

Operations of Legal Rhetoric: Examining Transsexual and Judicial Identity

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Transsexuality draws attention. A transsexual is someone who undergoes or contemplates undergoing anatomical and hormonal modifications in order to live in and be recognized as a different gender than the one attributed at birth. An individual transsexual's gender presentation may be so coherent that at any particular moment it draws no attention. However, the life history of any transsexual involves a shifting and a doubleness of gender attribution over time, which challenges cultural understandings of the ease and naturalness of the gender attribution process.

Legal opinions, as a genre, rarely draw attention. But they should, and for similar reasons. Individual legal opinions in a particular doctrinal area may appear to offer coherent and unified explanations of their decisions. However, they also offer a shifting and a doubleness of the rhetoric used to justify outcomes, both in the conflicts apparent in the aggregate and in the incoherencies in any particular opinion. The phenomenon of transsexuality provides writers of judicial opinions with the sort of controversy that renders these qualities of legal texts particularly visible.

An increasing number of transgender theorists and activists urge that claims about and images of transsexual identity undergo a shift in perspective. By moving the experience of surgical operations to the conceptual foreground, these theorists hope to reveal more fully the complex mechanisms of gender at work in the lives and histories of transsexuals.¹ I seek a similar foregrounding of the rhetorical operations in judicial opinions in order to reveal the more complex mechanisms of decision-making. Just as an embrace by transsexuals of their personal histories might have significant implications for an understanding of gender, so might an embrace within legal decisionmaking of the repudiated, the excluded, the crisis-generating features that appear to mar the smooth con-

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¹ See, e.g., KATE BORNSTEIN, *GENDER OUTLAW: ON MEN, WOMEN, AND THE REST OF US* 12 (1994); Sandy Stone, *The Empire Strikes Back: A Posttranssexual Manifesto*, in *BODY GUARDS* 292, 295 (Julia Epstein & Kristina Straub eds., 1991); Susan Stryker, *My Words to Victor Frankenstein Above the Village of Chamounix: Performing Transgender Rage*, 1 *GLQ: J. LESBIAN & GAY STUD.* 237, 238 (1994).

sistency of opinions alter our understanding of judging. In this Article, I emphasize the rhetorical operations of decisions in which judges contemplate the identity claims of transsexuals in order to offer insights into the condition of both judging and gender, as well as the connection between the two.

The phenomenon of transsexuality may offer controversy for two contradictory reasons. This conflict is illustrated by the celebrated case of Renee Richards, a male to female transsexual² who won the right to play in the women's division of the U.S. Open Tennis Tournament.³ The validation of her⁴ claim that she was a woman may disturb either those with a flexible view about gender (to the extent that the process of determining Richards' gender was based on very essentialized concepts of gender), or those with a rigid view of gender (to the extent that an individual who had previously played tennis as a man would now play as a woman).

At the same time, the phenomenon of transsexuality also offers an opportunity for people of very diverse viewpoints to identify with the struggles of individual transsexuals. The following thought exercise may suggest how. Imagine you have gone to the doctor with some troubling symptoms and are told:

You have a rare condition. Without further medical intervention you will transform biologically over the next three months into the other gender. Biologically means hormonally and anatomically, internally and externally. However, there are steps that can be taken to forestall this change. These treatments involve major surgery, and can be painful and costly. Your insurance may or may not cover them. Furthermore, you may find the results unsatisfactory; we will never be able to restore you to the way you look and feel today. You may not have the same degree of sexual function you have had in the past or would have in your new gender without the intervention. However, we can ensure that your physical appearance will allow others, whether strangers or intimates, to attribute to you your old gender.

² The terms "male to female" or "female to male" when modifying "transsexual" are used to indicate the direction of change of gender attribution. "Male to female" means the person had male gender attributed to her at birth, but through surgical alteration, or other means, now lives, or plans to live, as a woman.

³ See *Richards v. United States Tennis Ass'n*, 400 N.Y.S.2d 267 (N.Y. Sup. Ct. 1977).

⁴ See *infra* Part II.C (discussing the importance of pronoun choice). In this Article, when referring to individuals, I use the gendered pronoun by which that individual wishes to be referred, or uses to refer to him or herself. Where such information is available, this choice seems an uncomplicated matter of respect and courtesy, and is consistent with a position of "elastic tenability." See *infra* Part I.B (discussing elastic tenability). However, to the extent that I rely on more limited information, like a person's name, the choice foreshadows some of the difficulties of gender attribution that I will analyze in the legal texts.

Which choice would you make?

Either choice offers an opportunity to identify with transsexuals. Because I have altered the default assumptions, those who would never contemplate transsexual surgery might allow themselves to experience an effortless transition beyond their control, and thus imaginatively accept the mutability of gender that transsexuality represents.⁵ Those who would nonetheless undertake the effort to remain in their original gender share with transsexuals a strength of gender identity that makes accommodating that original gender identity worth the physical, fiscal, and emotional cost.

The double controversy raised by the different reactions to Renee Richards' case and the double identification elicited by the hypothetical doctor visit together suggest a paradox about transsexuality: it is a phenomenon that can both undermine and reinforce traditional thinking about gender. Legal opinions on transsexuals are often paradoxical in the same way: they are capable of undermining as well as reinforcing ideas about gender and other social norms. However, legal opinions rarely either explicitly embrace the doubleness of transsexuality or admit into view its troubling aspects. Instead, judges either accept the claims in a manner consistent with traditional thinking about gender (more rarely) or reject transsexual claims altogether (more often).

In this Article, I examine cases involving claims by transsexuals concerning employment discrimination, treatment in prisons, name changes, parental rights, and other matters. Using these cases, I argue that the judges writing these decisions pursue their judicial projects in a manner that is analogous to the method by which transsexuals pursue their "gender projects."⁶ The rhetorical strategies judges use to shore up the coherence of their own arguments and reconcile the controversies offered by the transsexual litigants resemble strategies used by transsexuals and others to establish coherence of gender. I further argue that the devices most opinions employ for establishing this coherence in fact prevent a more meaningful understanding of the difficult issues raised by and facing transsexuals.

⁵ See Leslie Pearlman, *Transsexualism as Metaphor: The Collision of Sex and Gender*, 43 BUFF. L. REV. 835, 835-36 (1995) (offering similar imaginative suggestion to readers). See generally VIRGINIA WOOLF, ORLANDO (1928) (depicting title character awakening to find herself transformed from man to woman).

⁶ Ronald Garet, *Self-Transformability*, 65 S. CAL. L. REV. 121, 124 (1991) (referring to the processes of self-transformation that transsexuals undergo).

I. Identity, Tenability, and the Law

A. *Transsexual Identity*

A discussion comparing transsexual identity strategies to the rhetorical strategies of judges requires an understanding of the different ways in which transsexuals themselves and authors writing about transsexuality approach the issue of transsexual identity. Many transsexuals have not had surgery, may never have surgery, or may have conflicted feelings about surgery. However, as a desire, consideration, or accomplishment, surgery tends to play a role in most attempts at defining transsexuality. In the transgender community, transsexuals are distinguished from cross-dressers, who do not seek reassignment to a gender other than that attributed to them at birth, and from transgender people, who do seek to live as the other gender, but without surgery.⁷ Transsexuals vary widely in their embrace or rejection of a specific "transsexual identity," and in the creative manner in which they combine or separate that identity, gender identity (whether they consider themselves "men" or "women"), and sexual orientation identity. Those writing about transsexuality are similarly varied in their characterization of the phenomenon.

For some transsexuals, a "transsexual identity" means little. Writing in 1978, sociologists Suzanne Kessler and Wendy McKenna confidently asserted, "[v]ery seldom did the transsexuals we interviewed refer to themselves as 'transsexual.'"⁸ Instead, they thought of themselves in terms of gender identity—man or woman. According to Kessler and McKenna, after surgery, transsexuals seek to consolidate their new gender attribution in the world's eyes in such a way as to erase their transsexual past and their former gender attribution. This erasure can include a rewriting and retelling of the history of their lives when in social and professional situations.⁹ Ronald Garet compares this process to conversion or immigration.¹⁰

Today, a number of transsexuals write in a manner that represents a marked shift from this perspective.¹¹ Sandy Stone, for example, argues that the process of "constructing a plausible history" is "profoundly dis-

⁷ See PAT CALIFIA, *SEX CHANGES: THE POLITICS OF TRANSGENDERISM* 58 (1997).

⁸ SUZANNE KESSLER & WENDY MCKENNA, *GENDER: AN ETHNOMETHODOLOGICAL APPROACH* 121 (1978).

⁹ See *id.* at 132; DEBORAH HELLER FEINBLOOM, *TRANVESTITES & TRANSEXUALS: MIXED VIEWS* 210 (1976) (describing a similar effort in her extensive correspondence with a male to female transsexual named Helen: "Over a few months' period we had constructed a biography for Helen which had two years of college, some advertising, copy, layout, and art experience, two marriages, and time out for children.").

¹⁰ See Garet, *supra* note 6, at 142 ("Clinics to which transsexuals come in quest of sex-reassignment surgery constitute an Ellis Island of gender immigration.").

¹¹ See also KESSLER & MCKENNA, *supra* note 8, at 134 (suggesting, even at the time they were writing, a growing discomfort among younger transsexuals with the need to construct false biographies).

empowering."¹² She argues that "[w]hat is lost is the ability to authentically represent the complexities and ambiguities of lived experience," and that "in the transsexual's erased history we can find a story disruptive to the accepted discourses of gender."¹³ She and other theorists urge transsexuals to speak openly about their experiences with gender.¹⁴ Whether this idea is representative of a widespread transsexual sensibility is impossible to gauge; those who adopt erasure as their identity strategy by definition will not be as visible. Nonetheless, this perspective is increasingly available in media, such as newsletters, autobiographical accounts, and even radio programs.¹⁵

By contrast, others writing about transsexuality deny both the claims transsexuals make to gender and the claim of a transsexual identity.¹⁶ Still other theorists support the gender claims of transsexuals, but oppose transsexuality as a surgical practice and either explicitly or implicitly argue that such a practice falsely consolidates under a single identity label a wide range of other possible identities. For example, sociologists Dwight Billings and Thomas Urban contend that "[t]he legitimization, rationalization, and commodification of sex-change operations have produced an identity category—transsexual—for a diverse group of sexual deviants and victims of severe gender role distress."¹⁷

B. Tenability

The different models for understanding transsexual identity can be plotted along an axis of "tenability," a term used by sociologist Dave King. According to King, "[t]enability . . . refers to the issue of whether or not the behaviour is considered acceptable on the basis of some standard—whether medical, religious, political or whatever."¹⁸

When courts view transsexuality as tenable, they typically accept a model of identity that seeks to erase the transsexual's past. For instance,

¹² Stone, *supra* note 1, at 295 (emphasis omitted).

¹³ *Id.*

¹⁴ See *id.* at 299; Stryker, *supra* note 1, at 250 (presenting what she calls "a transgendered consciousness articulating itself"); see also BORNSTEIN, *supra* note 1, at 98 (urging "transgendered people to come together under our own banner").

¹⁵ See, e.g., *Gender Talk* (WMBR radio broadcast, Cambridge, Mass.).

¹⁶ See, e.g., JANICE RAYMOND, *THE TRANSEXUAL EMPIRE* at xxiv (1994) ("I accept the fact that transsexuals have suffered an enormous amount of physical and emotional pain. But I don't accept the fact that someone's *desire* to be a woman, or a man, makes one a woman or man. Or that the instrumentality of hormones and surgery creates a real woman or man.").

¹⁷ Dwight B. Billings & Thomas Urban, *The Socio-Medical Construction of Transsexualism: An Interpretation and Critique*, 29 SOC. PROBS. 266, 266 (1982). See generally Susan Etta Keller, *Crisis of Authority: Medical Rhetoric and Transsexual Identity*, 11 YALE J. L. & FEMINISM (forthcoming 1999) (discussing the criticisms these and other theorists make regarding the medical model of transsexuality).

¹⁸ DAVE KING, *THE TRANVESTITE AND THE TRANSEXUAL: PUBLIC CATEGORIES AND PRIVATE IDENTITIES* 12 (1993).

in *Richards v. United States Tennis Ass'n*,¹⁹ the court cites approvingly the testimony of Richards' expert witness that apart from the chromosome test the U.S. Tennis Association ("USTA") sought to apply, Richards was in every other respect entirely female. According to the expert, Richards' internal anatomy was "that of a female who has been hysterectomized and ovariectomized,"²⁰ even though Richards never in fact had a uterus or ovaries to be removed. By accepting Richards' gender claim, the court suggests that it finds her transsexuality tenable. However, by also accepting the rewriting of her anatomical history, the court endorses the erasure of her transsexual past.

When courts see transsexuality as untenable, their views align most closely with those who seek to deny the identity claims of transsexuals. For example, in *Ulane v. Eastern Airlines*,²¹ the court characterized the plaintiff, a male to female transsexual claiming employment discrimination on the basis both of her transsexuality and her female gender, as "a biological male who takes female hormones, cross-dresses, and has surgically altered parts of her body to make it appear female."²² This characterization denied the plaintiff's claim to gender and transsexuality. If all the cases are considered together, however, they produce a more conflicted and complex identity model, not least of all because each case explicitly acknowledges a litigant's transsexual status, even if it goes from there to endorse either erasing or denying that status.

My goal is to explore, through an examination of the conflicts within the legal opinions, a position of "elastic tenability." Elastic tenability not only accepts as tenable those who, like transsexuals, express gender in ways that differ from society's norms, but also accepts a variety of perhaps conflicting identity claims made by transsexuals and other transgender people. For instance, elastic tenability would acknowledge the claims of both those who seek to erase their transsexual past, and those like Sandy Stone who seek to embrace it.²³

C. Reading Transsexuals and the Law

Both transsexuals and legal texts offer the opportunity for an analysis or reading that unsettles traditional assumptions. When a transgender

¹⁹ 400 N.Y.S.2d 267 (N.Y. Sup. Ct. 1977).

²⁰ *Id.* at 272.

²¹ 742 F.2d 1081 (7th Cir. 1984).

²² *Id.* at 1087.

²³ See EVE SEDGWICK, *THE EPISTEMOLOGY OF THE CLOSET* 26-27 (1990) (offering the best example of a position analogous to elastic tenability). Sedgwick urges us "to give as much credence as one finds it conceivable to give to self-reports of sexual difference," *id.* at 26, arguing, in the case of homosexuality, "[i]n so homophobic a culture, anyone's dangerous decision to self-identify as gay ought to command at least that entailment of *bona fides* and propriodescriptive authority." *Id.* at 27. Her rationale is based on the extreme vulnerability in this society of each conflicting identity model.

person, either a transsexual or a crossdresser, seeks to be identified as a person of the gender other than the one assigned at birth (to "pass"), yet fails to secure that identification, the process is known as "being read."²⁴ Recently, transgender theorists arguing for a more visible transsexual identity have used the concept of legibility inherent in this phrase to suggest that transsexual bodies may themselves be texts, but readable in a manner that is productive, rather than destructive, of identity.²⁵ According to Sandy Stone, this process has potentially broad implications for destabilizing and reconceptualizing gender: "In the transsexual as text we may find the potential to map the refigured body onto conventional gender discourse and thereby disrupt it, to take advantage of the dissonances created by such a juxtaposition to fragment and reconstitute the elements of gender in new and unexpected geometries."²⁶

Whether or not it is intentional, a breakdown in this "passing" process, "being read," has a particularly disruptive edge. "Reading" someone's gender is not the same as simply noting it. A woman crossdressed as a man who is "read" as a woman is not likely to be read unambiguously as a woman, but as a woman crossdressed as a man. Reading a transsexual in the sense intended by Stone will involve both writer and reader, and will invoke many other existing discourses on transsexuality as well as gender generally. These discourses also must be read, and might, like the transsexual body itself, be read for productive, subversive ends.

The discourse I plan to read in this manner is, of course, legal discourse. Legal discourse itself has until recently been neglected as an arena of identity construction.²⁷ However, like the transsexual body, legal texts offer the opportunity for subversive reading and reconceptualization.²⁸ Although I attempt to challenge the power of these texts, I am

²⁴ BORNSTEIN, *supra* note 1, at 128.

²⁵ See Stone, *supra* note 1, at 299; see also Stryker, *supra* note 1, at 250 (seeking to "gain access to the means of my legible reinscription. Though I may not hold the stylus myself, I can move beneath it for my own deep self-sustaining pleasures.").

²⁶ Stone, *supra* note 1, at 296.

²⁷ Frequently, in the work of Foucault and other analysts of sexuality discourse, law plays a role, but not as a discourse to be analyzed strategically. Rather, Foucault describes *the law* as a blockage: "We must at the same time conceive of sex without the law, and power without the king." 1 MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY: AN INTRODUCTION* 91 (Robert Hurley trans., Vintage Books 2d ed. 1990) (1978); see also JUDITH BUTLER, *BODIES THAT MATTER: ON THE DISCURSIVE LIMITS OF "SEX"* 109 (1993) (describing law as a series of prohibitions that provide only the "discursive occasion for a resistance, a resignification, and potential self-subversion of that law"). But see DUNCAN KENNEDY, *SEXY DRESSING, ETC.* 119 (1993) (criticizing this approach because it sees law only as composed of prohibitions, rather than as the more complex arrangement of regulatory practices that private law affords).

²⁸ See Susan Etta Keller, *The Rhetoric of Marriage, Achievement, and Power: An Analysis of Judicial Opinions Considering the Treatment of Professional Degrees as Marital Property*, 21 VT. L. REV. 409, 416 (1996) (arguing that legal rhetoric, in a manner drawing on Foucault, "may need to be reworked rather than simply supplanted").

mindful, as Eve Sedgwick cautions, that an analysis that exposes contradictions does not alone undo them.²⁹ Rather, by "reading" legal texts for their ambiguities, I hope, with Sedgwick, to join "competitions for the material or rhetorical leverage required to set the terms of, and to profit in some way from, the operations of such an incoherence of definition."³⁰

There are some obvious ways in which cases might be "read" the same way one might "read" a transsexual. First, the different rhetorical choices courts make when deciding cases in fact mirror the array of different identity styles adopted by transsexuals.³¹ Second, legal opinions are vulnerable to the same skepticism about their internal coherence as the judges themselves display toward the gender claims of transsexual litigants. Just as the judge purports to understand the true gender of the litigant, I purport to be able to unmask what the opinion really is saying.

The parallels between legal opinions and transsexuals are, however, even more sustained. For example, Judith Butler uses the common law method of reasoning from precedent as a metaphor for how sexuality is maintained and performed, arguing that sexual identity is continuously established only by "citing" to a "juridical domain" of constraints and prior citations.³² It is also possible to see gender performance as a metaphor for legal cases and the manner in which their authors strive to achieve unity and coherence.

According to Butler, we act—all of us, not just transsexuals—as if there were a core gender, thereby creating a concept of internal gender by performing it on the outside.³³ Thus, the testimony by Renee Richards' physician that Richards had the anatomy of someone who has undergone a hysterectomy and an ovariectomy makes sense if the goal is to achieve a consistency among anatomy, self-perception, and appearance. For Richards and those who knew her well, her performance of gender was so congruent it was as if she had a history of internal organs that she in fact never possessed.

Legal opinions are similarly performative, enacting the concept of unitary precedent and clearly articulated social norms as if these existed

²⁹ See SEDGWICK, *supra* note 23, at 10 (arguing that deconstructive analyses are not "at all sufficient to disable" the discourse she analyzes—the contradictory definitions of homosexuality and heterosexuality—suggesting instead "that an understanding of their irresolvable instability has been continually available, and has continually lent discursive authority, to antigay as well as gay cultural forces of this century"); see also SLAVOJ ŽIZEK, *THE SUBLIME OBJECT OF IDEOLOGY* 21 (1980) (maintaining that the discovered inconsistency in ideology "far from announcing the 'imperfect realization' of these universal principles . . . functions as their constitutive moment").

³⁰ SEDGWICK, *supra* note 23, at 11.

³¹ See Dan Danielsen, *Representing Identities: Legal Treatment of Pregnancy and Homosexuality*, in *AFTER IDENTITY: A READER IN LAW AND CULTURE* 39, 58 (Dan Danielsen & Karen Engle eds., 1995).

³² BUTLER, *supra* note 27, at 108.

³³ See JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* 136 (1990).

in some temporally prior realm.³⁴ However, as Butler notes, "neither sex nor the law can be said to preexist their various embodyings and citings."³⁵ Although the authority cited in legal decisions exists in the form of actual documents, the meaning and coherence of the precedent and preexisting norms cited are created through a back-formation, in the performance of the legal text itself.³⁶ And judicial opinions, just like gender performances, may be attempts to impose coherent stories upon a welter of conflicting impulses.³⁷ Of course, the attempts often fail. Because of the rhetoric chosen, or because of the material effects of the decision, these attempts often produce new crises of their own for the affected litigant or for subsequent judge-interpreters.

In part, my goal in analogizing between transsexuals and judges is to illuminate the resonances between the experiences of both, in the hope that judges will have a greater sympathy for transsexual litigants through cross-identification with their identity claims and conflicts. In addition, I seek to demonstrate that the rhetorical strategies or operations judges employ in the legal texts to construct transsexual identity are implicated in the trouble, abjection, and violence these conflicts generate for transsexuals in our society. Power, wealth, even gender choice are distributed in society as a result of rule choices in each of the areas I examine. For example, the decisions to exclude transsexuals from employment discrimination under Title VII³⁸ have affected transsexuals in terms of wealth, and in terms of gender choice for those who conform to expectations rather than risk job loss.

Much of the rhetoric I explore—footnotes, pronoun choices, use of metaphors, and the elaboration of rationales—may seem only tangentially related to legal outcomes. However, "cultural imagery may weigh more heavily than either deduction or policy in influencing judicial rule choice."³⁹ This effect is even more pronounced when judges rely on imagery from prior opinions. Further, rhetoric may affect a transsexual's

³⁴ See Richard Hyland, *Babel: A She'ur*, 11 CARDOZO L. REV. 1585, 1589–97 (1990) (analogizing this quality of performativity to that of biblical stories like the tale of Babel, which similarly enact the existence of historical origins in the text itself).

³⁵ BUTLER, *supra* note 27, at 108.

³⁶ Hans Vaihinger argues that selected legal fictions operate in this manner, creating the conditions they assume by the very act of their deployment. See HANS VAHINGER, *THE PHILOSOPHY OF 'AS IF': A SYSTEM OF THE THEORETICAL, PRACTICAL AND RELIGIOUS FICTIONS OF MANKIND* 83–90 (C.K. Ogden trans., 1924). My claim is broader, to include all of legal decisionmaking.

³⁷ See generally DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION: (FIN DE SIECLE)* (1997) (analyzing the conflicting ideological stakes that judges deny through a style of neutral decisionmaking); cf. ERIC SANTNER, *MY OWN PRIVATE GERMANY: DANIEL PAUL SCHREBER'S SECRET HISTORY OF MODERNITY* (1996) (suggesting that crises in judicial decisionmaking were responded to in the case of one turn-of-the-century Austrian judge by a delusional system that involved a gender transformation).

³⁸ See, e.g., *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659 (9th Cir. 1977).

³⁹ KENNEDY, *supra* note 37, at 405 n.21.

power, wealth, and gender choice not so much because it determines outcomes, but because the crisis-avoiding rhetorical and doctrinal strategies employed by the judges allow them to ignore or deny the material and ideological effects of their decisions.⁴⁰

These rhetorical operations both produce and are generated by crises that implicate judicial as well as transsexual identity. By imposing coherence upon these crises, judges help to consolidate a coherent judging identity. Moreover, the strategies they employ for consolidating their own identities often resemble those employed by transsexuals for similar purposes.⁴¹ In this Article, I consider how judges construct their own identity while interpreting the identity claims of transsexuals. This process occurs through three interrelated operations: the attempt to maintain and shore up a coherent ideology of gender, the interpretation of identity through an inside/outside heuristic, and abjection.

In Part II, I examine the methods by which judges repudiate transsexuals' claims about gender in order to maintain a consistent ideology of gender. These methods parallel the repudiating identity strategies of some post-operative transsexuals who "erase" their pasts. In their effort to consolidate their own identities as judicial interpreters of gender, however, judges fail to take advantage of the complex view of identity that their own skepticism about the transsexual litigant provides.

This process of repudiation to achieve coherent identity, a process we all engage in, is often aided by an interpretive device that privileges as authentic those qualities perceived as inside and devalues those deemed external. In Part III, I explore how both transsexuals and judges employ this device to determine and adjudicate identity claims on the level of the individual, the group, and the text itself.

When judges or employers so thoroughly repudiate transsexuals as a group that transsexuals cease to seem even human, they are engaging in an identity operation of abjection, which I discuss in Part IV. Although transsexuals themselves do not engage in an explicit operation of group abjection, their own identity is often formed, to a large degree, by the experience of and response to their abjection by others. At the same time, the operation of repudiation that begins a process of abjection does bear some similarity to the repudiations that transsexuals do engage in—of anatomy, or more generally, of contrary indicia of gender.

Despite the similarities between legal opinions and transsexuals, judges, because of the power they command, can sustain more searching challenges to their identity strategies. For instance, it is possible to ask of opinion writers what some theorists would ask of transsexuals, that they

⁴⁰ See *id.* at 8 (describing this effect in other areas of the law).

⁴¹ See generally Keller, *supra* note 17 (examining how transsexuals' reliance on medical authority for the construction of their identity mirrors the deferral accorded medical expertise in judicial opinions).

self-consciously examine what their operations (in this case, rhetorical operations) ignore—what variable and varied responses to gender identity might yet be considered tenable. An increased acceptance by judges of different identity models could inspire a concomitant opening of decisional complexity. Judges who accept the greater complexity, or even uncertainty, of gender might treat transsexuals of many different identity models with more sophisticated understanding. This acceptance would allow courts to address more directly the difficult questions raised by transsexuals' material conditions. Considering the variable and varied responses already employed by judges, a new regime of legal analysis might not be necessary or possible; the instruments for reconsideration and self-consciousness may already be available.

II. Gender Ideology

Judges, transsexuals, and other members of society share an ideology of gender, a cultural belief that informs practices and attitudes regarding gender. In our society, we all participate in a gender ideology that holds there are two easily distinguished genders. In this Part, I examine the methods judges use when operating under this ideology to assess the identity claims of transsexuals. When judges rely upon the gender ideology in deciding claims raised by transsexual litigants, they comment on and help construct not only transsexual identity but their own identity as confident interpreters of gender. The coherence of the gender ideology, however, is undermined by the very uncertainty and skepticism generated for many judges by the transsexual litigant. Although this incoherence offers judges the opportunity to question their beliefs about gender, in most instances they fail to take advantage of the opportunity.

Ideology is a mechanism for structuring action as well as belief.⁴² In our society, we act as if humans form two fully distinct anatomical categories, male and female, as if all members of each category experience themselves as members of one or the other category (what social scientists would call gender identity), and as if members of each category display certain common characteristics (gender role).⁴³ I say we act "as if" these were true, because factual knowledge that would call any of the assumptions into question—such as the significant variation in human genitalia, including those infants born with genitals considered ambiguo-

⁴² See ZIZEK, *supra* note 28, at 30–33 (demonstrating how an ideology structures actions even when people recognize the ideology's distortions).

⁴³ See KESSLER & MCKENNA, *supra* note 8, at 113–14; see also BERNICE HAUSMAN, CHANGING SEX: TRANSEXUALISM, TECHNOLOGY, AND THE IDEA OF GENDER 7 (1995) (suggesting that the concept of a distinction between anatomical structures, on the one hand, and identity and roles, on the other, is of relatively recent historical origin).

ous⁴⁴—does not seem to undermine societal practice consistent with the assumptions.⁴⁵

A. *The Natural Attitude*

Our gender ideology is based on what sociologists Suzanne Kessler and Wendy McKenna call the "natural attitude." The "natural attitude," as they use the term, is an unquestioned assumption governing our everyday lives "that every human being is either a male or a female."⁴⁶ According to Kessler and McKenna, those seeking to explain gender differences uncritically assume the fact of two genders as a starting point.⁴⁷ This attitude so informs the social and physical sciences that scientists inevitably reproduce gender difference in their studies; Kessler and McKenna believe instead that gender is socially constructed, arising from the very process of assuming the natural attitude.⁴⁸ According to them, "[b]iological, psychological, and social differences do not lead to our seeing two genders. Our seeing of two genders leads to the 'discovery' of biological, psychological, and social differences."⁴⁹

It might seem that the very phenomenon of transsexuality would unsettle the natural attitude. Adrienne Hiegel, for instance, asserts that "transsexualism exposes the potential for a lack of correlation between a sense of oneself as gendered and one's external appearance,"⁵⁰ and thereby, with transvestitism as well, "call[s] into question the idea that gender categories are discrete, mutually exclusive, and stable."⁵¹ Nonetheless, transsexuality is normally assimilated into the natural attitude, or so distanced from it that the natural attitude remains unassailed.⁵² This

⁴⁴ Estimates of the number of infants born in the United States with genitals considered ambiguous (neither distinctly male nor female) range from one percent to four percent. See William O. Beeman, *What are You: Male, Merm, Herm, Ferm or Female?*, BALTIMORE MORNING SUN, Mar. 17, 1996, at 1F.

⁴⁵ Cf. ZIZEK, *supra* note 29, at 31 (using the ideology of commodity exchange to illustrate people's attitudes: although people know that "there are relations between people behind the relations between things," they nonetheless act "as if money, in its material reality, is the immediate embodiment of wealth as such").

⁴⁶ KESSLER & MCKENNA, *supra* note 8, at 1.

⁴⁷ See *id.* at 4–5. Kessler and McKenna use the term "gender" rather than "sex" to refer to the whole range of attributes including anatomical structures. They reason that it "serve[s] to emphasize our position that the element of social construction is primary in all aspects of being female or male." *Id.* at 7. I follow this usage. Where I use "sex" it is either because that is the language of a statute or opinion, or a text has made the distinction relevant.

⁴⁸ See *id.* at vii.

⁴⁹ *Id.* at 163 (maintaining that one mechanism for this self-fulfilling quality of the studies is the decision by researchers to first sort subjects by gender, thereby attributing gender, before proceeding to discover characteristics and traits associated with gender).

⁵⁰ Adrienne Hiegel, Note, *Sexual Exclusions: The Americans with Disabilities Act as a Moral Code*, 94 COLUM. L. REV. 1451, 1483 (1994).

⁵¹ *Id.*

⁵² See KESSLER & MCKENNA, *supra* note 8, at 108–09.

process is consistent with the operation of ideology; we act as if the incongruity is either of a piece with the ideology or nonexistent.

Transsexuals can be seen to display the natural attitude. According to Kessler and McKenna, "[e]ven though gender accomplishment is self-conscious for transsexuals, they share with all the other members of the culture the natural attitude toward gender."⁵³ Based on their 1979 interviews, they report:

The ways transsexuals talk about the phenomenon of transsexualism, the language they use, their attitudes about genitals, and the questions they are unable to answer, point to their belief that though others might see them as violating the facts, they, themselves, believe that they are not violating them at all.⁵⁴

Similarly, judges display the natural attitude both by asserting the centrality of two genders and through the gender attribution process.

Operating under the natural attitude can help constitute identity. This is easy to see in the case of transsexuals who may in small or large part undertake a transformation as a result of holding the natural attitude. But the natural attitude is also constitutive of the identities of those who, while facing no gender crisis of their own, invoke the natural attitude for purposes of understanding or adjudicating the gender claims of others. There are two mechanisms for this identity construction. First, faith in the natural attitude generates a belief about one's own privileged place in the world. For instance, Kessler and McKenna suggest that "[b]y holding these beliefs as incorrigible propositions, we view other ways of seeing the world, other sets of beliefs, about what reality is, as 'incorrect,' 'primitive,' or 'misinformed.'"⁵⁵ Second, the natural attitude gives those who need to make decisions regarding the gender identities of others a degree of confidence and certitude that is self-constitutive of the decision maker. Judges are similarly in a position to construct their own identities as judges by adopting the natural attitude while considering the claims of transsexual litigants.

When making determinations regarding the gender claims of litigants, judges are involved in a process similar to everyday gender attribution—the method by which we continuously determine whether someone is male or female. Despite its seeming reflexive quality, "[g]ender attribution is a complex, interactive process involving the person making the attribution and the person she/he is making the attribution about."⁵⁶

⁵³ *Id.* at 114.

⁵⁴ *Id.*

⁵⁵ *Id.* at 5.

⁵⁶ *Id.* at 6. According to Kessler and McKenna, the attribution process involves subtle visual cues. "Most of the cues people assume play a role in the attribution process are really *post hoc* constructions . . ." *Id.*

Gender attribution at once helps construct the person about whom the attribution is made and, less obviously, the person making the attribution. When we confidently attribute gender, particularly when we purport to discover the "true" gender in cases of ambiguous visual clues, we assert our own position within society as someone capable of making such claims about others. Such an assertion does not seem like much of an identity statement only because we regularly assume that everyone is capable of making such distinctions. However, the centrality of this capacity to our own sense of identity is revealed in the intense discomfort generated by those occasions in which we feel unable to distinguish, or in which we believe a prior attribution has been demonstrated to be incorrect.⁵⁷ In addition, the attribution, particularly when it flies in the face of another individual's preferred attribution, reveals further information about the attributer's own relationship to the natural attitude. Similarly, when judges offer gender attributions of transsexuals, often in contexts in which more is at stake than in the everyday encounter, they both assert their own identity as authorities on gender and reveal their own relationship to the natural attitude.

1. *Natural Attitude and the Law*

The courts confront a number of legislative and administrative rules and policies that themselves reflect the natural attitude in their logic, and that only become problematic in their relation to transsexuals. The policy of both federal and state prison administrations to maintain separate men's and women's prisons, with the inherent assumption that it will always be clear who goes where, is an obvious example.⁵⁸ In a typical response to this policy, one court has stated that "segregation of the sexes is a rational purpose."⁵⁹ Yet, as a result of the unquestioned anatomical criteria for assignment, prison administrators and courts confront significant difficulties in managing the incarceration of individuals whom they have classified as men but who appear as women.⁶⁰

⁵⁷ Janice Raymond demonstrates in her writing on transsexuals the significance of gender attribution to the identity of the attributer. Her denial of the gender claims made by transsexuals is explicitly connected to her conception of what it means to be a woman and a feminist. She writes that male to female transsexuals who identify as lesbians "challenge women's preserves of autonomous existence . . . how feminists assess and meet this challenge will affect the future of our genuine movements, self-definition, and power of being." RAYMOND, *supra* note 16, at 118.

⁵⁸ See *Farmer v. Brennan*, 511 U.S. 825, 829-30 (1994) (describing the federal prison system's practice "to incarcerate preoperative transsexuals with prisoners of like biological sex"); see also *Lamb v. Maschner*, 633 F. Supp. 351, 353 (D. Kan. 1986) (stating that in the Kansas state system "[a] male prisoner cannot be housed in a women's prison").

⁵⁹ *Lamb*, 633 F. Supp. at 353.

⁶⁰ See, e.g., *Supre v. Ricketts*, 792 F.2d 958, 960 (10th Cir. 1986) (prisoner placed in "protective custody" and ultimately released because of the "management problem" her feminine appearance presented); *Lamb*, 633 F. Supp. at 353 (prisoner placed in adminis-

Ordinances prohibiting crossdressing also rely for their meaning on an assumption that everyone can be classified as one or the other gender, described as "opposites." The Houston ordinance reviewed by the court in *Doe v. McConn* applies to "any person" who in public "is dressed with the designed intent to disguise his or her true sex as that of the opposite sex."⁶¹ Similarly, statutes that permit a male person to marry only a female person assume not only the existence of only these two categories, but the ease with which everyone can be assigned to one of them.⁶² The court in a 1968 name change petition rejects the suggestion "that there is some middle ground between the sexes,"⁶³ states that "the standard is much too fixed for such far-out theories,"⁶⁴ and applies an anatomical formula for determining whether someone is male or female. Of course, these are examples not of outrageous presumption but of the common attitude that there are two, opposite genders. It is an attitude likely to be extremely familiar and comfortable to most of us, including transsexuals, crossdressers, and other transgender individuals.⁶⁵ It is precisely the perceived opposition between genders that motivates many, or at least some, transsexuals to undergo the transition from one attribution to the other.⁶⁶

In certain instances of statutory interpretation, it is not the wording of the policy or statute itself that displays the natural attitude, but the manner in which the court interprets the wording or gives meaning to the issue. For example, in applying the provision of the New York State Civil Rights Law that authorizes court approval for name changes,⁶⁷ courts in both 1968 and 1992 saw a transsexual's name change petition not as a routine administrative matter, but as one having distinct gender implications because of the courts' uncomplicated association of name and gender. The 1968 court calls it an issue of "first impression" because "the petitioner has sought a change of name from an obviously 'male' name to an obviously 'female' name."⁶⁸

trative segregation in order to avoid sexual attacks).

⁶¹ 489 F. Supp. 76, 79 (S.D. Tex. 1980); see also *City of Chicago v. Wilson*, 389 N.E.2d 522, 523 (Ill. 1978) (citing Chicago ordinance imposing fines on persons appearing in public "in a dress not belonging to his or her sex, with intent to conceal his or her sex").

⁶² See, e.g., *In re Ladrach*, 513 N.E.2d 828, 831 (Ohio Prob. Ct. 1987) (applying Ohio statute to prevent male to female transsexual from marrying man).

⁶³ *In re Anonymous*, 293 N.Y.S.2d 834, 837 (N.Y. Civ. Ct. 1968) (referring, perhaps punningly, to this zone as a "no-man's land").

⁶⁴ *Id.*

⁶⁵ Cf. *Maffei v. Kolaeton Indus.*, 626 N.Y.S.2d 391, 396 (N.Y. Sup. Ct. 1995) ("Although . . . a person may have both male and female characteristics, society only recognizes two sexes.").

⁶⁶ Cf. Stone, *supra* note 1, at 286 (criticizing transsexual autobiographical accounts from the 1950s through the 1970s for "reinforc[ing] a binary, oppositional mode of gender identification. They go from being unambiguous men, albeit unhappy men, to unambiguous women. There is no territory between.").

⁶⁷ See *Application of Anonymous*, 587 N.Y.S.2d 548, 548 (N.Y. Civ. Ct. 1992). The judicial proceeding is used for purposes of public record and "official sanction." *Id.*

⁶⁸ *Anonymous*, 293 N.Y.S.2d at 835. See *Anonymous*, 587 N.Y.S.2d at 548 (stating that

2. Title VII and the Natural Attitude

The statutory provision that has received the most interpretation along these lines is the Title VII of the 1964 Civil Rights Act prohibition that an employer may not discriminate against an employee "because of such individual's . . . sex."⁶⁹ The courts frequently repeat the legislative nonhistory of this provision. The word "sex" as a basis for protection along with race, color, religion, and national origin was the result of a last minute amendment: "This sex amendment was the gambit of a congressman seeking to scuttle adoption of the Civil Rights Act. The ploy failed and sex discrimination was abruptly added to the statute's prohibition against race discrimination."⁷⁰ The *Ulane v. Eastern Airlines, Inc.*, court suggests, in an interpolation likely to be accurate, that under these circumstances, protection of transsexuality was unlikely to have been considered.⁷¹ Yet the courts justify denying coverage for transsexuals under the term "sex" by reference to simple divisions and common understandings that reflect the natural attitude.

Some courts find the word "sex" in the context of the statute to be so unambiguous in meaning that it is unnecessary to explain what that unambiguous meaning is. Based on the absence of legislative history, the court in *Grossman v. Bernards Township Board of Education* "is reluctant to ascribe any import to the term 'sex' other than its plain meaning."⁷² The court in *Powell v. Read's Inc.* states, "A reading of the statute to cover plaintiff's grievance would be impermissibly contrived and inconsistent with the plain meaning of the words."⁷³ Both courts follow these pronouncements with a sentence, introduced by the word "[a]ccordingly," declaring that the transsexual plaintiff has failed to state a cause of action.⁷⁴

Other courts tell us what the "plain meaning" is. *Ulane* is the most blunt: "The phrase in Title VII prohibiting discrimination based on sex, in its plain meaning, implies that it is unlawful to discriminate against women because they are women and against men because they are

the petitioner "seeks to change his first name from William, an obvious male name, to Veronica, an obvious female name"). But see *In re Eck*, 584 A.2d 859, 861 (N.J. Super. Ct. App. Div. 1991) (questioning the obviousness of gender associations with names by noting that "[m]any first names are gender interchangeable").

⁶⁹ Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 703(a)(1) (1994).

⁷⁰ *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984).

⁷¹ See *id.*

⁷² *Grossman*, No. 74-1904, 1975 U.S. Dist. LEXIS 16261, at *10 (D.N.J. Sept. 10, 1975).

⁷³ *Powell*, 436 F. Supp. 369, 371 (D. Md. 1977).

⁷⁴ *Id.*; *Grossman*, 1975 U.S. Dist. LEXIS 16261, at *10; see also *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662-63 (9th Cir. 1977) (finding "that Congress had only the traditional notions of 'sex' in mind," and that "[t]herefore, this court will not expand Title VII's meaning").

men."⁷⁵ This assertion suggests not only that women and men are sharply divided into two categories, but also that discrimination itself is gendered in a manner that matches this natural divide.

B. Gender Skepticism

By excluding transsexuals from Title VII coverage and imposing a sharp divide between women and men, but then professing skepticism about the identity claims of transsexuals, courts like *Ulane* undermine their certainty in the binary gender division. The uncertainty that they project onto the transsexual may be revealing of fundamental incoherencies in the gender ideology itself.

According to Slavoj Žizek, all the failures, incoherencies, and antagonisms of an ideological system are projected onto some "other."⁷⁶ Transsexuals are the recipients of such projections of the confusion and antagonism within the natural attitude. By expressing skepticism in the attribution of gender, judges establish the coherence of their own identity through this process of projection, while also defining transsexuals. Judges further construct their own identity by revealing the possible turmoil at the heart of the natural attitude they hold and also seek to represent. Transsexuals may thus provide the opportunity for recognizing the incoherencies in the gender ideology.

Courts often manifest their gender skepticism by questioning a litigant's very claim to transsexual status.⁷⁷ In the opinions themselves, the

⁷⁵ *Ulane*, 742 F.2d at 1085; see *Doe v. United States Postal Service*, No. 84-3296, 1985 U.S. Dist. LEXIS 18959, at *4 (D.D.C. June 12, 1985) (agreeing with *Ulane* that Congress did not "intend[] the word 'sex' to mean anything other than the biological male or female sexes"); see also *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 749 (8th Cir. 1982) (characterizing the plaintiff's argument as one urging the court to reject "the plain meaning of the term 'sex' under Title VII as connoting either male or female gender"); *Underwood v. Archer Management Servs.*, 857 F. Supp. 96, 98 (D.D.C. 1994) (quoting regulatory agency's interpretation of "sex" in local District of Columbia discrimination statute as "the state of being male or female and conditions associated therewith"). At least two courts suggest that the word "sex" has less give in this respect than the word "gender." See *Dobre v. National R.R. Passenger Corp.*, 850 F. Supp. 284, 286 (E.D. Pa. 1993) ("The term 'sex' in Title VII refers to an individual's distinguishing biological or anatomical characteristics, whereas the term 'gender' refers to an individual's sexual identity."); *Maffei v. Kolaeton Indus.*, 626 N.Y.S.2d 391, 394 (N.Y. Sup. Ct. 1995) (relying on *Dobre's* articulation of this difference in meaning to distinguish the scope of a New York City statute prohibiting discrimination on the basis of "gender" from the scope of Title VII as interpreted by the federal courts, which it found "unduly restrictive").

⁷⁶ ŽIŽEK, *supra* note 29, at 21 (comparing this process to the way, in psychoanalysis, a symptom is treated as the projection of inner psychic turmoil).

⁷⁷ This type of skepticism occurs primarily in cases involving prisoners' requests for medical treatment consistent with a diagnosis of transsexualism. See *White v. Farrier*, 849 F.2d 322, 326 (8th Cir. 1988) (relying, in holding that prisoner's transsexuality was in question, on expert testimony that the prisoner demonstrated a pattern of behavior that suggested that actions, which included attempts at self-castration "were motivated by the potential for secondary gain"); *Lamb v. Maschner*, 633 F. Supp. 351, 354 (D. Kan. 1986) (suggesting that prisoner claiming to be a transsexual who had engaged in self-inflicted

courts demonstrate the greatest uncertainty in assessing a transsexual's gender claim, even when the transsexuality is accepted by the court. For example, the *In re Ladrach* court stated that "there is no authority in Ohio for the issuance of a marriage license to consummate a marriage between a post-operative male to female transsexual person and a male person."⁷⁸ The court, unable to refer to the petitioner as a "woman" or a "female person" without undermining the holding, resorts to this circumlocution instead. By doing so, it problematizes and questions the individual's gender.

Whereas in a case like *Ladrach*, the attitude toward gender bears a logical connection to the holding of the case, courts demonstrate skepticism even in the absence of such a connection. For example, the court in *Terry v. EEOC* states that the male to female pre-operative transsexual asserting employment discrimination against her employer "is still a male; at this point he only desires to be female."⁷⁹ In a case like *Terry*, a ruling on gender status is arguably unnecessary, because the holding against the plaintiff is based on the failure of Title VII to cover transsexuals⁸⁰ and also on the decision that the cause of discharge was the individual's transsexuality, not gender.⁸¹ Other courts use this second basis to avoid ruling on the plaintiff's gender.⁸² In *Grossman v. Bernards Township Board of Education*, the court treats the prospect of such decision-making as odious, but reflects doubt all the same: "The Court finds it unnecessary and, indeed, has no desire to engage in the resolution of a dispute as to the plaintiff's present sex."⁸³

This skepticism about gender appears even in cases where the court is quite sympathetic to the transsexual litigant. In *Maffei v. Kolaeton Industry*, where the court finds that the female to male transsexual plaintiff has a viable sexual harassment claim against his employer under New

injuries to her male genitals was instead a "nonconformist" who liked to "defy the norm"); see also *Ulane*, 742 F.2d at 1084 n.7 ("Not all of the experts who testified agreed that Ulane is a transsexual."). But cf. *Phillips v. Michigan Dept. of Corrections*, 731 F. Supp. 792, 800 (W.D. Mich. 1990) (holding that whether plaintiff was a transsexual or instead suffered from another type of gender dysphoria, her "serious medical needs" were being met with "deliberate indifference").

⁷⁸ *Ladrach*, 513 N.E.2d 828, 832 (Ohio Prob. Ct. 1987).

⁷⁹ *Terry*, No. 80-C-408, 1980 U.S. Dist. LEXIS 17289, at *7 (E.D. Wis. Dec. 10, 1980); see also *Kirkpatrick v. Seligman & Latz, Inc.*, 636 F.2d 1047, 1049 (5th Cir. 1981) (holding male to female transsexual was properly classified as male and therefore not discriminated against as a woman).

⁸⁰ See *Ulane*, 742 F.2d at 1084; *Terry*, 1980 U.S. Dist. LEXIS 17289, at *8.

⁸¹ See *Terry*, 1980 U.S. Dist. LEXIS 17289, at *8 (stating that plaintiff "is not being refused employment because he is a man or because he is a woman").

⁸² See, e.g., *Dobre v. National R.R. Passenger Corp.*, 850 F. Supp. 284, 287 (E.D. Pa. 1993) (holding that plaintiff's sex need not be determined because "even when viewed in the most favorable light, the allegations in the complaint do not support a claim that the plaintiff was discriminated against as a female").

⁸³ *Grossman*, No. 74-1904, 1975 U.S. Dist. LEXIS 16261, at *9 (D.N.J. Sept. 10, 1975).

York City's antidiscrimination law,⁸⁴ the opinion nonetheless expresses doubt about his gender:

In January 1994 plaintiff underwent sex reassignment surgery to change his sex from female to male. The record is unclear as to what physical changes have taken place, and to what extent the plaintiff has completed his metamorphosis from a female to a male, but plaintiff today holds himself out to be Daniel Maffei.⁸⁵

Despite the completion of sex reassignment surgery, the plaintiff cannot be Daniel Maffei, but simply "holds himself out."⁸⁶

The leading Title VII case, *Ulane*, is paradigmatic in the gender skepticism it displays. As in other Title VII cases, the court finds that it need not determine the plaintiff's gender. Nonetheless, despite accepting the plaintiff's female status for the sake of argument,⁸⁷ the court casts considerable doubt on that status in the course of explaining why determining the issue is unnecessary:

Ulane is entitled to any personal belief about her sexual identity she desires. After the surgery, hormones, appearance changes, and a new Illinois birth certificate, it may be that society . . . considers Ulane to be female. But even if one believes that a woman can be so easily created from what remains of a man, that does not decide the case [I]f Eastern did discriminate against Ulane, it was not because she is female, but because Ulane is a transsexual—a biological male who takes female hormones, cross-dresses, and has surgically altered parts of her body to make it appear to be female.⁸⁸

The passage is brimming with the language of skepticism: "belief," "appear," "it may be." Ronald Garet comments on this passage, "[i]n these words, more than a trace is to be found, if not of disgust, then at

⁸⁴ *Maffei*, 626 N.Y.S.2d 391, 396 (N.Y. Sup. Ct. 1995).

⁸⁵ *Id.* at 391-92. What seems couched in this uncertainty is a curiosity about whether the plaintiff has undergone phalloplasty, that is, whether he has a penis. For a discussion on the important role the penis plays in gender attribution, see *infra* at Part III.B. For gender doubt in cases that have positive outcomes for transsexuals, see *Doe v. State*, 257 N.W.2d 816, 817 (Minn. 1977) (referring to the appellant Jane Doe, a male to female transsexual, as "an adult male transsexual" while holding that state welfare program cannot categorically exclude sex reassignment surgery from medical reimbursement coverage).

⁸⁶ See also *Ulane v. Eastern Airlines, Inc.*, 581 F. Supp. 821, 838-39 (N.D. Ill. 1984), *rev'd*, 742 F.2d 1081 (7th Cir. 1984) (wavering between its initial findings and its "Supplemental Findings" about Ulane's status as a woman for purposes of asserting an alternative theory for recovery based on discrimination against her as a woman).

⁸⁷ *Ulane*, 742 F.2d at 1087.

⁸⁸ *Id.*

least of distaste.”⁸⁹ More specifically, as a statement about gender, he finds that the court expresses “a guarding of gender not so much against illusion or misplaced agency as against what is perceived as cheap imitation.”⁹⁰ In this interpretation, the court suggests it knows what gender is, and uses its doubt as to transsexual gender validity to protect that knowledge.⁹¹ At the same time, its certainty about gender is undermined insofar as the court is uncertain—one way or the other—about Ulane’s gender.

C. Pronouns

Often, in the court opinions, the judges are vexed by the gender determination, yet at the same time feel constrained to make it, not unlike other members of society in everyday social interactions. A pronoun is one of the most common ways in which members of society render verdicts about one another’s gender. Pronouns are also an effective means of conveying or revealing gender acceptance or skepticism.⁹² Further, just as the gender attribution process generally helps construct the identity of the attributer, the judgment of “he” or “she” helps constitute the judging “I.”⁹³

In reporting a decision, whether it is favorable or unfavorable for the transsexual litigant, the court faces an initial language decision: how to refer to the plaintiff. In some cases, the court, without comment, simply refers to him or her by the gender pronoun chosen by the individual.⁹⁴ In other cases, again without comment, the court will use the pronoun that corresponds with the gender assignment made at birth.⁹⁵ Often, though not always, one can guess the court’s sympathies, and thus the outcome of the case, from this initial language choice. As with more direct expressions of gender skepticism, when a court refuses to accept an individual’s own assertion of gender identity, via the pronoun by which he or she re-

⁸⁹ *Garet*, *supra* note 6, at 197.

⁹⁰ *Id.*

⁹¹ *See id.* at 198 (discussing the relationship between doubt and faith); *see also* *Ashlie v. Chester-Upland Sch. Dist.*, No. CIV.A. 78-4037, 1979 U.S. Dist. LEXIS 12516, at *16 n.5 (E.D. Pa. May 9, 1979) (stating that “it may be logically argued that the transformation is more cosmetic and psychological than physiological” because of the various feminine properties, like ability to menstruate, that the plaintiff lacks).

⁹² *See* KESSLER & MCKENNA, *supra* note 8, at 140 n.6 (commenting on a doctor’s “use of the feminine pronoun to refer to the female to male transsexual” as suggestive of “an underlying attitude of skepticism toward the legitimacy of the transsexual’s gender claim”).

⁹³ *See* Katherine M. Franke, *The Central Mistake of Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 51 (1995) (“[A]lways implicated in the question ‘Who or what is s/he?’ is the question ‘Who or what am I?’”).

⁹⁴ *See, e.g.,* *Miranda v. Immigration & Naturalization Serv.*, 51 F.3d 767 (8th Cir. 1995); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659 (9th Cir. 1977).

⁹⁵ *See, e.g.,* *Long v. Nix*, 86 F.3d 761 (8th Cir. 1996); *Star v. Gramley*, 815 F. Supp. 276 (C.D. Ill. 1993).

fers to him or herself, it is unlikely to give credence to the transsexual litigant's other related claims.

Rarely in everyday life do we explain our pronoun choices—normally, they seem so obvious. However, in many cases affecting transsexuals, judges, presumably recognizing the importance of pronouns, feel the need to justify their choices either in the text or in a footnote. Often these remarks are quite respectful.⁹⁶ Sometimes, the remarks accept the litigant's pronoun choice a bit more grudgingly.⁹⁷ In other cases, however, courts, struggling with the confusion presented to them by the transsexual litigants, suggest in their footnotes that individuals must meet anatomical qualifications before they are allowed to be referred to by the pronoun of their choosing.⁹⁸

Other courts offer justifications for a decision to use a pronoun other than the one chosen by the litigant. The court in *Ladrach*, presumably fearing that to refer to the plaintiff with female pronouns would undermine its holding that a marriage license could not issue to the plaintiff as a "female person," stated that it would use masculine pronouns for "purposes of clarity."⁹⁹ Clarity, however, seems to have been sacrificed rather than gained. For example, one phrase in the case reads: "Elaine Frances Ladrach and his fiancé . . ." ¹⁰⁰ The confusion here is heightened by the gender ambiguity of the word fiancé/ee, at least as spoken aloud. The clarity that the court seeks, perhaps, is a clarity about biological sex and gender identity that the case fails to provide. The case also seems to be as much about preventing same sex marriages or avoiding precedent that would be followed to so allow, as it is about transsexuality.¹⁰¹ The pronoun and the accompanying gender attribution are key to this agenda.¹⁰²

⁹⁶ See, e.g., *Farmer v. Haas*, No. 90-1088, 1991 U.S. App. LEXIS 3549, at *1 n.1 (7th Cir. Feb. 14, 1991) (noting that the plaintiff "prefers the use of feminine pronouns for self-description, and we will respect this choice").

⁹⁷ See *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748 (8th Cir. 1982) ("Inasmuch as [the plaintiff] refers to herself in the feminine gender, this court will likewise do so."); *Meriwether v. Faulkner*, 821 F.2d 408, 410 (7th Cir. 1981) (referring to the plaintiff as "she" "intimate[s] no view as to the factual merits" of the case).

⁹⁸ See *Kirkpatrick v. Seligman & Latz, Inc.*, 636 F.2d 1047, 1048 n.1 (5th Cir. 1981) ("Appellant is referred to by the feminine pronoun because her suit was filed at a time that the sex reassignment surgery had been completed and she was entitled, if she wished to identify herself as a female . . ."); cf. *In re Harris*, 707 A.2d 225, 226 n.1 (Pa. Super. Ct. 1997) (suggesting instead a legal qualification: "We will use masculine pronouns when referring to petitioner until such time that the name change is legally operative.").

⁹⁹ *In re Ladrach*, 531 N.E.2d 828, 829 (Ohio Prob. Ct. 1987).

¹⁰⁰ *Id.* at 829.

¹⁰¹ See *id.* at 828 (framing issue as whether two individuals of same biological sex can marry each other); Susan Phillips, Comment, *Chromosome Loophole: Homosexual Marriages Should be Legalized Based on Transsexual Marriages*, 7 *ADELPHIA L.J.* 73 (1991) (suggesting that the legality of transsexual marriages should serve as a basis for legalizing marriages for lesbians and gays).

¹⁰² See also *Supre v. Ricketts*, 792 F.2d 958, 960 n.1 (10th Cir. 1986) ("Although plaintiff considers himself to be a woman, male pronouns will be used throughout this opinion.").

The profound connection between pronoun choice and gender role—or those traits and societal roles traditionally linked to gender¹⁰³—is illustrated in a case in which a child's mother sought to terminate the parental rights of her former husband, now a woman. In *Daly v. Daly*,¹⁰⁴ both the majority and the dissent, while disagreeing about appropriate pronoun attribution as well as the outcome of the case, maintain a strong connection between pronoun and gender role. These maneuvers reveal how strongly connected the two ideas of gender attribution and gender role must be for these judges. The majority of the Nevada Supreme Court held that the parental rights of Suzanne, formerly Tim Daly, a male to female transsexual, were appropriately terminated. It declared that "Suzanne, in a very real sense, has terminated her own parental rights as a father. It was strictly Tim Daly's choice to discard his fatherhood and assume the role of a female who could never be either mother or sister to his daughter."¹⁰⁵ Despite the use of "his" in the second sentence quoted, the court throughout the rest of the opinion refers to Suzanne as "she." The court accepts her gender claim, both through pronoun use and by declaring Suzanne to be so completely changed as to be a different person from the one who fathered the daughter Mary. In fact, the reference to Tim Daly with the male pronoun seems consistent with this view, because it refers to the earlier actions of a different person whose identity has now been replaced by Suzanne's. However, as the quoted passage suggests, for that reason the court cannot accept the parental claim: how, it seems to wonder, can a "she" also be a "father?" The court further undermines Suzanne's claim to a paternal role by referring to her as a "vestigial parent" and by justifying the claimed futility in offering Mary psychological counseling partly on "the irretrievable loss of Suzanne's former relationship with Mary as a parent-father."¹⁰⁶ The opinion describes this loss as if it were factually external and prior to Suzanne and Mary's interpersonal difficulties, as if the father were dead and Suzanne were a new person entirely.

¹⁰³ See KESSLER & MCKENNA, *supra* note 8, at 11–12, for a discussion on the relationship between gender role—"a set of prescriptions and proscriptions for behavior," *id.* at 11—and gender attribution:

All the major theories, however, make the assumption that dichotomous roles are a natural (and hence proper) expression of the dichotomous nature of gender. This assumption is being increasingly reexamined, but the grounds for questioning existing dichotomous gender roles do not question the existence of two genders. It is only by questioning dichotomous criteria for gender attributions that the dichotomous nature of gender, itself, becomes problematic.

Id. at 12.

¹⁰⁴ 715 P.2d 56 (Nev. 1986).

¹⁰⁵ *Id.* at 59.

¹⁰⁶ *Id.*

The dissent in *Daly*, arguing against the termination of parental rights, also is unable to resolve this gender identity/gender role conundrum. The dissent accepts Suzanne Daly as a father. In particular, it criticizes the majority for justifying a termination of parental rights by using rationales that would more appropriately justify a refusal of visitation rights, even though Suzanne did not in fact seek visitation.¹⁰⁷ At the same time that the dissent accepts Suzanne as a father, it does not, in contrast to the majority, appear to give much credence to her gender claim, referring to Suzanne throughout the opinion as "he."¹⁰⁸ At the very end of the dissent's opinion, however, gender rigidity breaks down in a confusing cognitive lapse: "Recognizing that the medical procedures *he* has undergone currently occasion distress to *her* child, the father does not contend *he* should now be allowed visitation rights."¹⁰⁹ Only here, and no doubt unintentionally, does the strong tie between gender and parental role in both opinions relax.

Daly illustrates how both gender identity acceptance and skepticism can be troubling to the extent they conflict with gender roles such as mother and father. Both opinions repudiate something about Suzanne Daly's claimed identity, which is constituted by being both a woman (someone who would be referred to as "she") and a father. They do so in the service of a more coherent and traditional ideology of gender, yet in the lapses suggest the challenge Suzanne offers this ideology.

The cases display both a belief in the natural attitude and skepticism about the identity claims of transsexuals. They express this skepticism by questioning the claim to either transsexual or gender status, or through their use of pronouns. By creating a class of eligible individuals who are nonetheless excluded from the ideology, the judges both maintain an ideology and challenge its coherence. Transsexuals themselves may engage in an operation similar to that of the judges. As the example of Renee Richards demonstrates, transsexuals themselves are perfectly capable of maintaining a natural attitude that the very process of their own transition problematizes.

It may be that members of society, including the judges, are in fact much less certain about gender and the gender qualifications of others

¹⁰⁷ See *id.* at 63 (Gunderson, J., dissenting); see also *J.L.S. v. D.K.S.*, 943 S.W.2d 766 (Mo. Ct. App. 1997) (denying joint custody but not challenging parental rights of transsexual father). But cf. *In re Darnell*, 619 P.2d 1329 (1980) (terminating parental rights of natural mother for defying order not to associate with the original legal father of the children, a female to male transsexual, whose rights had been previously terminated).

¹⁰⁸ The dissent also avoids using the name "Suzanne" by using "the father" instead. See *Daly*, 715 P.2d at 60 n.1 (Gunderson, J., dissenting) (stating that "in this opinion, to avoid confusion I shall refer to the parties as the 'mother' and the 'father'"); see also *D.K.S.*, 943 S.W.2d at 776 (Karohl, J., dissenting) (stating in child custody case under review: "Father objected during the trial to any usage of male pronouns to describe Father. To avoid confusion and not out of any disrespect for Father's wishes, we will use pronouns applicable to the parties when the children were born.").

¹⁰⁹ *Daly*, 715 P.2d at 64 (emphasis added).

and themselves; it is this confusion and uncertainty that is projected onto the figure of the transsexual. Just as similar confusion is suppressed in the lives of many transsexuals,¹¹⁰ this confusion is more often than not suppressed in the legal cases for the sake of coherence. The weight of the projected persecutions that fall upon those in the position of symptom is therefore not addressed. However, the confusion as well as the suppression help constitute the identities of those judging.

III. Internal/External Identity

In considering the variety of cases affecting transsexuals, courts frequently engage in a discourse of internal and external identity. This discourse is one, heard frequently in society, in which internal markers of identity, however defined, are privileged over external markers, as in "she might seem cold and aloof on the outside, but deep down she's warm and friendly." Judges, like members of society generally, can engage in heated contestations over what is really on the inside and what is on the outside. For example, in debates about whether certain traits, such as gender or sexual orientation, originate from biology or culture, neither side seems to dispute that some role is played by the subordinated source. Rather, the debate seems to be more about what is at the core, or furthest inside. One might believe that biological factors form core traits and that cultural markers of gender or sexual orientation are external manifestations. Or, like many theorists on transsexuality, one might believe that gender or sexual orientation are primarily formed in a culturally induced psychological interior and that physical or biological features are extraneous.¹¹¹ In this Part, I explore the methods by which judges attempt to make sense of transsexual identity by using insides and outsides, and how these techniques serve to place transsexuals as a group on the outside. This outside placement also helps construct the judge's own place on the inside.

Analyses of interior and exterior can occur both on the level of the individual body and on the level of the social body. Butler, for instance, in her work *Gender Trouble*, examines how the effect of interior gender core is produced "on the surface of the body": the body's exterior seems to reflect a truer interior, but the interior is only created through the performance on the surface.¹¹² Diana Fuss, by contrast, writes of interiority

¹¹⁰ See Stone, *supra* note 1, at 295.

¹¹¹ Katherine Franke describes the difference between this view and the traditional one in terms of insides and outsides: "According to the traditional view, the sexed body—one's inside—is immutable, whereas gender identity—one's outside—is mutable. Yet for the transgendered person, the sexed body—one's outside—is regarded as mutable while one's gendered identity—one's inside—is experienced as immutable." Franke, *supra* note 93, at 35.

¹¹² BUTLER, *supra* note 33, at 136.

and exteriority in terms of insider and outsider groups.¹¹³ In either context, the exterior helps define and constitute the interior,¹¹⁴ and analyses of the relationship between interior and exterior may suggest ways to destabilize the privileging of the interior. The operation by which judges, along with transsexuals and other members of society, understand and establish identity of individual litigants by reference to internal and external markers on the level of the body or psyche mirrors the operations that help constitute insider group identity by reference to those persons considered external to society. Indeed, the internal/external identity operations judges use at the level of the individual often enable the placement of transsexuals in the outside group. By moving from the individual to the group in this manner, judges are able to establish their own insider identity through these operations of internal/external identity. This method of arranging potentially conflicting clues as to identity is an attempt at imposing coherence on otherwise confusing material.¹¹⁵

A. *Wrong Bodies*

In discussions of transsexuality, the interior is often privileged, but there are sharp disagreements about what counts as the interior. The most common or notorious model for describing the transsexual condition, by academics writing about transsexuals, by transsexuals themselves, and by judges, is a vision of the transsexual as a woman/man trapped in a man/woman's body. In the "trapped" metaphor, the body one is born with is relegated to exterior status while the psychic gender identity is interior and privileged.¹¹⁶ From this metaphor, the justification for manipulating the exterior flows quite easily.¹¹⁷ Janice Irvine argues that this "catchphrase" helped transsexuals win the surgery they sought.¹¹⁸

¹¹³ See DIANA FUSS, *Inside/Out*, in *INSIDE/OUT: LESBIAN THEORIES, GAY THEORIES* 1, 3 (1991).

¹¹⁴ See BUTLER, *supra* note 26, at 3.

¹¹⁵ See BUTLER, *supra* note 33, at 134 ("['Inner' and 'outer' constitute a binary distinction that stabilizes and consolidates the coherent subject.]).

¹¹⁶ See KESSLER & MCKENNA, *supra* note 8, at 108–09 (positing that the societal acceptance of an invariant "core gender identity" is related to an effort to maintain the natural attitude toward gender).

¹¹⁷ See Garet, *supra* note 6, at 179 (suggesting that this metaphor was used by transsexuals to obtain surgery).

Talk of being "trapped" in the wrong body is hardly a magic word that opens up the gates, but it is easy to understand why a person might feel that she has a better chance of being approved for surgery if she dramatizes features of her plight that she is inclined to regard as beyond her control.

Id.

¹¹⁸ JANICE IRVINE, *DISORDERS OF DESIRE: SEX AND GENDER IN MODERN AMERICAN SEXOLOGY* 261 (1991); see also BORNSTEIN, *supra* note 1, at 66 ("I'll bet that it's more likely an unfortunate metaphor that conveniently conforms to cultural expectations, rather than an honest reflection of our transgendered feelings.").

Janice Raymond, in counterpoint, privileges genetic and birth assignment gender identity as interior:

We know that we are women who are born with female chromosomes and anatomy, and that whether or not we were socialized to be so-called normal women, patriarchy has treated and will treat us like women. Transsexuals have not had this same history. No man can have the history of being born and located in this culture as a woman . . . Surgery may confer the artifacts of outward and inward female organs but it cannot confer the history of being born a woman in this society.¹¹⁹

Despite the reference to "inward" female organs, these "artifacts" are clearly meant to be extra, outside metaphorically if not physically. Biological women, in Raymond's view, are even interior to ("located in") culture.

What gives the privileged inside its meaning and importance, of course, depends on what is placed outside; the outside therefore is actually meaningful in defining the interior.¹²⁰ As Sandy Stone's critique of the "wrong body" metaphor suggests, the whole concept of being in the "wrong body" not only says something important about the "rightness" of the psychological interior, but something significant about the external body's power to be "wrong."¹²¹

Courts frequently cite the assertion that a transsexual feels "trapped" in the "wrong body," whether or not they accept the implications of that statement for the individual's gender identity. For instance, in *Richards v. United States Tennis Ass'n*, the court quotes the plaintiff for purposes of explaining her situation to the reader: "I underwent this operation after many years of being a transsexual, a woman trapped inside the body of a man."¹²² The phrase shows up with notable frequency in cases involving the medical treatment or segregation of preoperative transsexual prisoners.¹²³ Perhaps the metaphor is compelling (although this receives no comment) because of a prisoner's more obviously "trapped" circum-

¹¹⁹ RAYMOND, *supra* note 16, at 114.

¹²⁰ See FUSS, *supra* note 113, at 2 (summarizing the Lacanian insight that "any identity is founded relationally, constituted in reference to an exterior or outside that defines the subject's own interior boundaries and corporeal surfaces"); see also SEDGWICK, *supra* note 23, at 10.

¹²¹ See Stone, *supra* note 1, at 297 (connecting the phrase to the "phallogocentric, binary character of gender differentiation" and urging that it be problematized).

¹²² *Richards*, 400 N.Y.S.2d 267, 267-68 (N.Y. Sup. Ct. 1977); see also *Doe v. State*, 257 N.W.2d 816, 819 (Minn. 1977) (describing a male to female transsexual who contested the state welfare program's exclusion of medical coverage for sex reassignment surgery: "[h]e considers himself a normal woman trapped inside a male body").

¹²³ See, e.g., *Supre v. Ricketts*, 792 F.2d 958, 965 (10th Cir. 1986) (Seymour, J., dissenting) ("Supre became desperate: as a male to female transsexual, she viewed herself as a woman trapped in a man's body").

stances. Indeed, some prison cases, relying on language from the *Merck Manual of Diagnosis and Therapy*, use an even more direct metaphorical connection between penological and bodily confinement. For example, the court in *White v. Farrier* states: "Although anatomically male, White believes that he is a woman *cruelly imprisoned* in a man's body."¹²⁴

Although transsexual individuals may report, or have the belief attributed to them, that the gender to which they are reassigned through medical treatment has always been their core identity, courts will often instead treat as internal or core the gender assignment given at birth—one based solely on biological characteristics. In *Ulane v. Eastern Airlines*, the court, on the one hand, explains Ulane's self conception in terms similar to the "trapped" metaphor: "She explains that although embodied as a male, from early childhood she felt like a female."¹²⁵ In stating its own views, on the other hand, the court reverses the internal/external assignment: "After the surgery, hormones, appearance changes, and a new Illinois birth certificate and FAA pilot's certificate, it may be that society, as the trial judge found, considers Ulane to be female."¹²⁶ Yet, the court found "that if Eastern did discriminate against Ulane, it was not because she is female, but because Ulane is a transsexual—a biological male who takes female hormones, cross-dresses, and has surgically altered parts of her body to make it appear to be female."¹²⁷ These comments suggest that the real or core identity of the individual is male (the gender assigned at birth) while the new designation of female is based on aspects like appearance, dress, administrative events, and even genital surgery that the court considers more social and external. The court in many ways now views Ulane as a *man* trapped in a *woman's* body. This quotation from *Ulane* highlights two additional areas in which courts strongly produce an internal/external distinction, but in which they also sometimes conflict and sometimes confuse themselves: genitals and clothing. Although the inside/outside heuristic is designed to achieve coherence in the face of these conflicts, the results of its application are in fact quite varied when examined across the board.

¹²⁴ *White*, 849 F.2d 322, 323 (8th Cir. 1988) (emphasis added); see also *id.* at 325–26 ("A transsexual believes he is the victim of a biologic accident, cruelly imprisoned within a body incompatible with his real sexual identity." (quoting *MERCK MANUAL OF DIAGNOSIS AND THERAPY* 1434 (Richard Berkow ed., 14th ed. 1982))); *Meriwether v. Faulkner*, 821 F.2d 408, 412 n.5 (7th Cir. 1987) (same).

¹²⁵ *Ulane*, 742 F.2d 1081, 1083 (7th Cir. 1984).

¹²⁶ *Id.* at 1087.

¹²⁷ *Id.*

B. Genitals

What makes the inside/outside dichotomy difficult to analyze in the area of gender identity (but hardly therefore meaningless) is the fact that internal gender identity is frequently attributed through external markings.¹²⁸ Genitals are in constant motion in the dichotomy of inside/outside—external when compared to the psyche, yet internal when compared to the clothing. Courts differ, even within a single opinion, on whether they consider genitals to be the ultimate internal measure of identity or external and irrelevant to identity.¹²⁹ Even, or perhaps particularly, when genitals are seen as external and irrelevant to identity, they continue to have significance, if only as a source of danger, a threat to the internal identity. In this respect, the ideas of judicial opinion writers do not necessarily differ from those held by or attributed to transsexuals themselves. Marjorie Garber analyzes the importance of the penis as the rejected external marker in discussions of male to female transsexuality. Quoting sexologist Robert Stoller's phrase, she writes: "[T]he 'insignia of maleness,' present or absent, desired or despised, is the outward sign of gendered subjectivity."¹³⁰

The policy adopted by state and federal prison officials, and uniformly approved by the courts, to classify any prisoner with a penis as male for purposes of prison assignment¹³¹ reflects an attitude that genitals

¹²⁸ See BUTLER, *supra* note 33, at 136.

¹²⁹ The issue is somewhat more complicated by the fact that, based on anatomical geography, one set of genitals (those considered male) can be seen as external compared to the other set. This distinction, which might suggest that vaginas are truer indicators of identity than penises is, if anything, reversed in the cases, to the extent that they mostly concern male to female transsexuals for whom vaginas are constructed while penises are original equipment. Kessler and McKenna argue that the penis is the *sine qua non* of gender attribution, based on a study involving drawings with conflicting gender markings (including hair, breasts, clothing on and off, as well as genital markings) shown to participants in the experiment. They conclude:

The presence of a penis is, in and of itself, a powerful enough cue to elicit a gender attribution with almost complete (96 percent) agreement. The presence of a vagina, however, does not have this same power. One third of the participants were able to ignore the reality of the vagina as a female cue.

KESSLER & MCKENNA, *supra* note 8, at 151. Unfortunately, these results may have something to do with the way the "vagina" is drawn. The "reality of the vagina" is no reality at all: in the example they offer in their book, all we see is pubic hair, whereas the male genitals are drawn in sufficient detail to distinguish shaft, glans, scrotum, as well as pubic hair. See *id.* at 147–48 (for drawings). Kessler and McKenna confirm, not through the results of their study but through its design, the importance of the penis as presence or absence.

¹³⁰ MARJORIE GARBER, *VESTED INTERESTS: CROSSDRESSING AND CULTURAL ANXIETY* 97 (1992). Garber sees the difficulties in perfecting phalloplasty (or the surgical construction for female to male transsexuals of a penis) as further evidence of obsessive concern with this organ: "In sex reassignment surgery there remains an implicit privileging of the phallus, a sense that a 'real one' can't be made, but only born." *Id.* at 103–04.

¹³¹ See *Farmer v. Haas*, 990 F.2d 319, 320 (7th Cir. 1993) ("The practice of the federal

are internal and privileged for identity purposes. These prisoners are considered male on the basis of genital identification, and the feminine characteristics they have acquired, through facial and breast augmentation surgeries, through hormone therapy, or through other means, are, along with their professed gender identity, considered external. Even when these characteristics create "serious management problems,"¹³² courts reject challenges to the place of gender-specific confinement. Instead, they offer extended administrative segregation as the only solution for the prisoner to avoid assault and harassment in the male prison.¹³³ In *Lamb v. Maschner*, the court makes the point bluntly: "Plaintiff originally requested to be transferred to a women's prison because of his transsexualism. A male prisoner cannot be housed in a women's prison."¹³⁴ While citing the *Merck Manual's* definition of a transsexual as believing him or herself to be "cruelly imprisoned" in the wrong body,¹³⁵ the *Meriwether* court similarly dismisses the notion that the plaintiff might be cruelly imprisoned in the wrong facility.¹³⁶

Other courts reject genitals, at least surgically transformed genitals, as relevant to identity, relegating them to a more external or superficial position. The *In re Ladrach* court refused to allow the male to female transsexual petitioner to marry a man, citing, but rejecting as not relevant, a doctor's testimony that the petitioner had "normal female external genitalia."¹³⁷ Although the court ultimately accepted anatomy (that possessed at birth) as determinative, it treats this initial set of genitals as internal and alterations as external:

It is generally accepted that a person's sex is determined at birth by an anatomical examination by the birth attendant. This results in a declaration on the birth certificate of either "boy" or

prison authorities . . . is to incarcerate persons who have completed sexual reassignment with prisoners of the transsexual's new gender, but to incarcerate persons who have not completed it with prisoners of the transsexual's original gender."). From the cases, it appears to be true of state prison systems also. See *Lamb v. Maschner*, 633 F. Supp. 351, 353 (D. Kan. 1986). But see *Pollock v. Rashid*, 690 N.E.2d 903, 906 (Ohio Ct. App. 1996) (referring to a complaint that describes a prisoner at a male facility "who has, through surgery and hormone therapy, physically altered her body to the point where she has the physical characteristics and appearance of a woman").

¹³² *Meriwether v. Faulkner*, 821 F.2d 408, 417 (7th Cir. 1987) ("[H]er being housed among male inmates in a general population cell would undoubtedly create . . . 'a volatile and explosive situation.'").

¹³³ See *Meriwether*, 821 F.2d at 417 ("Because of plaintiff's psychiatric and physical state, it may prove infeasible to fashion any kind of relief against the condition, namely, prolonged confinement in administrative segregation, she challenges."); *Lamb*, 633 F. Supp. at 353.

¹³⁴ *Lamb*, 633 F. Supp. at 353.

¹³⁵ *Meriwether*, 821 F.2d at 412.

¹³⁶ See *id.* at 415 n.7 (holding that classification decision cannot be challenged because plaintiff alleged no "design or intent to discriminate").

¹³⁷ *Ladrach*, 513 N.E.2d 828, 830 (Ohio Prob. Ct. 1987).

"girl" or "male" or "female." This then becomes a person's true sex and as [the judge in a previously cited British decision] stated, "[t]he respondent's operation, therefore, cannot affect her true sex."¹³⁸

Courts appear to be willing to treat the psyche as interior to the genitals, but, significantly, only in cases in which the genitals have been altered to match the psychic interior. A battle between the psyche and chromosomes as the appropriate interior gender indicator is apparent in Renee Richards' effort to play in the women's division of the U.S. Open tennis tournament. The USTA, which had previously used anatomical inspection to determine players' sex, required that Richards, a postsurgical male to female transsexual, take a test based on chromosomes that she would undoubtedly fail.¹³⁹ Richards and her expert witnesses focused on the congruence of her psychology and anatomy in arguing that she should be classified as a woman. As one such expert's testimony is summarized by the court:

Dr. Richards is a female, i.e., external genital appearance is that of a female; her internal sex is that of a female who has been hysterectomized and ovariectomized; Dr. Richards is psychologically a woman; endocrinologically female; somatically (muscular tone, height, weight, breasts, physique) Dr. Richards is female and her muscular and fat composition has been transformed to that of a female; socially Dr. Richards is female; Dr. Richards' gonadal status is that of an ovariectomized female.¹⁴⁰

This quotation seems designed to show smooth congruence between interior and exterior. However, the expert, as reported by the court, also manages to internalize Richards' external gender changes by re-historicizing the process: she is said to have the "internal sex" of a woman "who has been hysterectomized and ovariectomized." While the end result may be the same, obviously there was no historical hysterectomy or ovariectomy; she never had a uterus or ovaries. Rather it was her testicles that were removed (an orchidectomy). The court agreed with the expert's assessment of psychological and anatomical congruence and found the USTA's actions to violate the state Human Rights Law.¹⁴¹

¹³⁸ *Id.* at 832; *see also* K. v. Health Div., 560 P.2d 1070, 1072 (Or. 1977) (endorsing the view that a "birth certificate" is an historical record of the facts as they existed at the time of birth, rather than "a record of facts as they presently exist," and refusing to issue a new birth certificate for a female to male transsexual).

¹³⁹ *See* Richards v. United States Tennis Ass'n, 400 N.Y.S.2d 267, 268 (N.Y. Sup. Ct. 1977).

¹⁴⁰ *Id.* at 272.

¹⁴¹ *See id.*

An older name change case from New York demonstrates the importance of external genital congruity for assertions that the psychological interior is privileged. One might consider names, because of their cultural contingency, to be extraneous and easily changed.¹⁴² However, the court, at least in 1968, saw the matter, in which a male to female transsexual sought to change her name from a male one to a female one, as presenting "problems of immense proportions."¹⁴³ Presaging the *Richards* decision, the court rejected the proposition that chromosomes should play a role in the approval or disapproval of the proposed name change:

It has further been stated that "'male to female transsexuals are still chromosomally males while ostensibly females.'" Nevertheless, should the question of a person's identity be limited to the results of mere histological section or biochemical analysis, with a complete disregard for the human brain, the organ responsible for most functions and reactions, many so exquisite in nature, including sex orientation? I think not.¹⁴⁴

Instead, as the quotation suggests, the psychic interior holds sway. However, this appears to be true only if psyche and anatomy are in congruence. The court takes great pains to try to explain this proposition:

[T]he application of a simple formula could and should be the test of gender, and that formula is as follows: Where there is disharmony between the psychological sex and the anatomical sex, the social sex or gender of the individual will be determined by the anatomical sex. Where, however, with or without medical intervention, the psychological sex and the anatomical sex are harmonized, then the social sex or gender of the individual should be made to conform to the harmonized status of the individual and, if such conformity requires changes of a statistical nature, then such changes should be made. Of course such

¹⁴² See *In re Eck*, 584 A.2d 859, 861 (N.J. Super. Ct. App. Div. 1991) (allowing name change and pointing out that "[m]any first names are gender interchangeable"). In contrast, see *Phillips v. Michigan Department of Corrections*, 731 F. Supp. 792 (W.D. Mich. 1990), for the potential identity significance of a name. In the effort to determine whether a prisoner was in fact a transsexual, one expert "testified that he did not consider plaintiff to have passed the 'real life' test," in part "because she used an ambiguous (male-female) name," and "because there had been no formal name change." *Id.* at 796. This standard presents a classic Catch-22 if a court is unwilling to grant a formal name change until a transsexual (presumably having passed a real-life test) has undergone surgical conversion.

¹⁴³ *In re Anonymous*, 293 N.Y.S.2d 834, 835 (N.Y. Civ. Ct. 1968).

¹⁴⁴ *Id.* at 838 (citations omitted).

changes should be made only in those cases where physiological orientation is complete.¹⁴⁵

The formula offered by the court is not nearly as simple as it could be. The following formula will achieve the same result as the court: anatomical sex = social sex.¹⁴⁶ The court avoids this even simpler formula in order to highlight that it is privileging the psychic interior, even if it is a contingent privilege.

The cases demonstrate that genitals are crucial to transsexual identity as it is construed in the judicial opinions. The apparent requirement by courts of congruence between psyche and anatomy before they will privilege the psychological interior suggests that genitals are important for identity even when they are considered external. That genitals acquire such significance even when they are considered extraneous to identity is a paradox judges share, at least according to some critiques of transsexualism, with transsexuals themselves. For example, Hausman notes the irony that, while early proponents of sex reassignment surgery justified their intervention on the basis that the problem was a psychological one, "above the belt," they addressed it with treatments "below the belt."¹⁴⁷

This criticism reveals that some transsexuals may also have an incoherent or conflicted attitude toward genitals as markers of identity, treating them as powerful influences even as they are considered extraneous to identity. When genitals do not conform to what the transsexual perceives as his or her inner identity, they are not only treated as external, but often despised for their power to deny or disrupt the internal identity.¹⁴⁸ They have the power to be "wrong." This potential is most vividly illustrated in the tragic steps taken by prison inmates in some of the reported cases when their sense of what is external conflicts with that of the prison officials and judges.¹⁴⁹ The disturbing consequences of these conflicts, while related, are not in fact addressed by courts seeking to apply seemingly coherent methods for determining identity.

¹⁴⁵ *Id.* at 837.

¹⁴⁶ This result continues to have controlling power within that jurisdiction. In 1992, the same court rejected a male to female name change petition where no evidence was presented of surgical alteration of anatomy, distinguishing the 1968 case because it involved "a male transsexual who had a sex change operation and was anatomically and psychologically a female in fact." Application of Anonymous, 587 N.Y.S.2d 548, 548 (N.Y. Civ. Ct. 1992). However, the petition was later granted, still prior to surgery, but with the submission of further medical and psychiatric affidavits. See *In re Rivera*, 627 N.Y.S.2d 241 (N.Y. Civ. Ct. 1995); see also *In re Harris*, 707 A.2d 225, 227 (Pa. Super. Ct. 1997) (holding that a "better-reasoned approach is to require [a pre-surgical transsexual] petitioner to demonstrate that he or she is permanently committed to living as a member of the opposite sex" in order to qualify for a name change).

¹⁴⁷ HAUSMAN, *supra* note 43, at 125.

¹⁴⁸ See generally RENEE RICHARDS, *SECOND SERVE* (1983).

¹⁴⁹ For cases describing efforts at self-castration, see, for example, *White v. Farrier*, 849 F.2d 322, 323 (8th Cir. 1988); *Supre v. Ricketts*, 792 F.2d 958, 960 (10th Cir. 1986); *Lamb v. Maschner*, 633 F. Supp. 351, 354 (D. Kan. 1986).

C. Clothing

Clothing would seem like the most external and easily changed aspect of gender identity. Yet, it is one of the most important clues by which we make gender attributions in everyday social life,¹⁵⁰ and thereby judgments about one or another internal criterion which are not otherwise readily accessible. An illustration of the complex connection between clothes and identity is available in the description one theorist gives of the transition period of a male to female transsexual known as Phil as a man and Helen as a woman:

In the late autumn Phil finally found a job which he held for a brief period of time. Getting up every morning and dressing as Phil, heading into town to work, *with Helen in a suitcase* for after five, in and out of the bathroom to change clothing, bus rides home as Helen, up again in the morning as Phil, became strenuous and overwhelming.¹⁵¹

Clothing can therefore become an important external signifier of internal gender identity, bypassing sometimes other physical indicators like genitals. Indeed, dress can be an important example of the process through which the whole concept of internal identity is created: "[A]cts, gestures, and desire produce the effect of an internal core or substance, but produce this *on the surface* of the body, through the play of signifying absences that suggest, but never reveal, the organizing principle of identity as a cause."¹⁵² Duncan Kennedy further observes that clothes influence as well as reflect attitudes toward gender and sexuality.¹⁵³ It is not surprising, then, to discover that in cases about transsexuals and gender identity, courts react with significance to clothing, whether they consider it confirming of internal identity or entirely external to the true interior.

There are a small number of cases that deal directly with clothing, those considering the constitutionality of local ordinances forbidding cross-dressing. In *City of Chicago v. Wilson*, the Illinois Supreme Court considered the validity of a Chicago ordinance that imposed a fine on "[a]ny person who shall appear in a public place . . . in a dress not belonging to his or her sex with intent to conceal his or her sex."¹⁵⁴ The

¹⁵⁰ But see KESSLER & MCKENNA, *supra* note 8, at 128–30 (suggesting that the role of physical appearance in gender attribution includes many more features of body presentation than clothing).

¹⁵¹ FEINBLOOM, *supra* note 9, at 209 (emphasis added).

¹⁵² BUTLER, *supra* note 33, at 136.

¹⁵³ KENNEDY, *supra* note 27, at 186; see also Franke, *supra* note 92, at 63 (describing how carefully gender coded clothing is).

¹⁵⁴ *Wilson*, 389 N.E.2d 522, 523 (Ill. 1978).

statute itself suggests that external dress is unimportant, compared to what is regarded as an authentic sex that the clothing might contradict.¹⁵⁵ At the same time, it attests to the considerable importance of dress to the extent that nonconforming style is unlawful.

In *Wilson*, it appears that the police confronted externalities and internalities layer by layer. The court states that the defendants, male to female preoperative transsexuals who had been arrested leaving a restaurant, "were taken to the police station and were required to pose for pictures in various stages of undress."¹⁵⁶ Presumably from the final set of photos, the court was able to make this observation: "Both defendants were wearing brassieres and garter belts; both had male genitals."¹⁵⁷ One gets the sense, both from the procedure and from the drama of this sentence, which seems designed to reflect not necessarily the court's but the police officers' perspective, that the final layer of female externality was removed to get to the (genital) truth of the matter.

The court in *Wilson*, however, finding that the ordinance flunks the rational basis test because "[a]bsent evidence to the contrary, we cannot assume that individuals who cross-dress for purposes of therapy are prone to commit crimes,"¹⁵⁸ is sympathetic to the gender identity significance of the clothing. The court relies heavily on the evidence that these individuals were engaged in the real-life test period prior to surgery: "It would be inconsistent to permit sex-reassignment surgery yet, at the same time, impede the necessary therapy in preparation for surgery."¹⁵⁹ Here, the court sees clothing as illustrative of internal psychological rather than genital identity, yet it leaves open the possibility that in other settings, in which clothing is consistent with neither psychological or genital identity, regulation might be permissible.¹⁶⁰

¹⁵⁵ See also *Doe v. McConn*, 489 F. Supp. 76, 79 (S.D. Tex. 1980) (citing similar ordinance from Houston making it unlawful for someone to appear in public "dressed with the designed intent to disguise his or her true sex as that of the opposite sex").

¹⁵⁶ *Wilson*, 389 N.E.2d at 522; see also *McConn*, 489 F. Supp. at 79 ("In determining whether or not a person is dressing as that of the opposite sex, the person is required to disrobe.").

¹⁵⁷ *Wilson*, 389 N.E.2d at 522.

¹⁵⁸ *Id.* at 525.

¹⁵⁹ *Id.*

¹⁶⁰ Other cases similarly recognize the power of clothing to confirm internal psychological identity. See, e.g., *Farmer v. Brennan*, 511 U.S. 825, 848 (1994) (holding that male to female transsexual's feminine appearance could have put prison officials on notice that risk of assault was substantial); *Ulane v. Eastern Airlines, Inc.*, 581 F. Supp. 821, 827 (N.D. Ill. 1984) ("Another factor which I think is relevant [in determining that Ulane was a transsexual] is how plaintiff appears to other people She appears to [reporting and testifying psychiatrists] to be a woman. She conducts herself as a woman. She dresses as a woman."); *In re Eck*, 584 A.2d 859, 860 (N.J. Super. Ct. App. Div. 1991) (arguing that the judiciary has no place interfering with a male to female transsexual's choice of feminine clothing and appearance, and that said choice should not interfere with a name change application).

Sometimes, the association of gender with clothing can be so strong that it causes courts to produce images that contradict reality. For example, female identity is associated with the dress even when it is not being worn.¹⁶¹ The district court judge in *Ulane* reacts with incredulity to Eastern's claim that it fired Ulane only because she failed to transition on the job prior to surgery. The court says: "Apparently Eastern would have me believe that if Ken Ulane had shown up for work in a dress and boarded the plane that there would have been no problem at Eastern."¹⁶² In truth, it is unlikely that, even as Karen, she would have worn a dress to work. Rather, as far as I can tell from airport observations, female flight crew members wear an outfit that, with slacks, epaulets, a necktie, and the captain's hat, is more like male drag than anything else. For the court, however, female identity and the dress are too closely associated for it to avoid evoking the image. Because her appearance would have conveyed her inner sense of female identity, it would be as if she were wearing a dress even if she was not actually wearing such a garment.

The district court's riposte, with its dismissive and at the same time campy flavor, also reveals the narrowness of the window in which courts generally are willing to see attire as a congruent mirror of identity. It seems that only in the special case of a transsexual (in which the body is "wrong" but the mind and clothes are "right") does clothing potentially achieve this special status. Cases like *Wilson*, with its emphasis on the therapeutic role of transsexual dress, and the lower court's ruling in *Ulane* would be easily distinguishable if a crossdresser or other member of the transgender community sought to apply them. In *Ulane*, even the specter of the plaintiff preoperatively appearing in a dress provokes unease. Indeed, the window is also narrowed by choice of clothing. States the *Ulane* district judge: "She dresses as a woman. There is nothing flamboyant, nothing freakish about the plaintiff."¹⁶³ If clothing reflects identity to these judges, it is a conventional identity that they see reflected.

Frequently, however, in the case of preoperative transsexuals, clothing is rejected as a reflection of identity and becomes dangerous and "external." This attitude is particularly apparent in cases in which courts have expressed skepticism about a litigant's gender claim. If the courts are inclined to reject a gender claim, treating genitals as determinative of identity, then clothing which points in the opposite direction must be dismissed as extraneous.¹⁶⁴ External attire is particularly likely to cause

¹⁶¹ See *infra* Part III.D for discussion of transsexuals and bathrooms.

¹⁶² *Ulane*, 581 F. Supp. at 827.

¹⁶³ *Id.*

¹⁶⁴ See, e.g., *Lamb v. Maschner*, 633 F. Supp. 351, 353 (D. Kan. 1986) (denying request for female clothing by male to female transsexual assigned to male prison); *Terry v. EEOC*, No. 80-C-408, 1980 U.S. Dist. LEXIS 17289, at *7 (E.D. Wis. Dec. 10, 1980) ("The law does not protect males dressed or acting as females and vice versa.").

dismissive ridicule where, as the lower *Ulane* court suggested, it fails to comply with established norms. It is even more likely to cause fits where external attire is itself contradictory.¹⁶⁵

Where genitals control identity and clothing is subsequently seen as extra to identity, the courts hint that a male to female transsexual prisoner is responsible for the bad treatment she receives as a result of her inappropriate attire.¹⁶⁶ In *Star v. Gramley*, the court cites "legitimate security concerns" that would "override any right the plaintiff may have" to wear women's clothing.¹⁶⁷ These include the warden's assertion "that allowing an inmate to wear women's garments and makeup in an all-male prison could provoke and/or promote homosexual activity or assault."¹⁶⁸

A fear expressed by the prison warden in *Star* demonstrates the power that even the dismissed external clothing might have. The court quotes the prison official as worried "that an inmate dressed as a female [in a men's prison] poses an additional security risk because the potentially drastic 'change in his identity' could facilitate an escape from prison."¹⁶⁹ This comment suggests that female clothing has such power to alter identity that it could overcome the senses of guards who, although presumably informed of the inmate's new attire, would be unable to recognize the inmate. In both the specific instance of transsexuals in prison and the general experiences of transsexuals in the culture at large, even when dress is seen as external to identity, it remains very potent for its effects and implications on the identity of others.

The operation by which judges relegate clothing to an external role that may or may not conform to or confirm a more privileged internal identity is not unlike the identity operations transsexuals often engage in with respect to external genitals. The judges create the "legal" identity of a plaintiff by moving along the inside/outside dichotomy much like transsexuals create identity by placing various degrees of importance on genitalia. Judges also construct their own identities through these rhetorical operations by allowing certain individuals (transsexuals) to be treated as extraneous to or "outside" a particular insider group, a group with which the judges themselves may identify.¹⁷⁰

¹⁶⁵ See, e.g., *White v. Farrier*, 849 F.2d 322, 323 (8th Cir. 1988) (quoting letter from prison official: "Female clothing is not permitted for inmate wear in this male facility . . . Some of the staff are baffled as to why you want perfume, cosmetics and women's clothing when you are wearing a mustache. A mustache does not accent your femininity.").

¹⁶⁶ See *Meriwether v. Faulkner*, 821 F.2d 408, 417 (7th Cir. 1987).

¹⁶⁷ *Star*, 815 F. Supp. 276, 278 (C.D. Ill. 1993).

¹⁶⁸ *Id.*; see also *id.* at 279 ("[A] male inmate wearing a dress faces ridicule or, worse, physical assault."). Assertions that female appearance may provoke assault are not unrelated to the "conventional view" Duncan Kennedy cites "that women sometimes provoke abuse by their dress." KENNEDY, *supra* note 27, at 162.

¹⁶⁹ *Star*, 815 F. Supp. at 278.

¹⁷⁰ FUSS, *supra* note 112, at 3.

The case of *Kirkpatrick v. Seligman & Latz, Inc.*,¹⁷¹ offers an example of how the externality of clothing relates to the externality of the individual. In *Kirkpatrick*, an employment discrimination case, the court takes pains to argue that the plaintiff was not in fact fired for her transsexuality, but for her adoption of inappropriate attire. That clothing creates an offense justifying termination of an employee suggests its potency.¹⁷² In *Kirkpatrick*, the court held that it did "not need to reach the question of whether transsexuals are a suspect class [under § 1985] . . . because we conclude that this complaint nowhere alleged conduct by the defendants that discriminated against such a class or against the plaintiff *qua* transsexual."¹⁷³ *Kirkpatrick* had been fired for refusing to wear male clothing after informing her employers of her sex reassignment program (male to female), and of the treatment requirement that she live as a woman, including dress, prior to surgery.¹⁷⁴ The court separated dress choice from transsexual identity:

The only charge of improper conduct made in the complaint is the charge that the defendants would not permit her to wear the clothing of a female at a time when, by her complaint, she acknowledged that she was a male The animus, if any is alleged, is directed towards the conduct of the plaintiff in violating the store's dress code, regardless of her membership in a class of transsexual persons.¹⁷⁵

Similarly, in the employment discrimination case of *Doe v. Boeing*, the court found that Doe's transsexual status was extraneous to the matter at hand: "Boeing discharged Doe because she violated Boeing's directives on acceptable attire, not because she was gender dysphoric."¹⁷⁶ The employer had therefore not violated Washington's law against discrimination for physical handicap.¹⁷⁷

Boeing's view of acceptable attire had been remarkably precise. Doe, like *Kirkpatrick*, was conducting the real-life test in preparation for male to female sex reassignment surgery. Doe was permitted, prior to surgery, "to wear either male clothing or unisex clothing. Unisex clothing

¹⁷¹ 636 F.2d 1047 (5th Cir. 1981).

¹⁷² So long as the employer does not terminate employment for reasons that are impermissibly discriminatory (or a pretext for such reasons), the courts need not rule on the legitimacy of this or any other reason for termination.

¹⁷³ *Kirkpatrick*, 636 F.2d at 1050.

¹⁷⁴ *See id.* at 1048.

¹⁷⁵ *Id.* at 1050–51; *see also* *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659 (9th Cir. 1977). Although the case was not argued on the merits, the employer in *Holloway* claimed "that *Holloway* was not terminated because of transsexualism, 'but because the dress, appearance and manner he was affecting were such that it was very disruptive and embarrassing to all concerned.'" *Holloway*, 566 F.2d at 661 n.1.

¹⁷⁶ *Boeing*, 846 P.2d 531, 536 (Wash. 1993).

¹⁷⁷ *See id.*

included blouses, sweaters, slacks, flat shoes, nylon stockings, earrings, lipstick, foundation, and clear nail polish. Doe was instructed not to wear obviously feminine clothing such as dresses, skirts, or frilly blouses."¹⁷⁸ Doe was fired when she crossed this very fine line, wearing and refusing to remove "a strand of pink pearls," which had previously been deemed "unacceptable in that the addition of the pink pearls changed Doe's look from unisex to 'excessively' feminine."¹⁷⁹

The court dismisses clothing as being extraneous to identity. At the same time, in assessing the employer's duty to accommodate Doe's gender dysphoria,¹⁸⁰ the court is cognizant of Doe's need to live as a woman, and it treats the need as an administrative prerequisite for surgery and not as an expression of identity.¹⁸¹ However, Boeing's actions demonstrate almost obsessive concern with clothing and its meaning.

In these cases, clothing is placed as external to transsexual identity. However, transsexual identity is placed as external to the real issue being decided. The result of this as well as other employment discrimination cases denying relief for discrimination against transsexuals is to place the transsexual outside of the protection afforded other citizens. Through these decisions, the judges are constructing their own judicial identity, an insider status partly determined by being situated to declare what is inside and what is outside.

D. Outside Groups and the Bathroom

The bathroom is the place where, potentially, genitals and clothing—or at least the strong feelings people have about them—collide, and where these aspects of gender attribution collide with the natural attitude.¹⁸² The natural attitude is perhaps nowhere more iconically displayed than by the designation of appropriate restrooms for men and women. Marjorie Garber cites Lacan's phrase "urinary segregation" for this practice of separate men's and women's rooms.¹⁸³ Appropriate restrooms are, in fact, often designated by symbols of clothing. At least the women's room is designated by the familiar triangle dress in the universal sym-

¹⁷⁸ *Id.* at 533.

¹⁷⁹ *Id.* at 534.

¹⁸⁰ *See id.* at 536. The fact that the court assessed a duty to accommodate is confusing considering that they found no handicap.

¹⁸¹ The court disapproves Doe's explanation for her actions—"Doe determined unilaterally, and without medical confirmation, that she needed to dress as a woman at her place of employment in order to qualify for sex reassignment surgery"—and approves the conclusion of the lower court, which found that "the unisex dress permitted by Boeing . . . would not have precluded plaintiff from meeting the Benjamin Standards presurgical requirement of living in the social role of a woman." *Id.* at 537.

¹⁸² Garber punningly refers to it as a crossdresser's or transsexual's "Waterloo" in terms of its challenges to one's ability to pass, and notes that because of its challenge, passing there produces considerable pride. GARBER, *supra* note 130, at 47–48.

¹⁸³ *Id.*

bol.¹⁸⁴ But, even when signified by a dress, the women's room is not meant to be accessible only to those wearing a dress, or by anyone wearing a dress.¹⁸⁵ The clothing symbols stand in for requests for genital conformity. The restroom becomes a site of social connection between clothing and genitals. The process by which determinations of an individual's identity based on internal/external analysis involving clothing and genitals turns into a determination of insider/outsider status is most clearly demonstrated in concerns that arise with regard to the use of public or workplace restrooms.

Boeing illustrates how concerns relating to external accoutrements are connected to more deep seated anxieties relating to the bathroom. As in *Kirkpatrick*, the court in *Boeing* found that the employee was not fired for her transsexual status but for failing to adhere to a dress code.¹⁸⁶ However, the court's and Boeing's anxiety regarding Doe's clothing are as much concerned with the needs of others as with Doe's own identity. For the Boeing company, Doe's clothing is indeed expressive of identity—not of Doe's, but of the identity of other employees, an identity that implicates choice of bathrooms.

The *Boeing* court regales the reader with the time, attention, and both legal and medical expertise with which Boeing developed its dress policy for Doe and its other transsexual employees.¹⁸⁷ Yet the detailed attention was not for Doe's benefit, as the court suggests, because the entire elaborate procedure for developing the policy would have been unnecessary had Doe been permitted to dress the same as other female employees. It was only necessary because of Boeing's "legitimate business purpose in defining what is acceptable attire and in balancing the needs of its work force as a whole with those of Doe."¹⁸⁸ And why would the work force as a whole care what Doe wore? The Bathroom. Doe was forbidden during her preoperative period from using the women's restroom.¹⁸⁹ The precision of the dress code to which she was subject, although it is not entirely intuitive, is directed toward the following standard: "Doe was told her attire would be deemed unacceptable when, in the supervisor's opinion, her dress would be likely to cause a complaint were Doe to use a men's rest room at a Boeing facility."¹⁹⁰ Doe had the sex organs deemed proper for use in a men's room; yet her employer, presumably on behalf of other employees, was deeply concerned that she would wear something that could cause problems in the men's room.

¹⁸⁴ See KENNEDY, *supra* note 37, at 185.

¹⁸⁵ See GARBER, *supra* note 130, at 14.

¹⁸⁶ See *Boeing*, 846 P.2d at 536.

¹⁸⁷ See *id.* at 537.

¹⁸⁸ *Id.*

¹⁸⁹ See *id.* at 533.

¹⁹⁰ *Id.* at 533–34.

The power possessed by the dangerous external of clothing has implications not so much for Doe's own identity but for that of the insider group: those using the men's room. Doe, along with her clothing, is relegated to outsider status, in Doe's case quite literally: because of her own discomfort in using the men's room and the discomfort her presence generated in others, she used the restroom at a local service station during her lunch break.¹⁹¹

As in *Boeing*, bathroom use frequently becomes either a means or a source of employer discipline of transsexual employees. In both *Holloway v. Arthur Andersen & Co.* and *Sommers v. Budget Marketing, Inc.*, disruption created by a transsexual's bathroom use (in one case the men's room, in the other the women's room) was cited by the employer as a reason for termination.¹⁹² The *Sommers* court treats the bathroom issue as insurmountable. In a selection from the district court cited favorably by the court of appeals, it is suggested that "the problems" of an approach that would "ignore anatomical classification" were "limitless. One example is the simple practical problem that arose here—which restroom should plaintiff use?"¹⁹³ In speculating on the difficulties posed if discrimination protection were offered to transsexuals, the appellate court frets: "The appropriate remedy is not immediately apparent to this court. Should Budget allow Sommers to use the female restroom, the male restroom, or one for Sommers' own use?"¹⁹⁴

The choice of a third bathroom for a transsexual's use is not uncommon, and offers a stark example of what outsider status is like: if society is composed only of those who enter the women's room and those who enter the men's room, requiring someone to use a third bathroom tells them they are outside society. Kate Bornstein tells the tale of her own relegation to a third bathroom while working for IBM shortly after her gender change, on a floor under construction four flights down from where she worked:

Piles of plaster and wiring littered the floor, and pools of water lay everywhere. But there was a working bathroom in the very back of that floor, and that's where they sent me. No one ever cleaned it, no one kept it stocked. It was poorly lit and it was scary. Isn't it amazing the lengths we'll go to in order to main-

¹⁹¹ See *id.* at 533 n.2.

¹⁹² See *Sommers*, 667 F.2d 748, 748-49 (8th Cir. 1982) (describing employer claim that male to female transsexual's use of women's room led to disruption); *Holloway*, 566 F.2d 659, 661 n.1 (9th Cir. 1977) (noting employer affidavit cites male to female transsexual's use of men's room as generative of "personnel problems"); see also *Dobre v. National R.R. Passenger Corp.*, 850 F. Supp. 284, 286 (E.D. Pa. 1993) (noting that plaintiff, a male to female transsexual, was forbidden by her employer from using the women's restroom).

¹⁹³ *Sommers*, 667 F.2d at 749.

¹⁹⁴ *Id.* at 750.

tain the illusion that there are only two genders, and that these genders must remain separate?¹⁹⁵

Similarly, Patricia Williams writes about a transsexual student, "S.," who became the object of a law school controversy; neither the female nor male students were willing to share their bathroom with her. The Dean's bathroom was suggested as an alternative.¹⁹⁶ "At the vortex of this torment, S. as human being who needed to go to the bathroom was lost."¹⁹⁷ Williams, who connects this incident to the experience of racial exclusion as part of identity formation, notes the emotional effects when "others had defined her as 'nobody.'"¹⁹⁸

An important underlying element in many of these stories is that those who feel they have appropriate rights to the designated restroom express their discomfort as fear. In *Sommers*, some (the court says "a number of") female employees with whom the plaintiff would share the ladies' room were so distressed, they "indicated they would quit if Sommers were permitted to use the restroom facilities assigned to female personnel."¹⁹⁹ Bornstein speculates that the building manager "felt I would terrorize the women in their bathroom, and lie in waiting for the men in *their* bathroom."²⁰⁰ Indeed, in the law school story related by Williams, both female and male students stated as a basis for excluding S. from the restrooms that they "feared rape."²⁰¹ Such fear could emanate from unfounded stereotypes linking transgender people with other deviants like sexual predators,²⁰² or it could be a metaphorical embodiment of a more abstract fear of breaching social conventions.²⁰³

It seems plausible, however, that there is some sense of privacy, an inside place, encompassing gender that restroom patrons fear might be invaded by a gender inappropriate individual, an invasion for which

¹⁹⁵ BORNSTEIN, *supra* note 1, at 84–85.

¹⁹⁶ See PATRICIA WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 122–23 (1991).

¹⁹⁷ *Id.* at 123.

¹⁹⁸ *Id.* at 124. *But see* Phillips v. Michigan Dep't of Corrections, 731 F. Supp. 792, 793 n.1 (W.D. Mich. 1990) ("Plaintiff states that she has been treated well on the whole in the male facility . . . She is also able to use the bathroom and shower privately.").

¹⁹⁹ *Sommers*, 667 F.2d at 748–49.

²⁰⁰ BORNSTEIN, *supra* note 1, at 84.

²⁰¹ WILLIAMS, *supra* note 196, at 122; *see also* City of Chicago v. Wilson, 389 N.E.2d 522, 524 (Ill. 1978) (citing justifications for overruled Chicago ordinance prohibiting cross-dressing including the belief that it would "prevent crimes in washrooms").

²⁰² The Americans with Disabilities Act makes such a linkage. In a provision specifically excluding certain individuals from coverage, the Act includes "transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders." 42 U.S.C. § 12211(b)(1) (1994).

²⁰³ *See* Audiotape: The ABC's of Gender and Art (OutWrite '96: The Sixth National Lesbian, Gay, Bisexual and Transgendered Writers' Conference 1996) (on file with the author) (quoting Leslie Feinberg, a female to male transgender person, on how complicated the dissection of these fears can be and stating that a careful interrogation of gender anxiety in restrooms is necessary to tease out these fears from "gender discrimination").

"rape" serves only as a hyperbolic metaphor.²⁰⁴ The court in *Sommers* writes about the importance for the employer "in protecting the privacy interests of its female employees."²⁰⁵ Because of the activities engaged therein, the bathroom may indeed be a place where one has an expectation of privacy, but then the term "public restroom" is something of an oxymoron. More realistically, because one is required to share it with others, a public or workplace restroom is someplace where one has a limited expectation of privacy. A transsexual does not seem to invade one's privacy any more than anyone else who shares the public restroom. However, realistic fears, especially in the case of women having to share a restroom with someone perceived as a man, intertwine with less pragmatic anxiety over gender. More complicating still is the vulnerability to assault faced by transsexuals and other transgender individuals, particularly in circumstances like bathrooms, in which clothing and genitals are found to conflict.²⁰⁶

If bathrooms represent a private inside place to which transsexuals represent the public outside, the case of *Ashlie v. Chester-Upland School District* confirms the association of transsexuals with things public by dissociating them from the realm of privacy.²⁰⁷ In distinguishing cases prohibiting discrimination on the basis of private sexual conduct, the court states:

The surgical transformation from man to woman, on the other hand, is inescapably public. Its very purpose is to give physical form to a long-felt private dissatisfaction with one's sexual identity. It is an ever-present badge, an outward declaration of one's innermost feelings. A student who has known a teacher to be first a man, and then a woman, is compelled, at every meeting with the teacher, to confront also the teacher's changed out-

²⁰⁴ See WILLIAMS, *supra* note 196, at 122 (noting that some women asserted that they only "felt raped"); see also RAYMOND, *supra* note 16, at 104 ("All transsexuals rape women's bodies by reducing the female form to an artifact, appropriating this body for themselves.").

²⁰⁵ *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982); see also *Lamb v. Maschner*, 633 F. Supp. 351, 353 (D. Kan. 1986) (stating that if a preoperative male to female transsexual were placed in a women's prison, "clearly a violation of the women's rights would be at issue").

²⁰⁶ For information on assaults against transsexual individuals, see, for example, Ben L. Kaufman, *Transsexual Sues over Prison Threats, Beating; Officials did Nothing to Stop It, She Says*, CINCINNATI ENQUIRER, July 8, 1998, at B5 (discussing death threats and assault on preoperative transsexual in prison); *Man Who Beats Transsexual Gets 2 Years*, BOSTON GLOBE, May 17, 1997, at B2 (describing defendant who thought male to female transsexual was anatomically female; when he discovered otherwise, he went into a rage and killed her).

²⁰⁷ No. CIV.A. 78-4037, 1979 U.S. Dist. LEXIS 12516, at *13 (E.D. Pa. May 9, 1979) (holding that a transsexual who transitions on the job may not seek protection from state government employer job discrimination under the privacy doctrine).

ward sexual identity. This is no private matter; it inevitably intrudes into every aspect of the teacher's public behavior.²⁰⁸

Not only are the physical manifestations of a sex-change—the “ever-present badge”—external, but the transsexual herself is a public, not private, figure.

When courts repudiate transsexuals by placing them on the outside, the judges help constitute the identity of those left inside through the repudiating operation, whether it is employers, other employees, the judges themselves, or other members of society. Repudiations do not only operate in judicial opinions. The very process by which transsexuals themselves, not just courts, make sense of a transsexual's gender identity is, or can be seen as, one of repudiating and treating as extraneous some aspect of the self, whether it is genitals, clothing, or some other aspect. It is this feature of transsexual identity that causes some to be critical of the extent to which transsexuals, even those who purposely present ambivalent external markers of gender, adopt and orient themselves around a gender binary.²⁰⁹

When developing their sexual identity, however, most members of society undergo this process of repudiation. Judith Butler suggests that subjects are constructed and construct themselves by an operation of exclusion for the sake of coherence:

The boundary of the body as well as the distinction between internal and external is established through the ejection and transvaluation of something originally part of identity into a defiling otherness . . . the “inner” and “outer” worlds of the subject is a border and boundary tenuously maintained for the purposes of social regulation and control.²¹⁰

Judges also constitute their own identity through this process, establishing—or attempting to establish—the coherence of their opinions by placing transsexuality or transsexuals themselves outside societal bounds.²¹¹ The exteriorization of the “contaminated” other helps define both the boundary between the interior and exterior and, through opposition, the qualities of the privileged interior position.²¹² Inside/outside identity operations are thus connected to gender ideology: the transsexual as the

²⁰⁸ *Id.* at *12–13.

²⁰⁹ See HAUSMAN, *supra* note 43, at 198.

²¹⁰ BUTLER, *supra* note 33, at 133.

²¹¹ See, e.g., *Kirkpatrick v. Seligman & Latz, Inc.*, 636 F.2d 1047, 1049 (5th Cir. 1981).

²¹² See FUSS, *supra* note 113, at 3; see also BUTLER, *supra* note 27, at 3 (“[T]he subject is constituted through the force of exclusion and abjection, one which produces a constitutive outside to the subject, an abjected outside, which is, after all, ‘inside’ the subject as its own founding repudiation.”).

excluded other helps define what is inside according to the gender ideology or natural attitude, resulting in two easily distinguished genders.

This Section demonstrates how judges use a heuristic of inside and outside, ultimately placing transsexuals on the outside. However, judges' methods for making this outside placement resemble the same methods used by transsexuals to construct their own identity. Just as transsexuals externalize aspects of themselves in order to achieve a coherent identity, judges also place transsexuals and the instability they represent apart and away from the coherence of the gender ideology and of the legal text itself.

IV. The Operation of Abjection

In Latin, "abject" (or *abiectus*) literally means thrown off, down, or away.²¹³ As in English, this quality of outside placement takes on the additional meanings of contempt, servility, and wretchedness.²¹⁴ The repudiation that some transsexuals engage in, the desire to throw off, down, or away their past lives and their body parts may have a tone of abjection towards parts of their own selves.²¹⁵

Furthermore, abjection of others, as in the abjection of transsexuals as a group, may be one way, though not a necessary way, of constituting the self. "The construction of the 'not-me' as the abject establishes the boundaries of the body which are also the first contours of the subject."²¹⁶ Although identity formation is always accomplished through the externalization of qualities and people, not every externalization is abjection. As Butler points out, there is a violence of repudiation in every act by which the subject—the "I"—is formed. However, these repudiating acts will have a different spin depending on hard to articulate circumstances:

Whereas every subject is formed through a process of differentiation, and that process of becoming differentiated is a necessary condition of the formation of the "I" as a bounded and distinct kind of being . . . there are better and worse forms of dif-

²¹³ See D.P. SIMPSON, *CASELL'S LATIN DICTIONARY* 2 (1968).

²¹⁴ See *id.*; RANDOM HOUSE WEBSTER'S *COLLEGE DICTIONARY* 3 (1991).

²¹⁵ Sandy Stone is critical of this quality of the transsexual experience:

Passing means to live successfully in the gender of choice Passing means the denial of mixture. One and the same with passing is effacement of the prior gender role, or the construction of a plausible history. Considering that most transsexuals choose reassignment in their third or fourth decade, this means erasing a considerable portion of their personal experience.

Stone, *supra* note 1, at 297.

²¹⁶ BUTLER, *supra* note 33, at 133 (summarizing the views of JULIA KRISTEVA, *THE POWERS OF HORROR* (1982)).

ferentiation, and . . . the worse kinds tend to abject and degrade those from whom the "I" is distinguished.²¹⁷

When considering claims of transsexual litigants, judges sometimes engage in the worse forms of differentiation Butler describes. In this Section, I examine how this abjection occurs and how transsexuals might use their outsider status to destabilize the inside.

A. *Removal from the Human*

Abjection occurs when judges refer to transsexuals as if they were outside the realm of the human.²¹⁸ When judges deny an individual transsexual status, or fail to acknowledge the gender change that is an important signal of transsexuality, they allocate to these individuals not a status of "nontranssexual" but something even more excluded from the mainstream. When the *Ulane v. Eastern Airlines, Inc.*, court suggests that it may not be so easy to create a woman "from what remains of a man," it also suggests that the transsexual litigant is something less than either a man or a woman, and—since it has previously offered those as the only choices—something less than human.²¹⁹ The court in *In re Richardson* conveys the same sense of removal from the human when it describes the plaintiff's request for a name change as asking the court to lend its dignity "and the sanctity of the law to this freakish rechristening."²²⁰

Even when the litigant's transition is not treated with the same degree of skepticism as it was in *Ulane*, courts still place the transsexual outside of the gender binary and therefore outside the human. Indeed, in some cases, judges treat the sex-reassignment as a magical transformation. In *Daly v. Daly*, for example, the majority considers transsexuality to have altered the father so dramatically that she is now a different person: "Suzanne, in a very real sense, has terminated her own parental rights as a father. It was strictly Tim Daly's choice to discard his fatherhood and assume the role of a female who could never be either mother or sister to his daughter."²²¹ By emphasizing the male and female roles from which Daly is precluded, the court suggests Daly falls outside the boundaries of normal human society. Likewise, the school board that dismissed the plaintiff in *Grossman v. Bernards Township Board of Education* charged:

²¹⁷ Judith Butler, *For a Careful Reading*, in SEYLA BENHABIB ET AL., *FEMINIST CONTENTIONS: A PHILOSOPHICAL EXCHANGE* 139–40 (1995).

²¹⁸ See BUTLER, *supra* note 27, at 8 (stating that "those abjected beings who do not appear properly gendered" have "their very humanness" questioned).

²¹⁹ *Ulane*, 742 F.2d 1081, 1087 (7th Cir. 1984).

²²⁰ 23 Pa. D. & C.3d 199, 201 (1982).

²²¹ *Daly*, 715 P.2d 56, 59 (Nev. 1986).

Paul Monroe Grossman knowingly and voluntarily underwent a sex-reassignment from male to female. By doing so, he underwent a fundamental and complete change in his role and identification to society, thereby rendering himself incapable to teach children in Bernards Township because of the potential her (Grossman's) presence in the classroom presents for psychological harm to the students of Bernard Township.²²²

Again, Grossman is now a fundamentally different person, and for that reason is out of bounds.²²³

In *Ashlie v. Chester-Upland School District*, the court provides the most stunning confirmation of this tendency to view the transsexual as becoming less than human through transformation.²²⁴ The *Ashlie* court chooses to support its argument that the right to privacy does not protect a male to female transsexual school teacher from dismissal with the following extended analogy:

It might just as easily be argued that the right of privacy protects a person's decision to be surgically transformed into a donkey. The transformation, by its very happening, would lose the quality of privateness. Certainly, those who had known the donkey as a man would detect the change, even though those acquainted only with the donkey might never have occasion to remark upon it. In addition, the change from man to beast might be just as devoutly wished, as psychologically imperative, and as medically appropriate as the change from man to woman, but the Constitution, I fear, could not long bear the weight of such an interpretation.²²⁵

The court retreats some from the implications of what it calls its "improbable analogy" by suggesting that it is inspired by Bottom's transformation into a donkey in Shakespeare's "delightful" *Midsummer Night's Dream*, and by hastening to add, "I do not mean to intimate that a sex-change operation under the proper circumstances is anything less than a valid and medically necessary form of treatment."²²⁶ Nevertheless, it is

²²² *Grossman*, No. 74-1904, 1975 U.S. Dist. LEXIS 16261, at *2 (D.N.J. Sept. 10, 1975).

²²³ Each of these cases also associates the magical transformation with a quality of moral contagion. See also *Daly*, 715 P.2d at 59 (citing the dimmed prospects for emotional family stability due to father's desire to introduce daughter to friends of the father including "lesbians, homosexuals and transsexuals" as a factor for termination of transsexual father's parental rights).

²²⁴ See *Ashlie*, No. CIV.A. 78-4037, 1979 U.S. Dist. LEXIS 12516, at *8 (E.D. Pa. May 9, 1979).

²²⁵ *Id.* at *6-7.

²²⁶ *Id.* at *7.

hard to avoid the sense of abjection that the court's introduction of the analogy promotes.

Transsexual theorist Susan Stryker has experienced this type of abjection. To explain her exclusion from the realm of human society, she uses an analogy to a famous literary victim of abjection:

I find a deep affinity between myself as a transsexual woman and the monster in Mary Shelley's *Frankenstein*. Like the monster, I am too often perceived as less than fully human due to the means of my embodiment; like the monster's as well, my exclusion from human community fuels a deep and abiding rage in me that I, like the monster, direct against the conditions in which I must struggle to exist.²²⁷

Stryker feels that as a transsexual, she is, like the monster, excluded from human society.

B. Transsexual Abjection and Homophobia

Much of the theorizing concerning abjection has occurred in attempts to explain the position occupied in human thought by lesbians and gay men.²²⁸ Indeed, the process of repudiating transsexuals often evokes homophobic discourse. Sometimes, however, transsexuality and homosexuality exist in a kind of see-saw relationship; one identity model requires the repudiation of the other for its own constitution.

The cases reveal attempts both to disassociate transsexuals from homosexuals and also to link them; either way, the attempt can have phobic and abjective dimensions. In defining transsexuality, courts sometimes take pains to distinguish transsexuals from both homosexuals and transvestites. For example, the court in *Ulane* explains:

To be distinguished are homosexuals, who are sexually attracted to persons of the same sex, and transvestites, who are generally male heterosexuals who cross-dress, i.e., dress as females, for sexual arousal rather than social comfort; both homosexuals and transvestites are content with the sex into which they were born.²²⁹

²²⁷ Stryker, *supra* note 1, at 238.

²²⁸ See, e.g., BUTLER, *supra* note 33, at 133.

²²⁹ *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1083 n.3 (7th Cir. 1984); see also *Meriwether v. Faulkner*, 821 F.2d 408, 412 n.6 (7th Cir. 1987) (quoting *Ulane*); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 749 n.2 (8th Cir. 1982) (citing medical affidavit which stated that "transsexualism . . . is not a matter of sexual preference"); *Doë v. State*, 257 N.W.2d 816, 818-19 n.2 (Minn. 1977) (quoting medical expert Harry Benjamin to differ-

It is odd that these courts work so hard at this distinction, because nothing in these cases seems to hinge on it. Indeed, in *Ulane*, the court abandons its careful distinction, ultimately lumping together transgender and homosexual individuals for the purpose of statutory construction. The court reasons that if Congress had intended "sex" in Title VII to exceed its "plain meaning," then "surely the legislative history would have at least mentioned its intended broad coverage of homosexuals, transvestites, or transsexuals, and would no doubt have sparked an interesting debate."²³⁰ Subsequently, the court cites Congress' failure to amend Title VII to prohibit discrimination on the basis of sexual orientation as further evidence that transsexuals, like homosexuals and transvestites, were not intended to be covered.²³¹

By contrast, the lower court in *Ulane* had used the set of distinctions among the different groups to come to the opposite conclusion about the legislative history of Title VII:

Homosexuals and transvestites are not persons who have sexual identity problems. They are content with the sex into which they were born. Transsexuals, on the other hand, are persons with a problem relating to their very sexual identity as a man or a woman. I believe on that basis the situation of a transsexual is distinguishable.²³²

Both analyses seem to draw on the outsider status that homosexuals occupy²³³—one to move transsexuals into that status, the other to rescue them from it.²³⁴

This conflicting set of pronouncements about the similarities and distinctions between homosexuals and transgender people (and the distinctions among the transgendered) offer a disturbingly limited set of

entiate homosexuals and transsexuals).

²³⁰ *Ulane*, 742 F.2d at 1085.

²³¹ *Id.* at 1085–86; see also *Sommers*, 667 F.2d at 750 (offering same interpretation); cf. *Desantis v. Pacific Tel. & Tel. Co., Inc.*, 608 F.2d 327, 329 (9th Cir. 1979) (citing the denial of Title VII coverage to transsexuals as the basis for denying similar coverage to homosexuals).

²³² *Ulane v. Eastern Airlines, Inc.*, 581 F. Supp. 821, 823 (N.D. Ill. 1983), *rev'd* 742 F.2d 1081 (7th Cir. 1984).

²³³ See Fuss, *supra* note 113, at 3.

²³⁴ In *Underwood v. Archer Management Services*, 857 F. Supp. 96 (D.D.C. 1994), the court relies on both *Ulane*'s statutory construction that groups homosexuals and transgender individuals and on the definitional footnote that distinguishes them in order to deny protection to transsexuals under a District of Columbia statute. The statute under analysis in *Underwood* prohibited discrimination on the basis of both "sex" and "sexual orientation." The court relied on *Ulane* for excluding transsexuals from coverage under "sex," an exclusion that depended on legislative similarities between transsexuals and homosexuals. It also relied on *Ulane* for excluding transsexuals from coverage under "sexual orientation," and stated, "In a Title VII context, courts have firmly distinguished transsexuality from homosexuality." *Id.* at 98.

choices for conceiving of the relationship among these groups: either the relationship is one of antagonism—the inclusion of one meaning the exclusion of the other²³⁵—or it is one of simultaneous ostracism.²³⁶

What is also apparent from the cases is that the fears evoked by transsexuals are so close to the fears that inform homophobic discourse that it is difficult to separate them to see which fear is the source. *In re Ladrach*, for example, seems to be as much about delegitimizing same sex marriages as it is about transsexuality: “the singular issue before the court is whether a post-operative male to female transsexual is permitted under Ohio law to marry a male. More simply stated, the issue is whether two individuals, biologically and legally of the same sex at birth, may contract to marry each other?”²³⁷ The natural attitude about gender the opinion displays²³⁸ is strongly connected to heterosexual object choice,²³⁹ and the disdain to homophobia. Similarly, concerns about transsexuals using inappropriate restrooms seem to be associated with homophobia as much as the discomfort with gender-inappropriate attire.²⁴⁰ Further, the specter of not just rape but “homosexual rape” greatly influences courts’ discussions regarding preoperative transsexuals in prison.²⁴¹

Finally, a rhetoric of moral contagion, especially as it applies to school teachers, taps into a similar homophobic discourse.²⁴² In *Ashlie*, the court notes in a footnote:

²³⁵ Compare the district court’s analysis in *Ulane*, 581 F. Supp. at 823 (excluding homosexuals and transvestites but including transsexuals), with that in *Underwood*, 857 F. Supp. at 98 (including homosexuals and excluding transsexuals).

²³⁶ The majority and dissenting opinions in *Daly v. Daly*, 715 P.2d 56 (Nev. 1986), offer an example of both moves. The majority, on the one hand, seeks to portray the father, a male to female transsexual named Suzanne, as unfit in part because of her association with other maligned groups including homosexuals. *See id.* at 59. On the other hand, the dissent, in seeking to support the father and oppose the decision to terminate parental rights, draws attention to a distinction between transsexuals and homosexuals, perhaps in an effort to save Suzanne from the outsider status homosexuals occupy. *See id.* at 61 n.2 (Seymour, J., dissenting).

²³⁷ *Ladrach*, 513 N.E.2d 828, 828 (Ohio Prob. Ct. 1987).

²³⁸ *See supra* Part II.B.

²³⁹ *See BUTLER, supra* note 33, at 136 (“[A]cts and gestures, articulated and enacted desires create the illusion of an interior and organizing gender core, an illusion discursively maintained for the purposes of the regulation of sexuality within the obligatory frame of reproductive heterosexuality.”).

²⁴⁰ *See WILLIAMS, supra* note 196 at 122 (reporting that the men as well as the women expressed a fear of rape in resisting the use of the public restrooms by a male to female transsexual student).

²⁴¹ *See Farmer v. Brennan*, 511 U.S. 825, 852–53 (1994) (Blackmun, J., concurring) (invoking the horrors of “homosexual rape” in support of an Eighth Amendment claim); *see also Star v. Gramley*, 815 F. Supp. 276, 278 (C.D. Ill. 1993) (citing warden’s statement that “allowing an inmate to wear women’s garments and makeup in an all-male prison could provoke and/or promote homosexual activity or assault”).

²⁴² *See SEDGWICK, supra* note 23, at 70 (describing fears of moral contagion as an aspect of homophobic discourse).

There was extensive credible expert testimony at the hearings, as to the grave, harmful psychological effects that the presence of plaintiff as a school teacher would have upon the many children who had formerly been plaintiff's students while plaintiff was a male. Testimony showed that most of the students were in their early teens, and that many came from single parent homes, where the sole parental guidance emanated from the mother.²⁴³

The seemingly odd reference to mothers suggests that the court is mindful of psychological studies that attempt to link both homosexuality and transsexuality (in men) to effeminacy in boys, and to link that effeminacy in turn to overinvolvement by mothers.²⁴⁴ The quotation suggests that a male role model who has become a female role model might push these vulnerable teens over the edge.

The alternating relationship of abjection observed in the cases between gays and lesbians on the one hand, and transsexuals on the other, is also reflected in the cultural stances each group takes toward the other. On the one hand, transsexuals have been defined against homosexuals, as is apparent in the cases. For many years, heterosexual orientation was a prerequisite for transsexual surgery. "Transsexual" was thereby defined to exclude homosexual candidates. Indeed, under one set of criteria, in order to qualify as a "true transsexual" one had to display "a disdain or repugnance for homosexual behavior."²⁴⁵ On the other hand, Eve Sedgwick cautions that the effort undertaken within the gay movement to distinguish between homosexuality and transgender identification, although a necessary sophistication, "may leave the effeminate boy once more in the position of the haunting object—this time the haunting object of gay thought itself."²⁴⁶

²⁴³ *Ashlie v. Chester-Upland Sch. Dist.*, No. CIV.A. 78-4037, 1979 U.S. Dist. LEXIS 12516, at *8 (E.D. Pa. 1979); *see also* *Grossman v. Bernards Township Bd. of Educ.*, No. 74-1904, 1975 U.S. Dist. LEXIS 16261, at *3 (D.N.J. Sept. 10, 1975) (noting school board's concern about the "psychological harm to the students" that might result from transsexual teacher).

²⁴⁴ *See* EVE KOSOFKY SEDGWICK, *TENDENCIES* 160 (1993). There is a strong strain of misogyny in these studies. Sedgwick observes:

Mothers, indeed, have nothing to contribute to this process of masculine validation, and women are reduced in the light of its urgency to a null set: any involvement in it by a woman is overinvolvement, any protectiveness is overprotectiveness, and, for instance, mothers "proud of their sons' nonviolent qualities" are manifesting unmistakable "family pathology."

Id. at 160 (quoting Richard C. Friedman, M.D., Lecturer, Department of Psychiatry, Columbia University).

²⁴⁵ Billings & Urban, *supra* note 17, at 270. It is not immediately intuitive how this criterion would be assessed. As Kessler and McKenna point out, applying a label of hetero- or homosexual "depends on the gender attributions made about *both* partners." KESSLER & MCKENNA, *supra* note 8, at 15 (emphasis in original).

²⁴⁶ SEDGWICK, *supra* note 244, at 157.

As Susan Stryker herself illustrates, the distinction between transsexuals and homosexuals breaks down considerably as more and more individuals identify as both.²⁴⁷ Further, political efforts by leaders in both groups have gone a long way toward demonstrating that it is not necessary for each group to define itself against the other.²⁴⁸ In her discussion of the Defense of Marriage Act, Mary Coombs offers a compelling case for a more collaborative effort.²⁴⁹ She argues that one rationale for such an alliance is the common abjection experienced. She notes that lesbians, gay men, and transsexuals have "common enemies" who "see gays and lesbians as dangerous and disgusting in part because we, our love and our relationships, threaten their views of what men and women are. Transgendered people, their love and marriages, can and do evoke much the same fear and loathing, and for much the same reasons."²⁵⁰

C. *The Subversive Potential of the Outsider*

Some theorists suggest that the outsider status accorded to the victims of abjection also affords them subversive potential. Whether they are considered projections of the insecurities within gender ideology or the dangerous outsiders that help constitute the subject,²⁵¹ they have enormous power. Butler alludes to the disruptive power those on the outside might have: "[t]hese excluded sites come to bound the 'human' as its constitutive outside, and to haunt those boundaries as the persistent possibility of their disruption and rearticulation."²⁵² If the coherence of gender ideology is haunted by the figure of the transsexual or would-be transsexual, then the very concept of what is human may be dependent on the ambivalences of gender disruption the transsexual offers.

This analysis might suggest that the courts, in constructing the transsexual as a being outside of both gender and the "human," have con-

²⁴⁷ See Stryker, *supra* note 1 (describing herself as a lesbian). Janice Irvine, however, also cites an estimate "that 30–35% of those diagnosed as gender dysphoric are really intensely homophobic gay people." IRVINE, *supra* note 118, at 267. The validity of this statistic is difficult to assess. How does one determine the "really" in the quoted sentence apart from noticing that the individuals have the same original anatomy as the people they desire? If bodies can change how does one assess the "really" of a definition—homosexuality—that requires attributing gender to bodies? Are male to female transsexual lesbians like Stryker "really" heterosexual?

²⁴⁸ See Susan E. Neff, *Mourning a Victim, Decrying a Crime*, BOSTON GLOBE, Dec. 11, 1995, at 19 (describing efforts by local gay, lesbian, and transgender activists to work together for legislation to combat "gender-based hate crimes" in wake of murder of a member of the local transsexual community).

²⁴⁹ See Mary Coombs, *Transgenderism and Sexual Orientation: More than a Marriage of Convenience*, 3 NAT'L J. SEXUAL ORIENTATION L. 1 (1997).

²⁵⁰ *Id.* at 7–8.

²⁵¹ See BUTLER, *supra* note 33, at 133.

²⁵² BUTLER, *supra* note 27, at 8; see also Stryker, *supra* note 1, at 238 (maintaining that the transsexual "represents the prospect of destabilizing the foundational presupposition of fixed genders").

structed a discursive monster of sorts that threatens the gender barricades. Susan Stryker argues in favor of exploiting the liberatory potential in monster status: "words like 'creature,' 'monster,' and 'unnatural' need to be reclaimed by the transgendered. By embracing and accepting them, even piling one on top of another, we may dispel their ability to harm us."²⁵³ This monster haunts the interior in a manner that has significant implications for the definition of self for those inside. As a result of the exteriority of the abject, Judith Butler argues the subject is never able to achieve coherence "because it is founded and, indeed, continuously re-founded, through a set of defining foreclosures and repressions that constitute the discontinuity and incompleteness of the subject."²⁵⁴

Judges may already understand something of the potential for defining one's own as well as others' identities from both the inside and the outside positions. Hardly abject themselves, they nonetheless occupy a certain outsider status. Their position might be called one of "suprajection" because they are not thrown out but up and beyond. Because of this outsider status, like abjects, they are able to provide boundaries, through their decisionmaking processes, to the actions of everyday life.

In judges, the power attendant to this constituting function is abundantly evident. Like transsexuals, however, judges have a quality of doubleness: not only are they on the outside, but they, like transsexuals, engage in repudiating acts to maintain internal integrity of the legal text. Similar to Sandy Stone's description of transsexuals, judges also have an "erased history"—a history perhaps of decisional confusion and incoherence regarding gender in which "we can find a story disruptive to the accepted discourses of gender."²⁵⁵ Judges might productively recognize both their affinity with the outsider status transsexuals occupy and the opportunity such status affords to bring more openness and decisional complexity to their work.

V. Conclusion

In cases adjudicating claims of transsexuals, judges engage in three operations of repudiation. By projecting troubles in gender ideology onto the transsexual, they seek to maintain the coherence of their gender ideology. By relying on an interpretive scheme that privileges interior over exterior indicators of identity, they also establish an inside group to which the transsexual is outside. Finally, the repudiation involved in both of these operations can lead to the placement of the transsexual in a position of abjection. In these efforts to maintain a coherent authorial identity, the judges resemble transsexuals in the repudiating strategies that

²⁵³ Stryker, *supra* note 1, at 240.

²⁵⁴ BUTLER, *supra* note 33, at 190.

²⁵⁵ Stone, *supra* note 1, at 295.

they sometimes employ to maintain a coherent gender identity, a process similar to that engaged in by all members of society. However, processes like the ones engaged in by the judges are impoverished compared to the richer understanding that may be available by engaging rather than expelling difference, incoherence, and confusion.

Neither the law nor societal concepts of gender need to be overhauled for each to achieve greater openness through the challenge transsexuality provides. The incoherence that is evident within individual opinions and across the aggregate of cases suggests numerous opportunities for accepting that challenge. The shakiness of gender ideology in the face of the skepticism so often displayed, the uncertainty regarding interiors and exteriors when all the different approaches are compared, and the threat raised by the holder of the abject position are already part of the decisionmaking process. At the same time, the various different models of transsexuality suggest a similarly irreconcilable array of gender identity expressions. An attitude of elastic tenability, on the part of judges as well as other members of society, has the potential to aid such openness.

With its recognition and accommodation of a variety of different identity models, elastic tenability has, perhaps ironically, the best chance of achieving the "wildcat strike at the gender factory"²⁵⁶ that Billings and Urban assert has been precluded by the proliferation of transsexual surgery. By raising the degree of social tolerance for expressions of gender that challenge each other as well as social conventions, such a position helps create what would seem to be the necessary preconditions for transcendence. The cases illustrate how precarious it currently is to be a member of society whose genitals and appearance, as well as self-image, conflict. By increasing acceptance for those who seek to bring all three factors into accord,²⁵⁷ we would make the world a safer place for those who wish to live in a manner that challenges such conformity, even in recombinations that, at this stage, can only be imagined.

That these challenges should occur through the binary of male and female rather than around it or beyond it—through recombination rather than transcendence—strikes me as unproblematic.²⁵⁸ It seems far more likely that challenges will occur and gain success if they participate in socially recognizable and even integral qualities of masculinity and femininity, the appeal of which the experiences of transsexuals, both positive and negative, amply demonstrate. Similarly, law is most likely to be challenged successfully through the method by which it already con-

²⁵⁶ Billings & Urban, *supra* note 17, at 278.

²⁵⁷ See Keller, *supra* note 17 (arguing for a concept of "social necessity" to justify prison treatment, benefits payment, and other outcomes that would otherwise depend on "medical necessity" as a standard, because of this lack of acceptance and even danger).

²⁵⁸ But cf. HAUSMAN, *supra* note 43, at 198 (arguing that binary gender cannot be challenged through recombination of its elements).

tinuously recombines and reinvents—the common law method of reasoning from precedent, but always adapting to new circumstances.²⁵⁹

The cases already demonstrate, to a certain degree, the opportunities for the development of an attitude of elastic tenability. However rigid any transsexual's relationship to gender may be at any one or several moments in time, his or her history or future over time will stand for some proposition of gender fluidity and transgression. Likewise, even in cases offering an inflexible attitude toward gender (whether they acknowledge or deny a transsexual litigant's claims about his or her own gender), any acknowledgement of the litigant's claimed transsexual status represents a moment of flexibility. If the court reacts with skepticism, as in *Ulane*,²⁶⁰ for instance, it is experiencing a breakdown in the natural attitude, no matter how that breakdown is ultimately rationalized or projected. If the court accepts a litigant's gender claim, as in the *Daly* majority,²⁶¹ the moment at which the court makes the transition from skepticism to acceptance, however fleeting, might be a significant one of transgression and mutation.²⁶² Although the dominant mode of understanding transsexuals in cases is the model in which either a transsexual's history is erased, or the claimed identity is denied, the recognition of the litigant's status as transsexual, as required by the issues under consideration, generates at least a small moment of transgressive change.

It is possible that the legal opinions, containing as they do the kernels of contradiction and transgression, already reflect the challenge that transsexuality offers.²⁶³ What the cases currently lack is a self-consciousness of their own contradictory history, much like the self-consciousness Stone and Stryker urge for transsexuals. By operating in different circuits of power, judges have much greater control than transsexuals over the self-identity they author in the opinions. Therefore, this request for self-consciousness, although challenging to the identity judges maintain through avoiding it, is nonetheless reasonable.

There is no guarantee that either a program of elastic tenability or the subjection of the cases to the kind of critique I have pursued will produce positive political effects. If one identity strategy for some transsexuals is to define themselves against other groups, like lesbians and gay men, then elastic tenability may rescue some individuals from abjection only at the expense of others. Of course, if these transsexuals were themselves to adopt a position of elastic tenability these effects might be mitigated. Despite this concern, I hope that gender identity is not constructed

²⁵⁹ See generally *supra* text accompanying note 32 (describing Judith Butler's use of the common law method as a metaphor for gender citation).

²⁶⁰ *Ulane v. Eastern Airlines*, 742 F.2d 1081 (7th Cir. 1984).

²⁶¹ *Daly v. Daly*, 715 P.2d 56 (Nev. 1986).

²⁶² I owe the development of this idea to Jorge Esquirol.

²⁶³ See Danielson, *supra* note 30, at 58 (asserting that discrimination cases concerning pregnancy and homosexuality hold similar potential).

with the same sense of using up tissue and trading off function that is used to describe the surgical construction of vaginas and penises:²⁶⁴ that the identity claims of one group are not exhausted for the benefit of another.

Critical exposure and judicial self-consciousness about the incoherence of the decisionmaking framework may not change anything about the way transsexuals are treated in society or even in case law. On the one hand, some theorists suggest that such critique and self-consciousness can have positive effects. In his application of techniques to uncover the mechanisms of power in the discourse of homophobia, David Halperin argues that such analysis may help frustrate oppressive exercises of power in the dominant discourses.²⁶⁵ On the other hand, other theorists are much more pessimistic about these possibilities, noting the intractability of various discourses of power to disabling critique and suggesting that the recognition of this instability is in fact consistent with ideological hegemony.²⁶⁶

The process, however, will most likely reflect the doubleness characteristic of transsexuality, offering the potential of reinforcement as well as challenge. Sedgwick's view of the analyst of discourse as one merely seeking "rhetorical leverage" in a struggle already ongoing is more modest than Halperin's²⁶⁷ and is similar to the critique developed by Duncan Kennedy, which in his view "asserts simply that often, very often we do succeed . . . in opening closure."²⁶⁸ This process is likely to be fraught with the possibility of reinforcing existing structures of power,²⁶⁹ just as the challenges transsexuals provide to assumptions about gender also run the risk of reinforcing those assumptions. The role that judges will play is also, ultimately, a modest one. If judges were to adopt a position of elastic tenability, whether across the board, or at opportune moments, the results would not produce coherence where earlier there were key contradictions; the incoherence would simply be of a different kind. Because legal rhetoric and gender expression are currently, and will continue to be, open in texture, one can only hope that the manipulations and recombinations create opportunities for judges and other members of society to recognize challenges to their method and ideology. Much easier than a

²⁶⁴ See, e.g., GARBER, *supra* note 130, at 102 (analyzing descriptions of sex reassignment surgery).

²⁶⁵ See DAVID M. HALPERIN, SAINT FOUCAULT 52 (1995).

²⁶⁶ See *supra* note 29 and accompanying text.

²⁶⁷ See SEDGWICK, *supra* note 23, at 11.

²⁶⁸ KENNEDY, *supra* note 37, at 661.

²⁶⁹ For Butler's argument that drag, although potentially useful in undermining gender roles, is not necessarily subversive, see BUTLER, *supra* note 32, at 231 ("But there is no guarantee that exposing the naturalized status of heterosexuality will lead to its subversion. Heterosexuality can augment its hegemony *through* its denaturalization, as when we see denaturalizing parodies that reidealize heterosexual norms *without* calling them into question.") (emphasis in original); see also KENNEDY, *supra* note 37, at 680.

sex-reassignment undertaking, these moments of insights will nonetheless be border-crossing—discursive rather than surgical operations of gender and law.