"A ROSE IS A ROSE"

On Producing Legal Gender Classifications

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Gender is perhaps the most pervasive, fundamental, and universally accepted way we separate and categorize human beings. Yet in recent years, U.S. courts and administrative state agencies have confronted a growing challenge from individuals demanding to have their gender reclassified. Transgender people create a profound category crisis for social institutions built on the idea that biological sex is both immutable and dichotomous. During the past four decades, the central legal question shifted from how to allocate specific individuals to categories to the permeability of gender categories themselves. This analysis of 38 judicial gender determinations provides a glimpse of the literal construction of the gender order and of the ways institutions gender individuals. It also provides powerful evidence that cultural anxieties about reproduction and the heterosexual, conjugal family underscore institutional efforts to manage the uncertainty of postmodern gender identities.

Keywords: *classifications; courts; gender; law; theory; transgender; transsexual*

On April 8, 1629, T. Hall appeared before the General Court of the Colony of Virginia. Slight of frame and wearing the typical clothing of a manservant, Hall had committed no crime nor become party to a dispute with any individual person. Hall appeared, instead, to settle a dispute among members of the community about whether Hall was a man or a woman. Alternately using the names Thomas and Thomasine, Hall had at various times donned both male and female attire. Raised female, Hall was skilled

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GENDER & SOCIETY, Vol. 24 No. 6, December 2010 814-837
DOI: 10.1177/0891243210385918
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at the delicate crafts associated with women's work but moved freely through the world, as was the purview of men, performing military service at home and in France. Under direction from the court, three women scrutinized Hall's body to determine the correct gender assignment. The women all declared that Hall was not one of them. When community members remained skeptical, the court mandated further inspections. Some were performed in stealth while Hall slept; others were compelled by physical force. Unsatisfied that it could make either a male or female designation, the court found Hall to be both a man and a woman and ordered Hall to dress at all times in garments associated with both genders (Norton 1997).

Gender is perhaps the most pervasive, fundamental, and universally accepted way we separate and categorize human beings. However, in recent years, U.S. courts and administrative state agencies have confronted a growing challenge from individuals demanding to have their gender reclassified. Transgender people create a profound "category crisis" (Garber 1991) for social institutions built on the idea that biological sex is both immutable and dichotomous. Yet our current system does not allow for opting out of gender or for combining legal statuses. During the past four decades, as transpeople have begun seeking to electively alter their gender markers, the central legal question has shifted from how to allocate individuals to categories to the permeability of gender categories themselves. As individuals call on the state to reconfigure the boundaries of gender schemes, they both challenge the fixity of gender categories themselves and encapsulate a paradigmatic problem postmodern identity politics poses for liberal states, namely, the integration of conflicting scientific ideas and individual identity constructs in bureaucratic practice. While it is individual transgender people who bear the burden of gender's impenetrability, there are central feminist concerns at stake in these determinations.

The juridical and administrative contexts in which gender reclassification requests are mediated mark institutional sites where gender is simultaneously produced and destabilized through struggles to assimilate competing medical, psychological, and social explanations of gender difference. Paradoxically, it seems the singular effect of juridical and administrative attempts to stabilize gender as a legitimate marker of legal difference underscores the mutability and indeterminacy of gender itself. As the state grapples with whether to premise legal gender recognition on biological sex as benign fact or on the complex nature of the social, psychological, and biological makeup of the individual, the logics it employs ossify outdated concepts of ideal "men" and "women" and of normative masculinity, femininity, and sexuality. In a context of uncertainty, state institutions summon medical evidence

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despite the fact that medical gender distinctions are similarly contested. This analysis of 38 judicial gender determinations between 1966 and 2007 provides a glimpse of the literal construction of the "gender order" (Connell 1987), a process of institutional gendering, of "creating distinguishable social statuses for the purposes of assigning rights" (Lorber 1994). The argument I present is threefold: First, I draw on literature from the social sciences to argue that bureaucratic identity management is a distinctly contemporary way to watch gender construction in action. Second, my analysis of the cases sampled demonstrates that while current legal scholarship examines transgender law as a patchwork of conflicting jurisdiction-specific legal gender criteria, or as a repressive body of law that denies individual agency and restricts rights (Sharpe 2002; Whittle 2002), it also provides powerful evidence that cultural anxieties about reproduction and the heterosexual, conjugal family underscore efforts to manage the uncertainty of postmodern gender identities. Finally, I suggest that these cases are a prime example of the ways institutions gender individuals. These gendering processes reinforce the dialogic relationship between legal and social classifications and demonstrate the active role played by the state in constructing gender categories themselves and in maintaining the gender order.

WHY STUDY LEGAL CLASSIFICATIONS?

French sociologist Claudine Dardy writes, we live today in the "*pays dans tout en ecritures,*" or the land where all is written (Dardy 1998, quoted in Caplan and Torpey 2001). Since the eighteenth century, there has been a veritable explosion of scientific classification schemes (Bowker and Star 1999; Foucault 1991; Hunt 1996), which coincided with the installation of government-issued identity documentation (Rule et al. 1983). Classification systems are ready tools for bureaucratic organization (Bowker and Star 1999). They reflect the structure of society, grow out of and are maintained by social institutions (Durkheim and Maus 1963). For this reason, they are often the site of political struggle (Bowker and Star 1999). They paradoxically represent ideas of the natural yet necessitate elaborate apparatuses for adjudication and enforcement (Bowker and Star 1999). Processes of reclassification often operate like degradation ceremonies (Garfinkel 1956), denigrating the status of individuals while reinforcing the neutrality of the system. This proliferation of documentary records detailing every facet of individual life exists in concert with the rise of "self-identity" in late modernity (Giddens 1991). The creation of "legible

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people" is a hallmark of modern statehood (Caplan and Torpey 2001; Scott 1999). The "distinctive" problematic of modern identity exists not in being who we are but in establishing who we are and solidifying recognition by others (Calhoun 1995).

For these reasons, many study state identity schemas, particularly around race (see Brodkin 1998; Haney-Lopez [1996] 2006; Yoshino 2002). Analyses often focus on the effects of classificatory processes on individual lives. While classifications are universal cognitive coping mechanisms (Bowker and Star 1999; Lakoff 1987), they do not mark groups of naturally occurring like objects (Douglas 1966). They instead denote perceptually salient ideal types (Weber 1949), from which group members often differ in significant ways (Rosch 1973, 1975). To function properly, they must denote mutually exclusive groups; "A rose is a rose, not a rose sometimes and a daisy other times" (Bowker and Star 1999, 10-11). Objects that cut across categories must be placed in one box or another. Thus, categories are not passive indicators of natural similarity and difference; they do productive ideological and bureaucratic work, organizing individual and institutional responses in ways that structure social outcomes (Bowker and Star 1999; Douglas and Hull 1992; Starr 1992).

The idea that there are "deep and enduring" differences between men and women (Cruz 2002, 2000) is a paradigmatic example of a social classification. Gender is a fiction made real (Robson 1998). Despite copious evidence that a dichotomous sex/gender system (Rubin 1975) obscures the many ways human bodies exhibit both social and biological traits (Fausto-Sterling 2000; Preves 2002; Turner 1999), the law retains a rigidly dichotomous view of gender (Greenberg 1999, 2000; Greenberg and Herald 2005; Kirkland 2003). This is perhaps not surprising; indeed, "the basic method of legal analysis involves simplifying and focusing on a few traits, rather than the full complexity of the situation" (Minow 1990, 2). At the same time, major shifts in thinking about classification schemes in general and gender in particular, along with the advent of modern transgender identities, produce an increasing demand for permeability in gender categories. Understanding that "categories are made, not found" (Amsterdam and Bruner 2000, 37) allows us to move from examining classification systems as cultural artifacts (Durkheim and Maus 1963) to foregrounding the "struggles and compromises that go into the constitution of a 'universal' classification" (Bowker and Star 1999, 47). Because things we perceive as real "are real in their consequences" (Thomas and Thomas 1928), these compromises cut into the very real matter of human bodies and identities.

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THE ARCHITECTURE OF LEGAL GENDER

The coconstruction of meaning by legal institutions and the larger social world is a central presumption of both sociolegal and feminist theories of the state (Ewick and Silbey 1998; Haney 2000; McCann 1994; Richman 2002; Yngvesson 1993). Feminist and queer legal theories examine both the gendered assumptions underlying state action (Bernstein and Schaffner 2005; Currah, Juang, and Minter 2006) and the organization of gender relations in institutional contexts (Connell 1987); they also depict the way law employs normative categories (such as woman) to regulate individual behavior (Robson 1998). Feminist sociology critiques the ways the biological "fact" of natural sexual difference constitutes a foundation on which social ideas of masculinity and femininity are superimposed. Yet this "hydraulic model" of gender presumes that like water through a drainpipe, masculinity and femininity stream into and out of cultures, may be repressed or empowered, but always remain fundamentally distinct concepts (Laipson 2000). The social construction of gendered meanings is the vector through which we understand gender. Gender is a basis for stratification (Lorber 1994); it is also a social institution (Martin 2004) that imposes expectations on individuals and organizes various features of coordinated social life (Lorber 1996). We become accountable to others to perform our gender in particular ways. Individuals who transgress gender norms live with the often grave consequences of their "inappropriate gender displays" (Lucal 1999, citing Goffman 1976).

Law thus becomes an institutionalized piece of gender accountability. It is both a site of cultural (Sharpe 2002) or ideological (Haney-Lopez 2006) production and a coercive force that constricts individual behavior, based on its own ideology. Transgender law scholars foreground the very real, material effects discriminatory bodies of law have on individual transgender people's lives. Dean Spade (2008) elaborates the particular burdens contemporary bureaucratic identity management schemes pose for transgender people by outlining the inconsistent body of administrative gender reclassification rules across the 50 states. He argues that less restrictive rules for reclassifications (namely, those that lack surgical requirements) are in place and successful across several jurisdictions and calls on authorities to both recognize and respond to the injuries these schemes pose. For Richard Juang (2006), true recognition in a liberal democracy necessarily entails having one's personal identity acknowledged, having one's dignity valued, and having some measure of access to public self-expression. Both of these authors demonstrate the incidences of violence and discrimination that result from restrictive gender classification systems. They and other legal

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scholars remind us that transgender people lack secure legal status. Indeed, "in the eyes of the law of most states, they are nonpersons, with no right to marry, work, use a public bathroom, or even walk down the street in safety" (Currah, Juang, and Minter 2006, xiv).

Anna Kirkland (2003) has conducted the only social scientific analysis of transgender case law to date. She examined a sample of cases adjudicating the medical necessity of sex reassignment surgeries, whether transsexual status is a permissible basis for employment discrimination, and a handful of cases involving custody disputes that implicitly query whether transsexualism is a form of mental illness. She argues that transsexual litigants succeed in winning their status claims only when they engage in legal argumentation "that trades on heavily normalized conceptions of gender roles" (Kirkland 2003, 6). Her primary theoretical concern is with the liberatory potential of using transsexual status itself as a basis for rights and whether the legal rights concepts (in this case, the way law defines "sex" or "gender" stereotyping) are "liberating or oppressive" (Kirkland 2003, 5). She even goes so far as to argue for an "ontological disaggregation" of gender and sex within the law, such that "the reality of *being* one sex is not connected in any necessary way with one's presentation" (p. 29). Yet it is precisely the question of being a particular sex that interests me, not transgender identity politics per se. My analysis of a different but overlapping body of transgender case law, that which concerns explicit descriptions of which legal gender a particular transgender litigant can be, engages the broader question of how and through which mechanisms the law constructs its classification scheme for gender.

I aim to highlight the evolving social logics that inform gender classifications rather than the larger social history of the evolution of gender and science or the implications of transgender case law for other areas of law. Such analyses are useful and have been taken up elsewhere (see Fausto-Sterling 2000; Laqueur 1990; Preves 2002 on gender; Currah, Juang, and Minter 2006; Greenberg 1999, 2000; Greenberg and Herald 2005; Kirkland 2003 on law). I wish instead to accept the invitation transgender identities grant us to rethink the relationship of sex to gender in feminist thought. Contests over gender reclassifications expose the ways larger social institutions impose expectations of gender coherence on individuals, providing both ideological and material disincentives for its disarray. Instead of seeing gender as a compulsory "performance" of the exaggerated nature of sex difference, recent theories suggest that, in fact, the compulsory system of gender extends to construct the very idea that the sex dichotomy is natural and absolute (Butler 1990; Fausto-Sterling 2000; Preves 2002; Turner 1999). Most significantly, recent gender theory challenges the notion that there are

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"natural" configurations of biological, psychological, and social gender. Understanding the construction of gender categories requires a distinct set of analytic tools as well as the ability to be present at moments of its exaction or failure. Transgender individuals provide us with precisely that opportunity.

Sociologists have studied transgender phenomena for decades, beginning with Harold Garfinkel in 1967, but have seldom made use of the opportunity to shift focus from the production of gendered behavior in institutional contexts to the production of dichotomous gender categories themselves by social institutions (for an exception see Lucal 1997, 1999, 2008). Recent sociology on transgender, like ethnomethodology, examines familial experiences of transgender individuals (Hines 2006; Rubin 2003), their experiences in the workplace (Schilt 2006; Schilt and Connell 2007), and their internal identity constructions (Ekins and King 1999; Schleifer 2006). Some innovative studies position transgender individuals as travelers across the gender line uniquely able to examine broader patterns of gendered social opportunity (Schilt 2006; Schilt and Wiswall 2008) or look more broadly at the architecture of the gender order by foregrounding social responses to unconventional gender displays (Lucal 1997, 1999). The frame of my inquiry works to shift focus from the experiences of transgender individuals to foreground the social and legal processes that institutionalize restrictive gender frameworks (Currah and Spade 2007), producing transgender as unintelligible in the first place (Butler 2004). The law marks a primary site where social gender norms become actively consolidated into institutional practice. This article does not seek to explore the "doing" of gender by individuals (West and Zimmerman 1987) but instead concerns the work we do to install gender, in the pragmatic sense, as "scaffolding in the conduct of modern life" (Bowker and Star 1999, 47).

METHOD

The purpose of this inquiry is to understand both the juridical contexts in which requests for gender reclassifications arise and the rationales courts employ to either grant or deny those requests. Using Westlaw, a legal database, I conducted a search for case law involving transgender or transsexual litigants, in which either (1) there was a direct petition for reclassification or (2) the issue of whether the court would reclassify the litigant was germane to the outcome. The initial search produced close to 500 cases involving implicit designations of transsexual litigants' gender (courts must, at the very

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least, select pronouns); but rather than imputing meaning in minute linguistic choices, I excluded decisions without explicit discussions of the criteria for legal gender or the extent to which classifications are permeable.

The resultant sample includes 38 cases decided between 1966 and 2007: 13 from federal courts and 25 from state courts. Using an inductive, grounded theory approach (Strauss and Corbin 1998), I read through the cases, tracking the considerations raised by judicial rationales. I then went back and coded each case for its deployment of any of the major social goals and rhetorical techniques described herein: medicine, conjugal heterosexuality, stability, identity, and metaphor. I then wrote up analytic memos depicting the ways in which these considerations produced different gendered logics in the case law. While the sample is too small and scattered to provide a reliable basis for predictive measures, this discursive analysis of outcomes and rationales captures judges in the moment of the creation and installation of gender categories themselves and maps the key ideological battles fought around gender across contexts.

RESULTS

What Is Legal Gender?

Courts conceptualized legal gender in three distinct ways: descriptively, as a feature of individual identity (and as a metric for identity verification); relationally, as a characteristic of specific gendered relationships; and finally hierarchically, as a construct to which power attaches. These features of gender map onto specific legal issues that arose in the cases sampled. About a third concerned identity verification. Litigants sought the ability to carry government identification that bore a name and/or gender designation that matched their identity and presentation of self. In the 14 identity cases, 4 litigants petitioned for legal name changes, 4 asked specifically for gender reclassifications, and 6 included requests for both. Courts were much more likely to grant name changes than gender reclassifications; they granted 7 of 10 name change petitions but only 2 out of 10 gender reclassification requests (see Table 1).

Status cases, efforts to secure marital or parental relationships or challenges to administrative gender segregation, feature relational concepts of gender. Legal gender depends in large part on the implications of an individual's gender for the others with whom he or she interacts in specific relationships and social contexts. Status cases overall employ far less permeable gender schema than identity cases. In the 13 status cases, 11 litigants sought to

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TABLE 1: Cases by Claim and Disposition

	Identity Verification (17)		*Legal Status (13)*			*Discrimination (11)*	
	Name	*Gender*	*Marriage*	*Parenthood*	*Sports*	*Work/Other*	*Total*
Reclassified	6	3	1	1	1	4	16
Denied	1	4	8	1	0	6	20
No ruling	0	3	1	0	0	1	5
Total	7	10	10	2	1	11	41

defend marriages against challenge, and 2 cases concerned protection of parental rights (one of which arose from a contested marriage). One marriage case involved a service member who faced administrative exclusion from the U.S. armed forces. Another notorious case involved tennis champion Renee Richards's 1977 petition to compel the U.S. Tennis Association to allow her to compete in women's tournaments. Only three courts granted status recognition to litigants.

Finally, 10 cases involved claims of discrimination by transgender employees or individuals seeking public services. Most courts faced with discrimination claims question specifically whether transgender discrimination involves the same sort of power relationship imagined by sex discrimination laws, whether a particular litigant is both female and capable of facing discrimination as a female. On the surface, only 3 of the 10 discrimination cases resolve in favor of the transsexual litigant, yet these cases all occur after 2000 and comprise 75 percent of the total cases sampled during the past seven years. Because state antidiscrimination laws are evolving in favor of increased protection for transgender people as transgender people, we might expect legal classifications to matter less in these cases going forward.

These are not tidy distinctions. Although the particular remedies sought by individuals fall within these three categories, the issues courts address in the course of adjudicating claims tend to bleed across them. Discrimination cases often contained both identity verification and status issues. For example, when Lucas Rosa went into Park West Bank seeking a loan, she presented three forms of identification. Rosa appeared more traditionally masculine in some forms of identification, more feminine in others. The bank employee refused to provide her with a loan application, insisting she go home and transform her appearance to match one of the identification cards "in which she appeared in more traditionally male attire" (*Rosa*).

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While Rosa makes a pure discrimination claim, issues of identity verification feature prominently in the court's discussion.

Gender classifications become most hotly contested in spaces that are traditionally gender segregated. Workplace discrimination cases, in particular, illustrate the heightened significance of gender markers in women's restrooms. An employer's fear that other women employees would quit rather than risk encountering a transsexual justify stricter boundaries around gender permeability than cases that lack such considerations. Courts hearing identity documentation cases concur. One judge explains,

> When an individual changes his name to one clearly accepted by society as female, in addition to his own personal considerations, there are significant potential effects on the public. . . . Providers of public sanitation facilities need some clear-cut, decisive and well-accepted indicator of gender identity in order to be able to facilitate the health, sanitary and comfort needs of the public. . . . The line must be drawn somewhere. (*McIntyre* 86)

Other cases involved the termination of transsexual women for using a women's restroom (*Summers, Goins*). These status cases produce an interesting shift in focus from the interpretation of the "fact" of a transgender person's body to the effect on others of reading that body in particular ways. In this way, gender shifts from a property of individuals to a relational construct, and law becomes less an arbiter of fact than a regulatory mechanism producing specific relationship formations.

When Is Gender Permeable?

The boundary between legal genders appears tremendously unstable. Despite reliance by courts on medical corroboration, medicine produces no singular definition of maleness or femaleness. Instead, courts engage in projects of excavation; they enumerate constellations of bodily and psychological indicia and then provide social rationales for why some of gender's indicia matter more than others. What emerges is a relational construct; law actively constructs the fabric of the gendered body and ties it to relationships with others. While no courts treat gender solely as an elective property of individuals, almost half of the courts allow for movement between gender statuses. The process of legitimation relies most heavily on medical procedures associated with treating transsexuality (efforts to surgically and hormonally align the physical and psychological gender of the litigant). Bodily change is the avenue through which litigants can contest anxieties about fraud (or what we can really know to be true about an individual) and stability (what we can count on remaining true).

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Body Logics

The concept of a sex/gender distinction presumes a body onto which social actors can impose expectations for gender behavior and identity. Yet the very existence of transgender medicine subverts the notion that biological sex is a static property of individuals. Many courts look to medical definitions of sex, which include seven distinct indicators: (1) sex chromosomes (XX for females or XY for males), (2) gonads (ovaries or testes), (3) sex hormones (estrogen or androgen predominance), (4) internal reproductive organs (uterus and ovaries or sperm ducts), (5) external genitalia (clitoris and labia or penis and scrotum), (6) secondary sex characteristics (presence of breasts, body hair distribution), and (7) psychological sex (or gender identity). Medicine has means to alter most anatomical and physiological markers of sex (with the exception of chromosomes), yet there is no consensus about when gender change actually happens. Gender determinations therefore rest on the relative importance placed on conflicting indicia and on the overarching question of whether medical alteration of gender markers can ever constitute a change of legal status.

Successful reclassifications in these cases always require some form of gender-confirming medicine, but the extent of the required intervention varies widely (see Table 2). In some instances, a statement from a physician confirming receipt of psychological counseling and stable identity proves sufficient; many others require some step toward bodily harmonization. Of those courts that require hormonal or surgical intervention, some deem hormone therapy sufficient to alter gender, and others insist on "irreversible" genital surgeries. One court explicitly states that a female-to-male transsexual litigant must exhaust every available surgical option to qualify for "complete" gender reassignment, setting the bar for recognition at more than seven separate medical procedures (*Simmons*). But while all courts use medical indicia to determine gender, some reject the notion that medical technologies can alter legal gender. One court dismisses the significance of surgical gender reassignment, stating that "[the litigant's] anatomy, however, is all man-made. The body that [she] inhabits is a male body in all aspects other than what the physicians have supplied" (*Littleton* 231). These refusals to reclassify gender generally privilege chromosomes or ascriptions made at birth above all other indicia (*In re Anonymous* 1970*, Kantaras*).

The genitalia of the transsexual litigant feature more prominently in these discussions than do most other indicia, whether veiled by reference to "physical treatments" (*Rentos* 6) and "surgical alter[ation of] outward anatomy" (*McIntyres*) or explicitly quantified in lists of gender-conforming surgeries (*Gardiner, Simmons*). Genitals are typically considered "adequate"

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TABLE 2: Levels of Medical Intervention Required for Gender Reclassification

Requirement	*Number of Cases*
Never reclassify	8
Medical testimony	1
Hormones	2
Genital surgery	3
Hormones and surgery	2
All available surgery	2
Total	18

NOTE: This includes only cases with specific rulings on when gender change can occur.

to mark legal gender when they are able to service heterosexual intercourse. One particularly striking case includes graphic detail about a petitioner's use of a prosthetic penis during intercourse to underscore the fact that he did not qualify as a "male" or a "husband" (*In re Marriage of Joy and John R.*). The judge further expresses defiant disbelief in petitioner's wife's testimony that she could not tell the difference between petitioner's prosthesis and a "real" penis.

They inevitably conclude that "the words 'male,' and 'female' in everyday understanding do not encompass transsexuals." Indeed, "the plain, ordinary meaning of 'persons of the opposite sex' contemplates a biological man and a biological woman and not persons who are experiencing gender dysphoria" (*Gardiner* 135).

Although courts often list gender identity alongside bodily indicia, it is evident that the law treats psychological gender differently. "This Court is ever sensitive to the need to assist those who find themselves caught in the human turmoil of a psychological sexual orientation that is in conflict with their actual anatomical sex. . . . Sensitivity, although laudable, cannot be the deciding factor in the Court's final decision" (*In re Matter of Anonymous* 941). Another concurs, "Matters of the heart do not always fit neatly within the narrowly defined perimeters of statutes, or even existing social mores" (*Littleton* 231). The court recognizes that "the evidence fully supports that [litigant], born male, wants and believes herself to be a woman. She has made every conceivable effort to make herself a female, including a surgery that would make most males pale and perspire to contemplate." Yet it concludes with a tone of somber resignation, "There are some things we can't will into being. They just are." While many courts reject the challenge psychology poses to concrete identity classification schemes, those that are willing to consider identity often do so from an explicit humanistic perspective rather than frame it as an issue of "fact":

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TABLE 3: Rationales for Gender Determinations

	Biology	*Stability*	*Fraud*	*(Hetero)Sexuality*	*Fertility*
Identity verification cases	10	5	7	1	0
Status cases	11	2	4	7	4
Total	21	7	11	8	4

> The evidence and authority which we have examined, however, show that a person's sex or sexuality embraces an individual's gender, that is, one's self-image, the deep psychological or emotional sense of sexual identity and character. Indeed, it has been observed that the "psychological sex of an individual," while not serviceable for all purposes, is "practical, realistic and humane." (*M.T.* 86-87)

Judicial discussions of identity present the core ethical question attending reclassification cases, the call by outsiders for humanistic recognition, the call to remake the architecture of gender to account for individual subjectivity.

Hetero-Logics

In enumerations of the anatomical and physiological properties of litigants' bodies, courts frequent employ as a metric the ability to participate in heterosexual intercourse (for genitalia) and reproduction (for gonads and internal reproductive organs). One court determines that while hormones and surgery can provide the appearance of femaleness, inclusive of genitalia, a "vaginal canal," and breasts, medicine cannot create the ultimate criteria for female gender recognition, the womb, cervix, and ovaries (*Littleton*). Others define the "common and ordinary meaning" of female as "the sex that produces ova or bears young," and male as "the sex that has organs to produce spermatozoa for fertilizing ova" (*Nash* 6). One court dismisses entirely the capacity of medicine to alter gender because even after surgery, the litigant would not "have a uterus and ovaries and be able to bear babies" (*Ulane* 1083). The court calls the litigant a "facsimile"; she is a "biological male who takes female hormones, cross-dresses, and has surgically altered parts of her body to make it *appear* to be female" (emphasis added). See Table 3.

Other cases cite British law as the definitive statement on sex reclassification for the purpose of marriage, often considering the words of Judge Ormond, a medical doctor, doubly persuasive.

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> Having regard to the essentially heterosexual character of the relationship which is called marriage, the criteria must, in my judgment, be biological, for even the most extreme degree of transsexualism in a male or the most severe hormonal imbalance which can exist in a person with male chromosomes, male gonads and male genitalia, cannot reproduce a person who is naturally capable of performing the essential role of a woman in marriage. (*Corbett* 48)

Although *Corbett* was subsequently rendered moot by the Gender Recognition Act of 2004, more than a third of the cases sampled mention it. While British law now allows gender reclassifications with a showing of surgical gender alteration, the law invokes similar notions of permanence to those outlined in the following section (Grabham 2010; Sharpe 2007).

One case offers a combination of biological and psychological criteria for legal gender status in the context of marriage, proposing a congruence test for anatomy and psychology:

> In this case the transsexual's gender and genitalia are no longer discordant; they have been harmonized through medical treatment. Plaintiff has become physically and psychologically unified and fully capable of sexual activity consistent with her reconciled sexual attributes of gender and anatomy. . . . It follows that such an individual would have the capacity to enter into a valid marriage relationship with a person of the opposite sex and did so here. (*M.T.* 89-90)

The court installs a rule more reflective of contemporary gender ideology in its rejection of the procreative imperative and retention of a notion of marital conjugality tied to sexual capacity. "Sexual capacity or sexuality in this frame of reference requires the coalescence of both the physical ability and the psychological and emotional orientation to engage in sexual intercourse as either a male or a female" (*M.T.* 87). Marital sexuality, however, remains undeniably heterosexual. The permeability of gender relies on medicine's capacity to prepare the litigant for heterosexual, conjugal marriage. In this way, legal gender is bound up with social expectations of heterosexuality.

Stability and Fraud

Recent writing about transgender legislation describes the ways individual actors employ social anxieties about fraud to restrict recognition of transgender individuals' elective gender (Currah and Moore 2009). Likewise, when courts were willing to consider individual psychological gender identity,

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or to assign legal value to medical treatments, it was typically with the express condition that litigants provide evidence of a stable identity. Courts' concerns about fraud and deceit appear frequently, despite the fact that this analysis proves gender reclassifications to be anything but a reliable way to evade legal responsibilities. In those moments, courts seek evidence of irreversible medical intervention to indicate a reliable, lifelong commitment to reclassification (*Harris, Kantaras, McIntyre*). Even absent evidence of individual instability, the specter of a future change of heart is sufficient risk for some courts to deny reclassifications (*In re Anonymous* 1968).

One court refuses reclassification absent "the permanent and irreversible act of male-to-female assignment surgery" (*McIntyre* 86), likening the execution of a legal name change prior to medical sex reassignment to a "sanction [of] the perpetration of a deception on the public" (Ibid.). This logic is mirrored in other cases (*In re Anonymous* 1970*, In re Matter of Anonymous* 1992*, Simmons*). Yet another court comes to the opposite conclusion, reasoning that saddling with a male name someone who presents in all other ways as female perpetuates a public perception of fraud. In this case, the court declares, it is in the public interest to allow petitioner to assume a name that harmonizes her identity for the outward observer (*Harris*).

Gendered Metaphors

Courts have no concrete roadmap for determining when legal gender changes, and indeed the decisions they issue often read like the working through of a novel intellectual puzzle. The frequent use of metaphor captures the precise moment when courts must choose whether to broaden their conceptual scheme of gender. Metaphor, in its simplest sense, functions as a cognitive coping mechanism; it allows the mind to grapple with categorically new information by presenting unfamiliar things in familiar ways (Borbely 1998; Lakoff and Johnson 1980). Moments of metaphor typically attend assessments of the permeability of the boundary between gender categories. Metaphor does more than merely structure the experience of judicial actors; it also allows them to abstract the question away from the material reality of a litigant's body and psyche, producing an alternate reality in which these questions can be tested without human consequence.

One court framed the issue underlying a name change petition in the following way:

> A rose is a rose. Remove one petal and it is still a rose. It is unnecessary to probe into the intricacies of biology and the absoluteness of genetic identity.

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> But, one can go so far as to agree that at the point where one has removed every single petal from a rose, only then is it reasonable to say that it is a stem. The case for the assertion that it is still in essence and in fact a "rose" is self-evident, but we would concede that it may then properly be referred to as a "stem" and no longer in any meaningful way a "rose." (*McIntyre* 87)

This analogy does a kind of sanitizing work, engaging the issue of body modification indirectly by replacing the litigant with an object more easily picked apart, one with no internal consciousness or sense of its own recognition. It also poignantly depicts that active struggle to remake interpretive frameworks about bodies and identities with a limited conceptual tool kit.

Another court finds a creative way to frame the question when it compares a transsexual litigant to a donkey:

> I find it somewhat difficult to accept the proposition that the constitutional right of privacy . . . attaches also to a person's decision to surgically rearrange the parts of his body, in order to be transformed from one kind of living being into another. 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 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.
>
> Although this may seem an improbable analogy, there was certainly a time, before the coming of age of modern surgical techniques, when both transformations would have seemed equally implausible. It was at just such a time, in fact, that William Shakespeare masterfully chronicled the only known transformation of man into donkey, in the delightful Midsummer Night's Dream, and it is fair to assume, I think, that audiences of the time greeted the tale told there of the luckless Bottom The Weaver with no less amusement and disbelief than they would have greeted the tale of [the plaintiff]. (*Ashlie v. Chester Upland,* FN4)

While metaphor is often framed as a tool for integrating new knowledge (Lakoff and Johnson 1980) in these cases, its use uniformly corresponds with notions of gender fixity. It appears that abstracting individuals into objects of analysis allows courts to retain similarly abstract constructs of gender classifications themselves. While metaphors theoretically create room for reimagining the boundaries of categories, they are, in actuality, a mechanism through which the particularities of identity and subjectivity are elided.

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INSTALLING THE GENDER ORDER

Foucault argued that narrative instability characterizes our epistemology around gender (Foucault [1978] 1980). Transgender people, who inhabit a borderland between categories, illuminate these particular features of gender. Transsexuals, by virtue of crossing from one gender category to another, become blank tablets on which individual institutional authorities can impose fantasies of ideal manhood or womanhood (Stone 1991). Those fantasies rely not only on concepts of what men and women are but also on notions of what they are meant to do. In the first instance, the need for accountability to state institutions, coupled with the routinization of bureaucratic identity management, creates a need for transgender people's presenting a specific gender to the outside world to secure recognition of that gender from law. When they seek this recognition, courts and administrative agencies must determine when to make gender categories permeable. These cases suggest that courts analyze the legal constructs for which gender is germane, largely those involving interpersonal, sexual, and family relationships. Gender then becomes a feature of particular relationships, and courts evaluate transgender bodies and psyches for their suitability to enact the relationship forms the law prefers.

These litigants present a claim to courts that is, at once, about both biology and identity (or about the fusion of sex and gender). Courts might make the "liberal" move of viewing transsexuality through the prism of gender difference, but part of what is at stake in these claims is the very idea that sex and gender are distinct and that that distinction is meaningful. Judicial attempts to shore up gender categories and the movement between them provide a glimpse of a peculiar paradox about postmodern gender—at the moment in which medical technology is permitting us to define and detect gender markers with ever-increasing certainty, individuals are actively resisting their classifications and using medical technologies to change those markers themselves. Transgender people thus raise particular questions for the law: To what extent can law allow human beings to elect their social roles? Can a legal paradigm that embraces scientificity also provide room for individual notions of self and relationship? In these cases, courts tie the permeability of legal gender to the state apparatus controlling family and sexuality. Bodies become legible if they have procreative potential. Similarly, marriages become illegible when they lose that potential. There is no rewriting gender without similarly dismantling the boundaries around legal ideas of reproduction and family. In this way, sexuality and gender become interwoven in the legal imagination, resisting modern attempts to separate those concepts.

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It is apparent why the instability of biological categories provokes anxieties about social instability more broadly. These ideas of sex/gender frame the architecture of a system that uses them to treat men and women fundamentally differently and to place them in relationship to one another. Social classifications both limit governmental power and confer rights, but they differ from scientific classifications in one crucial way: Classifications of the natural world involve one-way relationships. People categorize plants, but plants "are in no position to protest" (Starr 1992). Human beings, on the other hand, have very specific and deeply felt beliefs about our own identities and group memberships. The state's capacity to assert and deny recognition has both material and emotional consequences in the lives of individuals (Hunt 1996). Gender classifications, in this view, invite particular scrutiny because we perceive them to be so inevitable. The institutional production of the gender order operates through the consolidation of particular relationship ideals (like the "essential" role of women in marriage) through recognizing only certain bodies and psyches and the ways they can relate to the bodies and psyches of others.

CONCLUSIONS

Judith Lorber argues, "rationales given for the categorization of the ambiguous as either male or female shed a great deal of light on the practices that maintain the illusion of clear-cut sex differences" (1996, 148). These court decisions are institutional practices that maintain the illusion of dichotomous gender while at the same time demonstrate the larger social purpose these categories serve. Legal gender emerges in these cases not solely as a property of individuals but as a process of allocation (Salamon 2010). The state "gives gender" (Ward 2010) to individuals, by which I mean, they engage in projects which assist some individuals with solidifying gender recognition, while preventing the recognition of others. Gender is, in this formulation, a kind of intangible resource, finite, controlled and distributed by the state. It is certainly true that as state identity schemes continue to evolve and intensify, gender classifications will become ever more crucial for any number of forms of social participation. However, these cases illustrate that legal gender is not merely recognition of individual identities or rights (Juang 2006; Kirkland 2003) or a coercively and inconsistently instituted metric for bureaucratic surveillance (Spade 2008). It is not something "done" (West and Zimmerman 1987) or "undone" (Deutsch 2007) at the interpersonal or interactional level. It is not only a social practice dressed in the cloak of science (Fausto-Sterling 2000). Legal gender classifications

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are the implementation of a relational construct of gender that privileges the social roles men and women are expected to fulfill, namely, participation in the heterosexual, conjugal family. These cases sit in dialogue with recent work on "undoing gender" (Deutsch 2007; Risman 2009). They beg the question: *Without undoing gender classifications themselves, to what extent can individuals electively undo the gendered inequalities of relationships the law quantifies and recognizes?*

These gender reclassification cases illustrate the ways social institutions impose expectations of gender coherence on individuals and the very real social and material costs of failure to meet those expectations. While much feminist sociology describes interactional accountability to perform gender within relationships, we often have far less to say about institutional accountability. These cases demonstrate the ways the law engages in surveillance projects that infiltrate even the most intimate details of individual lives, bodies, and relationships. As science and medicine provide courts with ever-multiplying constellations of gendered indicia, it stands to reason that individuals will be called on to account for their gender in ever-more-nuanced detail. The legal demands for coherence among biological, social, and psychological gender have the potential to provoke ever-more-limiting constructs of legal gender and mechanisms for increased state regulation—mechanisms that rely on the kinds of heteronormative logics feminist and critical legal scholars have long fought against. If legal constructs of gender cannot keep pace with contemporary demands for fluidity, it will become ever more difficult to quantify and to achieve legal gender recognition. And feminists will be called on, if they dare to accept the challenge, to combat social gender expectations in ever-more-micro detail.

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