained that lesbian and gay issues were really inaccessible to them. How could they possibly learn anything about *that*? Apparently, they didn't know the first place to start. One of my well-meaning colleagues even went as far as to suggest that, if the LGBT student groups would prepare some comprehensive course modules, then s/he might consider teaching the material. I remember being struck by just how foreign my colleague must have considered lesbian and gay issues if s/he was willing to abdicate a portion of her/his syllabus to a group of nameless students. We all know that law

247. It is important to have a formal commitment to non-discrimination based on gender identity or gender expression. In the last ten years, there has been a marked increase in the number of employers with anti-discrimination policies that include gender identity. The HRC reports that a total of 307 employers expressly prohibit discrimination based on gender identity. Human Rights Campaign, http://www.hrc.org/Template.cfm?Section=Search_the_Database&Template=/CustomSource/WorkNet/srch.cfm&searchtypeid=1&searchSubTypeID=1 (last visited Apr. 23, 2006) (search under "Employers with Non-Discrimination Policies that Include Gender Identity"). This includes eighty-one Fortune 500 companies and fifty-five colleges and universities. GenderPAC, <http://www.gpac.org/genius/index.html> (last visited Apr. 23, 2006). In 2006, the ABA House of Delegates passed a resolution urging "federal, state, local, and territorial governments to enact legislation on actual or perceived gender identity or gender expression, in employment, housing, and public accommodations." AM. BAR ASS'N, HOUSE OF DELEGATES, RECOMMENDATION 1 (2006), available at <http://www.abanet.org/leadership/2006/annual/dailyjournal/hundredtwentytwob.doc>.

professors can suffer from some pronounced personality quirks, but we are rarely accused of accurately accessing the limits of our own expertise.

Self-education with respect to transgender issues will necessarily be a continuing process. It is important to realize that the transgender communities are engaged in an ongoing process of self-definition and, accordingly, questions ranging from legal strategy to terminology will be subject to change and reassessment.²⁴⁸ However, it is safe to say that there are a few basic rules. As a matter of civility, individuals should be called what they want to be called, and we should endeavor to respect an individual's gender self-definition.²⁴⁹ For example, if a student in your class asks to be called by a name different from the one appearing on your class list, it is probably not appropriate to make a crack about it in open class, as did one of my colleagues at the beginning of this past semester.²⁵⁰ Although we might not think twice about a throw-away comment expressing benign surprise, it can pack considerable sting to the transgender student. It can also signal to the other students a level of disrespect for the student's gender self-definition that was not intended. As a matter of professionalism, lawyers who represent transgender individuals should educate themselves on the appropriate and preferred terminology and we should do the same in the classroom.²⁵¹

Self-education starts with the recognition that, for many, gender continues to carry great social meaning and consequences. A good exercise is to spend a day trying to be conscious of every time your gender is read, requested, or acknowledged.²⁵² The next time you walk into a public restroom consider how that experience would differ if you could be perceived to be in the "wrong" place and you could be questioned or detained or worse. Consider what it is like to have no place that is "right." Once you become aware of the continuing weight of gender, transgender issues will become increasingly obvious.

248. Spade, *supra* note 14, at 15 n.2.

249. For example, journalists who cover trans issues have adopted guidelines for reporting on transgender people. The 2006 Associated Press *Stylebook* makes the following recommendation: "Use the pronoun preferred by the individuals who have acquired the physical characteristics of the opposite sex or present themselves in a way that does not correspond with their sex at birth. If that preference is not expressed, use the pronoun consistent with the way the individuals live publicly." *GLAAD Applauds Updated Associated Press Stylebook Entries*, GLAAD, Mar. 13, 2006, http://www.glaad.org/publications/archive_detail.phd?id=3869.

250. One way to avoid this is to institute a name change policy to ensure that a student's chosen name is reflected in her/his records and email address. At a minimum, you can circulate a seating chart and thereby poll the students directly.

251. Carolyn Grose, *A Persistent Critique: Constructing Clients' Stories*, 12 *CLINICAL L. REV.* 329 (2006).

252. RUTH FRANKENBERG, *WHITE WOMEN, RACE MATTERS: THE SOCIAL CONSTRUCTION OF WHITENESS* 142 (1993) (describing color-blind thinking as the "polite language of race").

2007 GENDER MATTERS: MAKING THE CASE FOR TRANS INCLUSION 53

Resisting the conclusion that transgender issues are the “new” gay, I want to close with a final example from the struggle to include lesbian and gay issues in the curriculum.²⁵³ One colleague who taught in a subject area where lesbian and gay issues seemed a natural fit defended her/his decision not to cover any lesbian or gay issues on the grounds that s/he did not want to make any of the closeted gay students feel exposed. What if homophobic sentiments were voiced during class discussion, s/he asked? Wouldn’t talking about the law’s inequities make the closeted students feel worse? I recall being astounded by this explanation, but I was moved by what appeared to be my colleague’s sincere agitation and apprehension. S/he was deeply concerned that by speaking about these issues s/he would make a mistake, make someone uncomfortable, or otherwise give offense. Undoubtedly, s/he would at some point do all of these things, as we will when we try to integrate transgender issues into our courses and support our transgender students. Silence is not an alternative. It is defeat—plain and simple. As Audre Lorde told us decades ago, “it is not difference which immobilizes us, but silence.”²⁵⁴

253. Wilchins, *supra* note 126, at 62 (referring to “the new gay”).

254. AUDRE LORDE, *SISTER OUTSIDER: ESSAY AND SPEECHES* 44 (1984). Lorde maintained that “your silence will not protect you.” *Id.* at 43. You should consider yourself forewarned.