

Chapter 13

The Transgender Rights Imaginary¹

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When I give talks in academic venues about discrimination cases brought by transgender plaintiffs, marriage litigation involving transsexual spouses, and attempts to get the state to issue identity documents that recognize the reassigned gender of transgender men and women, the question I'm often asked is: "Yes, but ... doesn't all the advocacy you're talking about just reinscribe gender as a binary category? Don't those transsexual marriage cases reinforce the idea that sex and gender are either-or propositions?" From taking gender and sexuality studies courses, the questioner has learned that gender is a category "constructed through relations of power," and that sex itself is not something we should see as a priori or natural but something that is "materialized" through "normative conditions." Often the follow up question will be, "When some transgender rights advocates assert that transsexuality is a medical condition, doesn't that undermine the rights claims of those who embody their gender in ways more complex than the binary system leaves room for?" Instead of bringing these types of cases, these questioners will tell me that the whole binary sex classification scheme should be thrown out.

In this chapter, I argue that the very different goals of working to dismantle gender as a coherent legal concept and working to expand gender to include trans people should not be seen as an either-or proposition. In fact, construing this opposition as a divide between gender theorists and transgender rights advocates (as a tradeoff between theoretical purity and political expediency) misrepresents the broad scope of the trans advocacy actually happening in the legal arena.

Just what stance *should* transgender rights advocates adopt in challenging the state's construction of transgender people as outside the legal universe of equal protection? How should we react to state definitions of sex and gender that classify people based on the sex assigned at birth? Should we demand that the state base legal sex assignment on reassigned sex rather than the sex assigned at birth, or on gender identity rather than "biological" sex? Should we challenge the state's ability to police the relationship between one's body and one's gender and its power as the legal arbiter of sex altogether? What role should medical discourse and expert knowledge play in furthering the cause of transgender rights? Will "medically certified" transsexual people be belatedly recognized as a lost population whose legal absorption into the gender normative binary regime

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prevents the entire edifice from collapsing? Or will the rights extended to people who can and do avail themselves of extant sexual reassignment technologies and expert medical discourses turn out to be one moment in a larger project of extending equal rights to any person whose gender practices contravene social norms? Is it fair to expect transgender people to bear the burden of destabilizing state sex classification schemes rather than to try to amend the legal meaning of sex in order to be recognized correctly by it? How should we negotiate the tensions between an identity politics movement that seeks primarily to amend the definitions of the binary sex classification scheme and the larger goal of disestablishing sex as a meaningful legal category which distributes rights and resources unequally? Finally, is it possible that transgender rights advocates are already doing both? By raising these questions I hope to participate in a conversation that considers both the particular legal needs of transgender people and the larger political imaginary of the transgender rights movement. Such a political imaginary would create room for these kinds of questions to be thought about and debated, and yet also remain grounded in the compelling needs of transgender people in the here and now.

Contradictions: Legal, Biological, and Ideological

The modern regulatory project of sex classification is currently in a crisis caused by the increasing divergence between individual gender definition and legal sex designation: individuals are more likely than ever to affirm a gender identity different than the one traditionally associated with the sex assigned to them at birth, and the gender expression of more and more people fails to reflect the normative stereotypes expected of them. Moreover, increasing numbers of people are refashioning their identity as transgender² by transitioning with the assistance of medical technologies or choosing not to undergo any body modification but opting to present themselves in gender non-conforming ways.

In the sex classification scheme, birth sex has for a long time been assumed to predict and guarantee the eventual achievement of a stable gender identity. Gender identity, in turn, operates to establish the limits of normative gender stereotypes. So, for example, infants designated as male at birth are expected to identify as male and behave in ways culturally marked as masculine. Before homosexuality was removed from the American Psychiatric Association's list of mental disorders in 1973, this series of relationships posited the achievement of a heterosexual

2 Defining any population entails a certain amount of discursive violence, which is one of the implicit arguments of this paper; however, for the purposes of political mobilization, the term "transgender" is now widely used in political advocacy in the United States. To that end, I use transgender as an umbrella term, encompassing pre-operative, post-operative, and non-operative transsexual people, cross-dressers, feminine men and masculine women, and more generally, anyone whose gender identity or expression differs from the social norms attached to the legal sex assigned to them at birth.

sexual orientation as the end point of healthy development (Minter, 1999). The series of cultural constructions and normative assumptions that so tightly link birth sex to gender identity and expression continue to remain largely masked, shrouded by naturalized discourses of the body and its "truths."

But as developments in U.S. case law illustrate, the project of conclusively securing sexualities, gender identities, and expressions to birth sex has turned out to be fraught with incommensurable solutions. Sex is not the simple binary concept that members of Congress appear to have assumed when they included it in Title VII of the Federal Civil Rights Act of 1964. In the last four decades feminism, the GLB rights movement, and the emergence of transgender communities have begun to expose the impossibility of mooring social gender norms to birth sex. Moreover, the development of the sciences of sex and the growth of technologies to alter its components have made it more difficult to reliably contain sex within the bounds of prevailing gender norms.

What we call "biological sex" is in fact an amalgam of chromosomes, external genitals (penis and scrotum or clitoris and vagina), internal reproductive organs (prostate and seminal vesicles or vagina and uterus), gonads (testes or ovaries), hormonal sex, and the secondary sex characteristics (voice quality, amount of facial hair, level of muscle development/breast development) that hormones generally produce (Greenberg, 1999). The "common sense" of biological sex tells us that in each individual all of these components are unambiguously male or female, congruent, and aligned in a predictable and permanent relation to each other—that is, the sex assigned at birth is static, remaining constant from the cradle to the grave. In fact, the more science probes the constituent elements of sex, the less unequivocally dichotomous the overall categories turn out to be (Fausto-Sterling, 2000).

Julie Greenberg (1999) provides a helpful summary of intersexuality, the law, and sex definition. For each biological component of sex, there are conditions that make the unambiguous sexing of some individuals very difficult. Some of these conditions include chromosomal ambiguity (instead of the typical XX pattern for females or XY pattern for males, researchers have identified the XXX, XXY, XXXY, XYY, XYYYY, and XO patterns in individuals); gonadal ambiguity (incomplete or absent sex organs or the presence of both male and female sex organs); ambiguity in external genitalia (a hypertrophic clitoris or a micro penis, for example); and unusual levels of "male" and "female" hormones (pp. 281–3). Moreover, not only does sexual ambiguity within individual factors occur, some people exhibit "sexual ambiguity" between factors. For example, in any one individual some constituents of sex may be clearly "male," others may be clearly "female," and still others may be ambiguous. Clearly, the bodies of people born with these intersexed conditions do not conform to the bedrock notion of sexual dimorphism that there are only two dichotomous sexes which are easily recognized and thus "assigned" at birth. In addition to intersexed individuals, many people who experience dissonance between their gender identity and their assigned sex at birth choose to change their bodies by undergoing sex reassignment surgery to

alter their genitals and/or breasts, and take regular doses of hormones to produce the secondary sex characteristics associated with their gender. In the matter of legal sex definition the law is on a collision course with biology (Greenberg, 1999, p. 265). Finally, in addition to the apparently material components of sex, there is also gender identity, and one's gender of rearing, both of which are usually based on the assigned sex at birth. Following the psychological literature, gender identity is usually classified in legal discourse as the psychological component of sex, in contrast to what judges see as more clearly sex's "biological" markers.³

In fact, the collision between law and biology has already produced numerous wrecks. The individual elements that presumably constitute biological sex do not always cohere as expected, and legal authorities have added to the confusion by choosing different sets of criteria. Because individual states have jurisdiction over laws regulating marriage, because there are many different government agencies that include sex designation on the identity documents they issue, and because sex discrimination cases are heard by both state and federal courts, there are a number of different government arbiters of the definition of "sex" for the purposes of legal classification or the interpretation of sex discrimination laws. And these arbiters have produced contradictory rulings on the question of sex definition.

For example, while most jurisdictions will issue new birth certificates to transsexual people indicating their reassigned sex, Idaho, Ohio, and Tennessee (Currah and Moore, 2009). To complicate the matter further, courts in Kansas (*In re Estate of Gardiner*, 2002) and Texas (*Littleton v. Prange*, 1999) have ruled that post-operative transsexual women who had received new birth certificates with female sex designations remained legally male for the purposes of marriage. In the *Littleton* case, the Texas court posed the question of whether Christie Littleton was legally female this way: "can a physician change the gender of a person with a scalpel, drugs and counseling, or is a person's gender immutably fixed by our Creator at birth?" (p. 222). The court concluded that, "there are some things we cannot will into being. They just are ... We hold, as a matter of law, that Christie

3 The transsexual marriage case, cited at length, positively or negatively, in every subsequent transsexual marriage case in the United States is the 1970 case in the United Kingdom of *Corbett v. Corbett* (1970). In a lengthy explanation of why a transsexual woman was not legally female for the purposes of marriage, the judge objected to some of the medical testimony, which suggested that gender identity as a "psychological factor" should be included along with biological markers in the determination of legal sex. In his ruling specifying the criteria for determining an individual's "true sex," Judge Ormrod found that only the most obvious biological characteristics (chromosomes, gonads and genitals) should be dispositive. In contrast to *Corbett*, a New Jersey court adopted a very different—and certainly more enlightened and humane—set of criteria for determining legal sex for marital purposes in the 1976 case of *M.T. v. J.T.*: "The English court apparently felt that sex and gender were disparate phenomena ... 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" (p. 209).

Lee Littleton is a male. As a male, Christie cannot be married to another male" (pp. 224, 231). However, a New Jersey court ruled in 1976 that a transsexual woman was legally female for the purposes of marriage. In that case, the court perceived "no legal barrier, cognizable social taboo, or reason grounded in public policy" to not recognize an individual's legal sex to conform to his or her psychological gender and surgically altered body: "[i]f the anatomical or genital features of a genuine transsexual are made to conform to the person's gender, psyche or psychological sex then identity by sex must be governed by the congruence of these standards" (*M.T. v. J.T.*, 1976, pp. 209–11).

In the area of sex discrimination law, courts for the most part have found that discrimination against transgender people is not legally prohibited. But, again, discrepancies are emerging in this area of the law. In Louisiana, a federal court found Peter Oiler, a truck driver for the Winn-Dixie grocery chain who lost his job when his employer found out that he occasionally cross-dressed in public, had not been a victim of sex discrimination (*Oiler v. Winn-Dixie*, 2002). But another federal court came to a very different conclusion in a case involving another cross-dresser. In that case, when a bank denied Lucas Rosa the opportunity even to apply for a loan because he was wearing women's clothes (I refer to litigants by the pronouns used in their legal pleadings), a federal circuit court found that sex discrimination laws could be reasonably applied to the discrimination he suffered (*Rosa v. Park West Bank & Trust*, 2000).

Similarly, cases involving gender non-conforming youth have yielded very different outcomes. For example, "Pat Doe," a male-bodied teenager in Massachusetts, regularly went to school wearing make-up, girls' clothes, and fashion accessories—including skirts, wigs, high-heeled shoes, and padded bras with tight shirts. Eventually, the school principal banned her from the school unless she wore traditionally male clothing. In this case, a Massachusetts state court ruled that it was likely that Pat Doe had been discriminated against on the basis of both sex and disability (*Doe v. Yunits*, 2001). However, in another case, when female-bodied high school senior Nikki Youngblood sued her high school for not allowing her yearbook photo to be taken unless she wore a very feminine "frilly drape," a federal court found that no plausible claim of sex discrimination had been advanced (*Youngblood v. School Board of Hillsborough County, Fla.*, 2002).

Contestations over the legal meaning of "sex"—manifested not only in the incommensurate outcomes of different cases but in inconsistent rulings in the same case as it moves through the judiciary from lower to appellate courts—are stark illustrations of the clashes taking place in multiple social arenas over the inability of a birth sex determination to secure a person's gender. So, to Julie Greenberg's catalog of the biological ambiguities inherent in the problem of sex definition, then, at least three other strata of inconsistencies must be conceded, and perhaps even acknowledged as more crucial to the political project of unfastening gender from the state: inconsistency between jurisdictions on the question of the legal definition of sex for the purposes of sex designation or the applicability of sex discrimination laws; inconsistency within jurisdictions in the legal definition

of sex for different social functions (such as driver's licenses, birth certificates, marriages, passports, veterans benefits); and finally, inconsistencies at the level of the individual between official sex assignment and a person's embodied gender. Thus, instead of the slow development of a jurisprudence that leads to one common definition of sex, courts in individual states have developed their own criteria, criteria which are often inconsistent with those of other, even neighboring, states, and which, read together, have created a condition of epistemological chaos around sex and gender in these United States.

Whose Crisis Is It?

The number of different legal constructions of sex, as well as the contradictions within and between those definitions, illuminate the fundamental impossibility of anchoring anything about gender—roles, characteristics, identities, expressions—in biological notions of sex. At first glance, it might seem that the main problem arises from the fact that various legal constructions of sex are in conflict. It might even appear, intuitively, that the very existences of these inconsistencies would advance the cause of transgender rights: if there is no uniform, objective, universal way to define sex, then surely it should be left up to the individual to define it for themselves. But it is, in fact, a mistake to think these incongruities necessarily pose a problem either for the state or for the intractability of the organic “common senses” of gender that make many transgender people strangers to the law. State policies can accommodate any number of logical contradictions. As Stuart Hall points out in an essay on the contradictory politics of Thatcherism in Britain, the real problem inheres in the progressive critical agenda of limiting itself to the task of identifying ideological inconsistencies. He writes, “in our intellectual way, we think that the world will collapse as a result of a logical contradiction: this is the illusion of the intellectual—that ideology must be coherent, every bit of it fitting together, like a philosophical investigation” (Hall, 1988, p. 166). Merely pointing out the definitional chaos resulting from attempts to define objective criteria for legal sex will not necessarily entail the collapse of the entire edifice of legal sex classification. It is not enough for transgender advocates merely to describe these inconsistencies; instead, we need to focus on the state's ability to police the relation between sex and gender. It is this policing power that constitutes one of the central problems for securing the rights of transgender people.

Critical Race Theory and Transgender Rights Advocacy

In thinking about how to frame the goals of rights claims made on behalf of transgender people, transgender rights advocates can learn much from the work done by Critical Race Theorists about similar questions on the positive and negative consequences of the racial classification system. This school of legal theory is

concerned with questions in some ways analogous to those circulating now in debates about the goals of the transgender rights movement.⁴ Should anti-racist civil rights advocacy focus on ameliorating the effects of the racial classification system to advance the cause of those who had been denied equality because of their race? Or should it focus on dismantling the very system of racial classification that enabled slavery and segregation because the very premise of this system—i.e., the notion that race is a biological category—is fundamentally flawed?

The Critical Race Theory movement arose in response to two different trends in legal studies: the traditional civil rights model and the more radical critique of the law found in critical legal scholarship. The founders of Critical Race Theory regarded the traditional black civil rights model, which focused on formal legal equality, limited in its ability to transform race relations (Crenshaw et al., 1995). On the other hand, Critical Race Theory took issue with the reigning leftist legal critique, that of the Critical Legal Studies (CLS) movement, which argued that the entire U.S. legal regime, including liberal efforts to modify it, merely represented hegemony trying to reassert itself. According to this critique, “legal institutions support a pervasive system of oppressive, inegalitarian relations” by allowing for reforms that would not radically challenge the power structures embedded within it (Fitzpatrick and Hunt, 1987, pp. 1–3). The CLS movement exposed as fundamentally flawed the idea that “the legal institutions employ a rational, apolitical, and neutral discourse” (Crenshaw et al., 1995, p. xvii). According to the Critical Legal Scholars, ending invidious discrimination based on legal categories such as race and gender is important, but even ending blatant discrimination still leaves intact underlying legal categories and classical liberal precepts, such as race, property, autonomy, and contract, which still perpetuate hegemonic power structures. CLS scholars were heavily influenced by postmodern critiques of the classical liberal subject and thus found rights-based arguments (especially ones based on identity categories) not to be theoretically compelling. While Critical Race Theorists agreed with much of this critique of liberal legal theory, they took issue with the willingness to abandon racial categories and rights discourse altogether.

Critical Race Theory emerges then as something of a mediating force between traditional civil rights advocacy and the theory produced by Critical Legal Studies. It attempts to both subject the legal system to a radical critique of the way legal categories and practices are themselves instruments of power, and the way identities are produced through processes of subordination, without throwing out the ability of advocates to make arguments for the rights of powerless people. As Kimberlé

4 By drawing on the insights of Critical Race Theory I am not suggesting that it is useful or productive to make an analogy between racial oppression and that based on gender or sexual orientation. However, because Critical Race Theory has so thoroughly addressed the tensions between narratives of agency and those of structure and between reformist and radical approaches, I suggest that transgender rights activists can learn much from the insights of these scholars.

Crenshaw reminds us, *Plessy v. Ferguson* (1896) was not merely an identity-based challenge to the doctrine of separate but equal:

At issue were multiple dimensions of domination, including categorization, the sign of race, and the subordination of those so labeled. There were at least two targets for Plessy to challenge: the construction of identity ("What is a Black?"), and the system of subordination based on that identity ("Can Blacks and whites sit together on a train?"). Plessy actually made both arguments, one against the coherence of race as a category, the other against the subordination of those deemed to be Black (Crenshaw, 1995, p. 376).

From the perspective of transgender rights advocates, one of the arguments advanced by Plessy's counsel, Albion Tourgee, anticipates the larger and more radical goal of disestablishing gender, getting the state out of the business of defining legal sex for the purpose of distributing rights and resources. As Tourgee wrote in his brief to the Supreme Court, "[t]he question is not as to the equality of the privileges enjoyed, but the right of the State to label one citizen as white and another as colored" (Brief for Homer A. Plessy, 1896). Both aspects of the standard question that identity-based discrimination raises—is the discrimination unconstitutional because of the classification or does the classification unfairly subordinate a particular group—can be answered in the affirmative. Plessy, as Crenshaw points out, made both arguments.

In her analysis of the erasure of black women's narratives from anti-racist and anti-sexist legal discourses, Crenshaw favors an approach that focuses on the effects a system of subordination has on oppressed identity groups: "At this point in history, a strong case can be made that the most critical resistance strategy for disempowered groups is to occupy and defend a politics of social location rather than to vacate and destroy it" (Crenshaw, 1995, p. 376). That race, gender, and even sex are categories that turn out not to be firmly grounded in biology or in science does not mean that they do not have powerful social and legal effects, effects that are both enabling and disempowering.

Whatever the "truth" of sex and gender, the legal meanings attached to them through regulatory apparatuses as apparently architectonic as marriage laws and as seemingly quotidian as single-sex bathrooms have real material consequences for transgender people. Certainly, the powerful valences attached to the social and legal category of sex emerged historically as regulatory mechanisms for the unequal distribution of resources and rights (Fraser, 1996, p. 55). It is also the case that as individuals we experience ourselves as gendered subjects, that we take varying degrees of pleasure in that identification, that our gender identity is a central mechanism for organizing our selves and our relations with other people, and that confirmation of our gender identity by others is very important to most people. This is true both for people whose gender identity and/or gender expression does not conform to the norms associated with the sex assigned to them at birth and for people whose gender identity and gender expression do meet social

expectations for those of their birth sex. Gender is as salient an aspect of identity for most transgender people as for most non-trans people. But transgender people are much less likely to have their gender acknowledged by the state and affirmed by the ideological apparatuses that reproduce hegemonic gender arrangements. Of course, those social gender structures are also racialized, as, for example, the intense scrutiny of black women, including trans women, in regulatory systems such as welfare and criminal justice (Roberts, 1997a).

Following Crenshaw and pushing the analogy between Critical Race Theory and the transgender rights imaginary a little further, it is important to make a distinction between the larger imaginary that I hope would animate the transgender rights movement as a whole and the needs of individual transgender clients to have the state agencies correctly recognize their gender, and to have judges recognize that discrimination against transgender people is a kind of sex discrimination. In fact, I would suggest there is no "zero-sum" tension between defending gender as a coherent category and disestablishing it. Nor would it be reasonable to suggest that the long term goals of the transgender rights movement to end the state's ability to classify people on the basis of sex be achieved by asking transgender individuals making rights claims in the here and now to abandon their attempts to be classified correctly, according to their gender identity.

One of the most recurring critiques of transsexual identity in general, and transgender rights litigation in particular, is the reliance on what has come to be termed the "medical model" of transsexuality. In some litigation, advocates assert that transsexuality is a medical condition—gender dysphoria or gender identity disorder—and as such transsexual men and women should not be subject to sex discrimination or denied legal recognition of their reassigned sex because of a pathological condition. However, too often discussions of the use and misuse of the medical model focus solely on its pathological side. In the context of critiquing the medical model, it is important to keep in mind that this model also produces the category of "non-transgender" people as well. We must remember that the purpose of any pathologizing discourse is not simply to define the "sick," but also to describe and identify the "healthy," and to set the boundary between them. So, the medical model governs the lives of everyone—both transgender and non-transgender, transsexual and non-transsexual. Everyone has a gender identity, and most people's gender identity is traditionally associated with the sex assigned to them at birth. The state-issued identity documents individuals carry designating their legal sex are in fact products of the same "medical model" that some transsexual individuals are invoking in trying to correct their legal sex. In critiquing the use of the medical model by transgender rights advocates, then, we need to acknowledge the privileges that this model endows non-transgender people with—the privilege of being legal subjects with all their documents in order, legal subjects who can apply for a driver's license, produce identification at the airline ticket counter, and present a resume and references to potential employers that do not potentially expose a differently-gendered history. Indeed, there are few forms of state-administered identification that do not list it. Not having the appropriate

sex designation makes negotiating any type of economic or official interaction very difficult. As a woman testifying before a New York City Council hearing on a transgender rights bill put it:

I do not suffer from gender dysphoria. I suffer from bureaucratic dysphoria. My ID does not match my appearance ... I worry every time I apply for a job, every time I authorize a credit card check, every time I buy a plane ticket, every time I buy a beer at the corner deli. I have changed my name but my gender continues to be officially and bureaucratically Male. (Transcript of the Minutes of the Committee on General Welfare, City Council of New York, 2001, p. 195)

Indeed, the most important difference between transgender and non-transgender people is that non-transgender people have already achieved the legal gender recognition that many transgender people seek.

Again, these questions are, in some ways, strikingly familiar to questions raised by Critical Race Theorists. Patricia Williams (P.J. Williams, 1991) writes of the importance of the pursuit of rights, even as those rights are part of a system largely designed to protect the property rights of white men; a system that, in the vernacular of Critical Legal Studies, operates to oppress us and foreclose more radical alternatives for the social organization of human life.

Obviously, any analogy can be pressed too hard, and certainly there are many differences between legal oppression based on race and that based on gender. Nevertheless, I think that the insights of Critical Race Theory about the usefulness of racial classification and the pursuit of rights claims should be taken into account by those who find fault with transgender rights advocates for attempting to locate their clients within the sex classification scheme, for focusing on getting their clients' reassigned sex legally acknowledged.

Moreover, as Shannon Minter (2000) has argued, it is mistaken to assume at this moment in the struggle for transgender rights that the medical model necessarily entails the closeting of transsexual people or the de-politicizing of transsexual identities. He writes:

part of the impetus behind the emergence of the transgender movement is precisely the strongly felt desire to create a less restrictive social and political space in which it is possible to be openly transsexual ... This relatively new self-consciousness of transsexualism as having a political, as well as medical dimension, has led many transsexual people to question the old medical directive to 'disappear' after transitioning and to reject the clinical definition of transsexuals as categorically separate and distinct from gay people, transvestites, and other gender-benders. (p. 611)

Conclusion

In a just regime, one that celebrates individuals as authors of their own lives, one's gender identity should be the deciding factor in determining one's legal sex. And in such a regime, the state's ability to classify its population and distribute resources on the basis of a binary gender system would cease to exist. In the short term, however, when state actors—most notably judges—remain fixated on the body and look to it as the site of epistemological privilege that will produce the “answer” to the question of sex classification, it is important that the transgender rights imaginary not shrink, nor react to contradictory and often negative legal rulings by suggesting that there is a way to resolve those contradictions. The challenge for the movement as a whole, then, is not to identify the “right” theory of the relationship between sex and gender. Either disavowing the medical model (the approach favored by those who champion social constructionist narratives) or trying to establish that model as the only way for transgender people to proceed (the approach favored by those who find essentialist models more convincing) would entail the imposition of a new hegemonic norm, one that would not be true to many people's experience of gender. Rather, I suggest the “gender pluralism” that the transgender rights imaginary—as distinct from transgender rights advocates working on individual cases—should be seeking to instantiate legally is already underway—in the aggregate. For practical political reasons, transgender rights activists have developed a very broad approach to gender pluralism. To forge a new social movement out of so many very disparate groups—heterosexual cross-dressers, transgender men, transgender women, non-op transsexuals, gender queers—it is a matter of political survival to adopt a robust notion of gender pluralism that includes as many ways of embodying gendered subjectivities as possible. So it is not that individual transgender activists do not necessarily have strongly held beliefs about what gender really is or should be, what its cause is, and how it ought to be related to the body. It is that within transgender communities so many of those beliefs about gender are so radically incommensurate that, ironically, gender pluralism becomes the one thing that everyone can agree on. Indeed, one could say that agnosticism about gender is the constitutive political tenet of transgender activists (Currah, 2006).

While each individual transgender rights case might advance a particular narrative about what biological sex is and how it is related to gender, collectively the advocacy efforts already reflect a multiplicity of transgender experiences, and portray transgender people as diverse. For example, Lucas Rosa's attorney, Jennifer Levi, argued that Rosa was treated adversely because, as a biological male wearing traditionally feminine attire, he “did not exhibit his masculinity in a way that met with Park West Bank's conception of how a man should look” (Brief for the Appellant, *Rosa*, 2000). On the other hand, Peter Oiler's counsel situated their client—a man who occasionally presented himself in public as a woman—firmly within the reigning psychiatric discourse on gender non-conforming people. One of his experts, Dr. Walter Bockting, submitted supporting material stating that a

"diagnosis of transvestic fetishism with gender dysphoria" is warranted. Another of Oiler's experts advanced a slightly different diagnosis: "gender identity disorder [not otherwise specified]" (Oiler, 2002, p. 1). These different depictions also appear in cases involving gender non-conforming youth: Pat Doe was described by her advocates as having been diagnosed with gender identity disorder, while Nikki Youngblood was described in her pleadings simply as "unwilling to wear ... stereotypically feminine attire" because it "would be emotionally damaging to her" (Doe, 2000, p. 3). Finally, "Teena Brandon," who referred to himself as "he," went by the first name Brandon, and was murdered when two acquaintances discovered he had female genitals, was represented somewhat differently in two *amici* briefs. In a brief submitted by the Gender Public Advocacy Coalition, Brandon was characterized as someone who "experienced and expressed his gender in a way that conflicted with traditional stereotypes and social constructions regarding what it means to be a woman or a man in our society" (Brief of *Amici Curiae* Gender Public Advocacy Coalition). But in the amicus brief submitted Legal Committee of the Harry Benjamin International Gender Dysphoria Association, Brandon's transgender identification was described as "not a lifestyle choice" but a "condition or syndrome in which one's identification and desire to live as a member of the other sex is deep-seated, unavoidable, and overwhelming" (Brief of *Amici Curiae* Harry Benjamin International Gender Dysphoria Association, p. 4).⁵ That brief relied explicitly on scientific constructions of transsexualism, and suggested that, while the "precise cause of cross-gender identity is not currently known, the weight of current scientific evidence suggests a biologically-based, multifactorial etiology, including genetic, hormonal and environmental influences."

My argument, then, is that it is a mistake to assume the goals of defending gender as a coherent legal category and disestablishing it need be characterized by a zero-sum calculus. Instead, I think the solution lies in ensuring that the many, often conflicting, narratives of transgender identity that now appear in social and legal arenas continue to circulate and proliferate. Rather than trying to make sense of all these contradictory accounts of sex, gender, and the relationship between them, rather than trying to develop the "one perfect theory" to unify them within the context of the larger transgender rights imaginary, we should, as a movement, be celebrating the incoherencies between them even as we continue to pursue rights claims by invoking particular constructions of gender definition. The fact that organic "common sense" notions about gender underlie both negative and positive outcomes in many transgender rights cases reveals that the social and legal imagination of the meaning of gender is already being expanded. It may well be that the best strategy is the one that is already occurring in the hurly-burly of political contestations over the legal meaning of sex: the assertion of multiple narratives of gender non-conforming identities and practices in multiple legal venues (or even in the same venue) on behalf of many different kinds of

5 In the interests of full disclosure, I must point out that I was and remain a member of the Harry Benjamin International Gender Dysphoria Association Legal Committee.

gender different people, people who inhabit their gender as differently as Christie Littleton, Lucas Rosa, Peter Oiler, Pat Doe, and Nikki Youngbound, the high school senior in Florida who would not be caught dead wearing a velvet drape for her graduation photo.