

**WAY OUT WEST: A COMMENT SURVEYING  
IDAHO STATE'S LEGAL PROTECTION OF  
TRANSGENDER AND GENDER NON-  
CONFORMING INDIVIDUALS**

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# WAY OUT WEST: A COMMENT SURVEYING IDAHO STATE’S LEGAL PROTECTION OF TRANSGENDER AND GENDER NON- CONFORMING INDIVIDUALS

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### I. INTRODUCTION: A TRANS-IDAHOAN’S STORY

In the winter of 2008, while Catherine Carlson, a resident of rural Payette, Idaho, was driving her 1993 Plymouth Voyager down Main Street to pick up a friend, a police officer pulled her over.<sup>1</sup> The police officer issued Catherine Carlson a traffic ticket.<sup>2</sup> To her surprise, the ticket listed her legal name as both Catherine and “Daniel,” her former name that Ms. Carlson legally changed prior to her sexual reassignment surgery over thirty years ago.<sup>3</sup> Ms. Carlson unsuccessfully petitioned to

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1. Jessie L. Bonner, *A woman’s quest to erase a past that won’t die*, NBCNEWS.COM, [http://www.msnbc.msn.com/id/30390801/ns/health-sexual\\_health/t/womans-quest-erase-past-wont-die/#.UKW2luOe\\_21](http://www.msnbc.msn.com/id/30390801/ns/health-sexual_health/t/womans-quest-erase-past-wont-die/#.UKW2luOe_21) (last updated Apr. 24, 2009).

2. *Id.*

3. *Id.*

have her former name removed from county records.<sup>4</sup> According to Ms. Carlson, this was just one more instance where the Idaho government refused to recognize her as a trans-woman.<sup>5</sup> She refused to pay for the ticket or appear in court because the State of Idaho failed to address her by her legal name.<sup>6</sup> In 2011, in a desperate attempt to be heard by the State of Idaho, Ms. Carlson set fire to her trailer home in Payette after the State refused to transfer her home's title to her legal name.<sup>7</sup> Later the court convicted Ms. Carlson on arson charges.<sup>8</sup> The court placed her in the men's prison facility to serve her sentence.<sup>9</sup> Ms. Carlson is still incarcerated as of the date of this comment, serving her twenty-year indeterminate prison sentence.<sup>10</sup>

As evidenced by Ms. Carlson's troubling story, transgender and gender non-conforming individuals<sup>11</sup> experience challenges and discrimination that non-transgender or gender conforming individuals within United States' culture do not.<sup>12</sup> These challenges are further complicated by the legal system's omission, over-, or under-inclusion of their identity.<sup>13</sup> This comment's goal is to examine the current status<sup>14</sup> of Idaho's law as it impacts transgender and gender non-conforming individuals. Ultimately, this comment will analyze the relevant Idaho law as it applies and affects transgender and gender non-conforming individuals

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4. *Id.*

5. *Id.* A trans-woman is a male-to-female woman who does not identify with her assigned male gender and/or sex. See *Transsexual, Definition of Terms*, GENDER EQUITY RESOURCE CENTER, [http://geneq.berkeley.edu/lgbt\\_resources\\_definiton\\_of\\_terms#transsexual](http://geneq.berkeley.edu/lgbt_resources_definiton_of_terms#transsexual) (last visited Apr. 10, 2013) [hereinafter *Definition of Transsexual*].

6. Bonner, *supra* note 1.

7. Jody May-Chang, *Catherine Carlson's day in court*, BOISE WEEKLY (Apr. 6, 2011), <http://www.boiseweekly.com/boise/catherine-carlsons-day-in-court/Content?oid=2174024>.

8. *Id.*

9. Jody May-Chang, *Hear me! My Name is Catherine! Legally a Woman, Jailed among Men*, AS I SEE IT: ON THE FRONT LINE OF THE CULTURE WARS (Apr. 24, 2011), <http://may-chang.com/?tag=catherine-carlson>.

10. *Id.*

11. See *infra* Part II.A (discussing the definition of "transgender" and "gender non-conforming" identities).

12. See generally JAIME M. GRANT ET AL., INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 3–8 (2011), available at [http://www.thetaskforce.org/downloads/reports/reports/ntds\\_full.pdf](http://www.thetaskforce.org/downloads/reports/reports/ntds_full.pdf) (a detailed national survey of transgender and gender non-conforming individuals).

13. For example, in Georgia, a pre-operative trans-woman was charged with exposing her breasts in public, a crime that under Georgia law can only be committed by a biological woman; she was then placed in the men's facilities of the jail. Sunnive Brydum, *Transgender Woman Arrested for Exposing Breasts, Jailed With Men*, THE ADVOCATE, Apr. 17, 2013, <http://www.advocate.com/politics/transgender/2013/04/17/watch-transgender-woman-arrested-exposing-breasts-jailed-men>; see generally Jillian Todd Weiss, *The Gender Caste System: Identity, Privacy, and Heteronormativity*, 10 TUL. J.L. & SEXUALITY 123, 147–56 (2001) (discussing the interplay between gender and the law).

14. The status of the law regarding issues related to gender and sexual minorities is rapidly changing. See generally *State Laws & Legislation*, THE HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/laws-and-legislation/state> (last visited Apr. 10, 2013) (tracking changes to state law that impact LGBTQ individuals). As of the writing of this article, all the Idaho laws discussed are current and in force.

like Ms. Carlson, and propose a broad interpretation of the terms “sex” and “gender” to encompass the diverse genders and sexes that exist within American culture. Part II of this comment will first discuss the background of transgender and gender non-conforming individuals, including the Idaho-specific population. Part III will then present the inherent conflicts between the law and transgender and gender non-conforming individuals, and propose a solution to remedy these conflicts. Part IV will survey the current protections that Idaho State law affords to transgender and gender non-conforming individuals. Finally, Part V will discuss how to change the interpretation of sex and gender in Idaho, and analyze the impacts of broadly interpreting sex and gender within the current Idaho statutes to encompass and fully protect transgender and gender non-conforming Idahoans.

## II. VOCABULARY AND BACKGROUND: WHAT DOES IT MEAN TO BE TRANSGENDER AND GENDER NON-CONFORMING IN AMERICAN CULTURE?

### A. Sex and Gender in American Culture

Unlike discrete minority groups within American culture, such as racial or ethnic minority groups, transgender and gender non-conforming individuals transcend through and intersect with a plethora of varying identities and groups within American culture.<sup>15</sup> Thus defining what it means to have a transgender or gender non-conforming identity can be a complex task.

A logical starting point to begin defining a transgender or gender non-conforming identity is to understand how American culture views sex and gender. Many people in American culture conceptualize sex and gender as permanent categories that are encoded in people’s biological fabric and nature; however, while there is truth to that idea, the reality of sex and gender in humans is far more complex.<sup>16</sup> To begin with, hu-

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15. Gender and sex are concepts in American culture that are not fixed to a single race or religion, but run throughout the culture; and thus transgender and gender non-conforming identities intersect with these other identities. *See generally* Juan Battle & Colin Ashley, *Intersectionality, Heteronormativity, and Black Lesbian, Gay, Bisexual, and Transgender (LGBT) Families*, 2 BLACK WOMEN, GENDER + FAMILIES 1 (2008) (examining how the intersection of black and gay/lesbian and transgender identities affect the family); *see also infra* Part II.A.

16. RACHEL ANN HEATH, *THE PRAEGER HANDBOOK OF TRANSSEXUALITY: CHANGING GENDER TO MATCH MINDSET* 37–49 (2006) (discussing the actual cognitive abilities and differences of men and women, while present are often not well understood and over emphasized); *see also* ANNE FAUSTO-STERLING, *SEX/GENDER: BIOLOGY IN A SOCIAL WORLD* 27–42 (2012) (discussing the modern understanding of the cognitive difference between males and females); *see also* COLETTE CHILAND, *TRANSEXUALISM: ILLUSION AND REALITY* 40–41 (Philip Slotkin trans., 2003) (1997).

mans actually have very little sexual dimorphism,<sup>17</sup> making most of the perceived differences between females and males a contrived and constructed reality based in culture.<sup>18</sup> Instead, throughout any given culture's history, a culture's construction of sex and gender is ever-changing and impacted by a myriad of factors.<sup>19</sup> What it means to belong to a certain gender category depends on how that particular culture, at that particular time, and in that particular place, conceptualizes the gender role.<sup>20</sup> For example, prior to the invasion and assimilation of the tribal nations of North America by Europeans, many tribal cultures had different understandings of gender and sex from what exist in those groups today.<sup>21</sup> For instance, many tribal cultures possessed and accepted a third gender identity apart from man and woman, commonly called "two-spirit" today.<sup>22</sup> This two-spirit identity does not exist in a binary gender and sex structure like that of modern America.<sup>23</sup> The two-spirit gender identity was an entirely separate gender role, with its own expectations and norms.<sup>24</sup> Many tribes saw two-spirit individuals as possessing both a man and woman "spirits."<sup>25</sup> Because of the belief two-spirit individuals possessed both female and male identities, and thereby could understand both the men and women of a given tribe, many tribes placed the two-spirit gender role in positions of power as the caregivers, teachers, holy people, and dispute mediators.<sup>26</sup> As late as the 1800s, travelers documented two-spirit individuals integrated and living in the Cherokee Tribal Nation.<sup>27</sup> However, after the invasion and subsequent forced cultural assimilation of European identities, the two-spirit gender eroded and was replaced with the European binary man and woman.<sup>28</sup> This example exemplifies that fact that contrary to popular

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17. Sexual dimorphism is the degree that females and males differ in biological structure. See Martin Daly & Margo Wilson, *Evolutionary Psychology and Marital Conflict: The Relevance of Stepchildren*, in SEX, POWER, CONFLICT: EVOLUTIONARY AND FEMINIST PERSPECTIVES 9, 9–11 (David M. Buss & Neil M. Malamuth eds. 1996). While there are visible physiological differences between male and female humans, these differences are less severe than other primates. *Id.* at 13–14.

18. HEATH, *supra* note 16, at 9–11.

19. CHILAND, *supra* note 16, at 26–38 (discussing the varying degree of genders through different cultures and time).

20. *See id.*

21. Wilhelm Murg, *Momentum Mounts to Again Embrace Two-Spirits*, INDIAN COUNTRY TODAY MEDIA NETWORK.COM (June 6, 2011), <http://indiancountrytodaymedianet.com/article/momentum-mounts-to-again-embrace-two-spirits-35837> (discussing the reincorporation of a gender variant identity into many tribal cultures).

22. While there was not a uniform inter-tribal title for a two-spirit individual, many tribes had a distinct gender designation for such individuals. *Id.* For example, the Navajo called third gender individuals *nadeeh*, the Lakota called third gender individuals *winket*, and the Crow called third gender individuals *bate* just to name a few. *Id.* There is a contemporary movement to reincorporate this identity into back into tribal cultures. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

belief, gender and sex are not fixed roles, but continually change as culture changes.<sup>29</sup> Accordingly, a culture's definition of those not conforming to sex or gender roles is dependent on place and time.<sup>30</sup>

The Western construction of binary gender roles—based on the perception that only two sexes exist—is the prevailing sex and gender identity system in the United States.<sup>31</sup> Each sex has its own set of norms and expectations associated with its respective gender role.<sup>32</sup> Furthermore, within Western nations like America, sex and gender have distinct meanings.<sup>33</sup> Sex is assigned at birth and is determined based on a baby's expressed reproductive organs.<sup>34</sup> Gender, however, is the role that is expected of the assigned sex: males are expected to act like men, while females are expected to act like women.<sup>35</sup> For example, American culture dictates that males are aggressive and dominant, while women are submissive and demure.<sup>36</sup> This is commonly referred to as masculinity versus femininity.<sup>37</sup> For the majority of Americans, these culturally defined and artificial roles are simply part of the fabric of what it is to be normal, an unconscious norm.<sup>38</sup> The majority of Americans associate with their gender role, live through their gender role, and view others with the same roles placed on them.<sup>39</sup> However, when an individual deviates from an assigned sex and/or gender, how American culture views and treats that individual changes.<sup>40</sup> Accordingly, how the individual fits into American culture and the law changes as well.<sup>41</sup>

Most modern gender scholars would describe gender and sex on a spectrum, as opposed to a binary that ignores the complex reality of sex

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29. CHILAND, *supra* note 16, at 26–38.

30. *Id.*

31. Taylor Flynn, *The Ties That (Don't) Bind: Transgender Family Law and the Unmaking of Families*, in TRANSGENDER RIGHTS 32, 34 (Paisley Currah et al. eds., 2006), available at <http://faculty.law.miami.edu/mcoombs/documents/FlynnTransgenderRights.pdf>.

32. *Id.*

33. *Gender, women and health*, WORLD HEALTH ORGANIZATION, <http://www.who.int/gender/whatisgender/en/> (last visited Apr. 10, 2013).

34. *Id.*

35. HEATH, *supra* note 16, at 33–35.

36. *See id.* at 34–37 (discussing the development the gender binary of children in American culture). For example, children as young as twenty-seven months a majority of infants can identify the toys our culture has approved of for men and women and at three years old almost all can identify the physical and emotional stereotypes and expectations of men and women in American culture. *Id.*

37. *Id.*

38. *See* HEATH, *supra* note 16, at 34–37.

39. *See id.* (discussing how children at a very young age view and expect others to act according to a binary gender).

40. *See generally* Kate Bornstein, *Gender Terror, Gender Rage*, in THE TRANSGENDER STUDIES READER 237–43 (Susan Stryker & Stephen Whittle eds., 2006) (discussing the reaction of American culture towards deviation from a binary gender norm).

41. *See id.*

and gender differences in humans.<sup>42</sup> Accordingly, below is a list<sup>43</sup> of gender and sex identities that deviate from this binary sex and gender norm in America. For the purposes of this paper, the term “transgender” and “gender non-conforming” collectively include all the identities that fall outside of the binary norm. This definition is an intentionally broad category of individuals because they all are excluded from a traditional binary construction of sex as used in context with the law.<sup>44</sup> Thus, the use of the words transgender and gender non-conforming in this comment encompasses the following identities:

*Intersex.* Generally, an intersex individual exhibits neither or both male and female reproductive organs, chromosomal, and/or physical characteristics, which conflicts with her/hir<sup>45</sup>/his assigned binary sex at birth.<sup>46</sup> This term is a more accurate and encompassing term than the antiquated term “hermaphrodite.”<sup>47</sup> It should be noted that many hospitals in America perform a surgery shortly after an intersex child’s birth to assign them a sex.<sup>48</sup> This is done in what the hospital believes to be in the best interest of the child to live a normal life, reasoning that “children should be saved from the anguish of looking weird, or of even knowing they were born looking weird.”<sup>49</sup> Hospitals may not even contact the parents until after the surgery.<sup>50</sup> There are, however, contemporary movements to stop this practice and hold off on a sexual assignment surgery, if any at all, until the child is older.<sup>51</sup> However, this poses its own problem as all states require that the child’s birth certificate indicate sex.<sup>52</sup> The Berkeley Gender Equity Resource Center defines “In-

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42. See Anne Bolin, *Transforming Transvestism and Transsexualism: Polarity, Politics, and Gender*, in GENDER BLENDING 25–27 (Connie Bullough et al. eds., 1997) (discussing the expanding spectrum of sex and gender identities in American culture); see also *Understanding Gender*, GENDER SPECTRUM, <http://www.genderspectrum.org/understanding-gender> (last visited Apr. 10, 2013).

43. Because American culture and the law is constantly changing and re-categorizing identities, this list is not exhaustive. See CHILAND, *supra* note 16, at 26–38 (discussing the formation of gender identities in culture).

44. See generally GRANT, ET AL., *supra* note 12, at 3–8; see Flynn, *supra* note 31, at 34.

45. “Hir” is a gender-neutral pronoun that refers to all gender identities, as opposed to only male and female: he vs. she. *A Crash Course in Gender Neutral Pronouns*, TRANSCENDING BOUNDARIES 2014, <http://www.transcendingboundaries.org/blog/153-a-crash-course-in-gender-neutral-pronouns.html> (last visited Apr. 10, 2012). For a further discussion on gender-neutral language see *infra* note 246.

46. See ALICE DOMURAT DREGER, *HERMAPHRODITES AND THE MEDICAL INVENTION OF SEX* 37–38 (4th ed. 2003).

47. See *id.*

48. Elizabeth Weil, *What if It’s (sort of) a boy and (sort of) a girl?*, N.Y. TIMES, Sept, 24, 2006, [http://www.nytimes.com/2006/09/24/magazine/24intersexkids.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2006/09/24/magazine/24intersexkids.html?pagewanted=all&_r=0).

49. *Id.*

50. *Id.*

51. See *id.*; see also Associated Press, *New Guidelines for Treating Intersex Babies: Doctors urged not to operate on infants with unclear gender*, NBCNEWS.COM (Feb. 18, 2005, 6:54 PM), [http://www.nbcnews.com/id/6994580/#.USqM3OPZ\\_20](http://www.nbcnews.com/id/6994580/#.USqM3OPZ_20).

52. See Associated Press, *supra* note 51.

tersex” as:

. . . a set of medical conditions that feature congenital anomaly of the reproductive and sexual system. That is, intersex people are born with “sex chromosomes,” external genitalia, or internal reproductive systems that are not considered “standard” for either male or female. The existence of intersexual [individuals] shows that there are not just two sexes and that our ways of thinking about sex (trying to force everyone to fit into either the male box or the female box) is socially constructed [and not congruent with biological reality].<sup>53</sup>

*Transgender/Transsexual.* Generally, a transgender individual feels that her/hir/his gender or sexual identity is opposite from the one assigned at birth.<sup>54</sup> These individuals’ internal identities generally do not match their assigned sex at birth, and as such, they may seek to correct their physical anatomy through hormone use, corrective surgery, and genital reconstruction surgery.<sup>55</sup> The Berkeley Gender Equity Resource Center defines “Transgender/Transsexual” as a:

[P]erson who experiences a mismatch of the sex they were born as and the sex they identify as. A transsexual sometimes undergoes medical treatment to change his/her physical sex to match his/her sex identity through hormone treatments and/or surgically. Not all transsexuals can have or desire surgery.<sup>56</sup>

*Gender Non-conforming/Gender Queer.* Generally, a gender non-conforming/gender queer individual feels that her/hir/his sex assigned at birth does not accurately reflect her/hir/his sex and/or gender.<sup>57</sup> Furthermore, unlike transgender individuals, these individuals feel that their true identity does not fit into a traditional gender binary; and as such, they do not identify either as male or female.<sup>58</sup> The Berkeley Gender Equity Resource Center defines a “Gender queer” individual as a

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53. *Intersex, Definition of Terms*, GENDER EQUITY RESOURCE CENTER, [http://geneq.berkeley.edu/lgbt\\_resources\\_definiton\\_of\\_terms#intersex](http://geneq.berkeley.edu/lgbt_resources_definiton_of_terms#intersex) (last visited Apr. 10, 2013).

54. CHILAND, *supra* note 16 at 16–17.

55. SANDRA L. SAMONS, WHEN THE OPPOSITE SEX ISN’T: SEXUAL ORIENTATION IN MALE-TO-FEMALE TRANSGENDER PEOPLE 13–16 (2009). Note that a transgender person may not have any, or may have a combination of these corrections to confirm their identity. *Id.* For a definition of “hormone therapy” see, *Hormone Replacement Therapy*, *infra* note 226.

56. *Definition of Transsexual*, *supra* note 5.

57. See generally Jack Harrison, et al., *A Gender Not Listed Here: Genderqueers, Gender Rebels, and OtherWise in the National Transgender Discrimination Survey*, in 2 LGBTQ POLICY JOURNAL AT THE HARVARD KENNEDY SCHOOL 13 (2011), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Harrison-Herman-Grant-AGender-Apr-2012.pdf>.

58. *Id.*

“person whose gender identity is neither man nor woman, is between or beyond genders, or is some combination of genders. This identity is usually related to or in reaction to the social construction of gender, gender stereotypes and the gender binary system.”<sup>59</sup>

#### B. Transgender and Gender Non-conforming Individuals in America

As discussed above,<sup>60</sup> when an individual’s gender or sex identity falls outside of the binary norm adopted by American culture, the culture treats these individuals differently.<sup>61</sup> Instead of meshing seamlessly into a culture’s fabric, they stand out and are often subjected to pressures to conform and discrimination from the general population.<sup>62</sup> Generally, transgender and gender non-conforming individuals experience high rates of discrimination and a lower quality of life than the aggregate of the American population.<sup>63</sup> Below is a brief snapshot of the statistics about transgender and gender non-conforming individuals in American culture:

*Education.* Transgender and gender non-conforming people in America experience physical and verbal harassment from both peers and teachers at much higher rates than the national average.<sup>64</sup> This includes both K-12 education and higher education.<sup>65</sup> This harassment has impacts later in life, which include higher rates of repeat-education because of interruptions in education due to their identity or harassment as compared to the general population;<sup>66</sup> a correlation with higher rates of homelessness as compared to the general population;<sup>67</sup> and a correlation with higher rates of sex work and drug addiction as compared to the general population.<sup>68</sup> Furthermore, transgender and gender non-conforming individuals experience lower rates of income, which substantially reduces their overall quality of life as compared to similarly educated people in the general population.<sup>69</sup>

*Employment.* Transgender and gender non-conforming individuals experience high rates of discrimination and harassment in the work place, including being denied a promotion or being fired because of their

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59. *Gender Queer, Definition of Terms*, GENDER EQUITY RESOURCE CENTER, [http://geneq.berkeley.edu/lgbt\\_resources\\_definition\\_of\\_terms#gender\\_queer](http://geneq.berkeley.edu/lgbt_resources_definition_of_terms#gender_queer) (last visited Apr. 10, 2013).

60. *See supra* Part II.A. (discussing the construction of gender and sex in a culture).

61. *See supra* Part II.A. and accompanying text.

62. *See generally* Harold Garfinkel, *Passing and the Managed Achievement of Sex Status in an “Intersexed” Person*, in *THE TRANSGENDER STUDIES READER* 58, 58–60 & 70–71 (Susan Stryker and Stephen Whittle eds., 2006) (discussing how society forces transgender and gender nonconforming individuals to “pass” or attempt to hide their sexual or gender identity through performing an expected gender role often contrary to their identity).

63. *See generally* GRANT, ET AL., *supra* note 12, 3–8.

64. *See id.* at 36–43.

65. *Id.* at 38–39.

66. *Id.* at 41.

67. *Id.* at 44.

68. *Id.*

69. *Id.* at 42.

gender or sex identity.<sup>70</sup> Transgender and gender non-conforming individuals report almost double the unemployment rate of the general population<sup>71</sup> with nearly four times the rate of the general population living below the poverty line.<sup>72</sup> If a transgender person or gender non-conforming person “comes out”<sup>73</sup> at work, high rates of these individuals receive demotions or are forced to dress in a gender that they do not identify with in order to keep their job.<sup>74</sup>

*Health.* Transgender and gender non-conforming individuals face greater health challenges than the general American population, including higher rates of HIV infection than the national average<sup>75</sup> and high rates of substance abuse.<sup>76</sup> These negative health statistics are often exacerbated and otherwise affected because transgender and gender non-conforming individuals experience homelessness at 2.5 times the national rate.<sup>77</sup> Shockingly, transgender and gender non-conforming individuals are over twenty-five times more likely than the general population to attempt suicide.<sup>78</sup>

*Public Accommodations.* Transgender and gender non-conforming individuals report high rates of unequal treatment in places of public accommodation.<sup>79</sup> This includes high rates of police harassment when accessing police services and hospital services,<sup>80</sup> and high rates of unequal treatment and harassment when seeking social services.<sup>81</sup>

### C. The Idaho-Specific Transgender and Gender Non-conforming Population: The Rural Factor

While there have been few studies conducted surveying the Idaho-specific transgender and gender non-conforming population, there are some documented statistics to add to the national snapshot of transgender and gender non-conforming individuals. In addition to the national statistics surrounding transgender and gender non-conforming individuals, Idaho's specific transgender and gender non-conforming population faces its own set of challenges. Within a survey of over 2,000

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70. *Id.*

71. *Id.* at 55.

72. *Id.* at 66.

73. This is a slang term used in the LGBTQ community to denote that someone has told or otherwise divulged their identity as an LGBTQ person. See *What is “Coming Out?”*, GENDER EQUITY RESOURCE CENTER, [http://geneq.berkeley.edu/lgbt\\_resources\\_coming\\_out#1](http://geneq.berkeley.edu/lgbt_resources_coming_out#1) (last visited Apr. 10, 2013). For a definition of LGBTQ see Stanley *infra* note 82.

74. See generally GRANT ET AL., *supra* note 12, at 60.

75. *Id.* at 72.

76. *Id.*

77. *Id.* at 112.

78. *Id.* at 82.

79. *Id.* at 125.

80. *Id.*

81. *Id.* at 134.

LGBTQ<sup>82</sup> Idahoans, 60% were asked to hide or deny their gender identity or sexuality at work in order to continue employment.<sup>83</sup> Additionally, 16.3 percent of the transgender Idahoans surveyed were expressly told by their employer that they were not promoted, were fired, or did not receive a raise as a result of their identity.<sup>84</sup>

Furthermore, Idaho's transgender and gender non-conforming population faces discrimination that is amplified by Idaho's rural demographic.<sup>85</sup> Rural communities are traditionally defined by kinship systems, legal marriages, and landownership that create a fluid and consistent socio-cultural network, which bolster the solidarity of the community.<sup>86</sup> Thus, when an individual's identity, such as transgender or gender non-conforming, is inconsistent with the values of the community, the community either sanctions the individual to force conformity or isolates them.<sup>87</sup> This generally means that openly transgender and gender non-conforming individuals may be denied the support and help that small, rural communities provide to one another; resulting in a lower quality of life within the community.<sup>88</sup> This isolation causes many LGBTQ people living in rural settings like Idaho to flee to metropolitan settings that have more accepting, open, and visible LGBTQ support networks.<sup>89</sup>

### III. PROBLEM: THE AMERICAN LEGAL FICTION OF THE GENDER AND SEX BINARY

It is common knowledge to anyone born in the United State that the moment a child is born, even before a child is even given a name, the state assigns a sex (either female or male) and gender (either girl or boy) to the new baby; then this distinction is memorialized in a legal birth certificate.<sup>90</sup> While the state codification of the American binary construction of sex and gender does not affect the vast majority of Americans, for a minority of United States' citizens this legal status does not

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82. LGBTQ stands for the lesbian, gay, bisexual, transgender, and queer community. See Kim Stanley, *LGBTQ Pamphlet*, TEXAS TECH. U. STUDENT COUNSELING CENTER, [http://www.depts.ttu.edu/scc/Virtual\\_Library/lgbtq.php](http://www.depts.ttu.edu/scc/Virtual_Library/lgbtq.php) (last visited Apr. 10, 2013).

83. MEMORANDUM FROM THE WILLIAMS INSTITUTE ON IDAHO—SEXUAL ORIENTATION AND GENDER IDENTITY LAW AND DOCUMENTATION OF DISCRIMINATION 1 (Sept. 2009), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Idaho.pdf>.

84. *Id.*

85. Idaho has approximately nineteen people per square-mile as compared to the eighty-seven per square-mile national average. *State & County Quick Facts: Idaho*, US CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/16000.html> (last updated Mar. 14, 2013).

86. Linda S. Culton, *Under the Rainbow: Rural Gay Life and Its Relevance of Family Providers*, 52 FAMILY RELATIONS 72, 72–73 (2003).

87. *Id.*

88. *See id.*

89. Culton, *supra* note 86, at 74.

90. *See generally* Saru Matambanadzo, *Engendering Sex: Birth Certificates, Biology and the Body in Anglo American Law*, 12 CARDOZO J. L. & GENDER 213, (2005) (discussing the tradition of ascribing sex and gender at birth in American culture and the legal conflicts that arise if someone does not identify with their ascribed status).

reflect their true sexual or gender identity.<sup>91</sup> This often leaves them outside of the law, as the law will only recognize their assigned birth sex; or their identity may not be covered within the scope of the law, as the law only identifies the gender and sex binary.<sup>92</sup>

This discrimination is particularly visible in a courtroom setting, where courts are required to construe sex and gender in order to apply the law. When courts construe sex and gender, absent a statutory definition, their construction often excludes transgender and gender non-conforming individuals; leaving transgender and gender non-conforming people outside the scope of the law, including antidiscrimination laws and marriage laws.<sup>93</sup> This non-inclusion arises from the state-supported fiction that there are only two sexes and genders.<sup>94</sup> Generally, the majority of jurisdictions define “sex” through an essentialist point of view, which concludes that sex is determined at birth as either male or female, and does not take into account the various nuances of sex or the gender identity of the individual.<sup>95</sup> This generally means that when doctors assign individuals’ sex at birth, the courts will apply law to transgender and gender non-conforming individuals as if the associated gender role and assigned sex is the identity they display and associate with.<sup>96</sup> Because this is a jurisdiction-to-jurisdiction determination, transgender and gender non-conforming individuals will receive a patchwork of varying legal inclusion and exclusion depending where they live or travel to.<sup>97</sup>

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91. Because transgender and gender non-conforming individuals are often a hidden minority within American culture, it is difficult to get an accurate estimation of what percent transgender and gender non-conforming individuals make up of the overall population of the United States. *See* NATIONAL CENTER FOR TRANSGENDER EQUALITY, UNDERSTANDING TRANSGENDER: FREQUENTLY ASKED QUESTION ABOUT TRANSGENDER PEOPLE 1 (May 2009), available at [http://transequality.org/Resources/NCTE\\_UnderstandingTrans.pdf](http://transequality.org/Resources/NCTE_UnderstandingTrans.pdf). Current conservative estimates of individuals who identify as transgender are approximately one to three percent. *Id.*; see also T. Bridges, *Can Living in the City Make you Gay?*, SOCIAL (IN)QUEERY (Mar. 8, 2013), <http://socialinqueery.com/2013/03/08/can-living-in-the-city-make-you-gay/> (discussing recent polls of LGBTQ people in America). However, as more people become visible, and the gender population becomes educated and understands what it means to be transgender and gender non-conforming, this percent may increase. *See* Pérez-Peña, *infra* note 273, discussing the increased visibility of transgender students.

92. *Olsen v. Olsen*, 98 Idaho 10, 16, 557 P.2d 604,610 (1976) (Idaho case discussing the essentialist view of sex and gender as being constrained to the sex determined at birth).

93. *Compare* *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (where the Supreme Court of the United States held that under Title VII, discrimination based on sex and gender included discrimination based on gender expectations/stereotypes), *with* *Albertsons’s, Inc. v. Wash. State Human Rights Comm’n*, 544 P.2d 98, 99–101 (Wash. Ct. App. 1976) (holding that men’s hair length was not covered under a prohibition on sex discrimination in employment settings).

94. *See supra* Part II.A; *see also* DREGER, *supra* note 46, at 8–9.

95. Flynn, *supra* note 31, at 34.

96. *Id.*

97. *Id.*

This essentialist construction of sex and gender can lead to bizarre results, some of which can be against a law's policy.<sup>98</sup> This is especially apparent when the essentialist construction of sex and gender meets a state's privileging of heteronormativity through the codification of laws that seek to reinforce heterosexuality.<sup>99</sup> For example under an essentialist system, a post-operative<sup>100</sup> trans-woman<sup>101</sup> could marry another woman and have the court, and consequently the state, validate and protect the marriage.<sup>102</sup> While this would normally violate many states' prohibition against same-sex marriages, under the essentialist system currently in place this would be completely legal, as a trans-woman is often assigned a male sex at birth.<sup>103</sup> However, if the couple moves to a jurisdiction that also bans same-sex marriage but does not construe sex and gender based on a person's biology, their marriage would not be legal as the trans-woman is now a woman for the purposes of the law.<sup>104</sup>

Because the essentialist view defines sex and gender through assignment at birth, many courts engage in "sexing" of transgender and gender non-conforming individuals.<sup>105</sup> This can include questions as to what reproductive organs someone has, if they live like the gender they portray, and other humiliating or arbitrary questions and invasions into their anatomies.<sup>106</sup> For example, in a child custody dispute between a married couple where the husband is a trans-woman, a court's decision would not focus on whether the husband is a good parent and thus fit to be in the children's lives, but whether she has a penis.<sup>107</sup> Another example would be filing a complaint as a protected class under Title VII.<sup>108</sup> Instead of acknowledging that a trans-woman may face discrimination

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98. *Id.* at 35.

99. *Id.* at 34. Heteronormativity "is a term used by social theorists in order to discuss the way in which gender and sexuality are separated into hierarchically organised categories . . . . Theorists have argued that a discourse or technique of heteronormativity has been set up, and subsequently dominates, social institutions such as the family, the state and education . . . . Heteronormative discursive practices or techniques are multiple and organise categories of identity into hierarchical binaries. This means that man has been set up as the opposite (and superior) of woman, and heterosexual as the opposite (and superior) of homosexual. It is through heteronormative discursive practices that lesbian and gay lives are marginalized socially and politically and, as a result, can be invisible within social spaces such as schools." *What is heteronormativity?*, GENDER AND EDUC. ASS'N (Mar. 26, 2011), <http://www.gendrandeducation.com/issues/what-is-heteronormativity/>.

100. This generally means someone who has a sexual reassignment surgery. *Post-Op, Definition of Terms*, GENDER EQUITY RESOURCE CENTER, [http://geneq.berkeley.edu/lgbt\\_resources\\_definiton\\_of\\_terms](http://geneq.berkeley.edu/lgbt_resources_definiton_of_terms) (last visited Apr. 10, 2013).

101. A trans-woman is an individual who identifies as a female sex and gender, but was determined to be a male sex at birth. *Transwoman, Definition of Terms*, GENDER EQUITY RESOURCE CENTER, [http://geneq.berkeley.edu/lgbt\\_resources\\_definition\\_of\\_terms#transwoman](http://geneq.berkeley.edu/lgbt_resources_definition_of_terms#transwoman) (last visited Apr. 10, 2013); *see also supra* Part II.A.

102. Flynn, *supra* note 31, at 35.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* at 32.

108. 42 U.S.C.A. § 2000e-2 (West 2013) (prohibiting employment discrimination based on sex).

and oppression that was taken into account when drafting Title VII, the question will again focus on whether the trans-woman was assigned a male sex at birth.

Currently, it would seem Idaho's courts use an essentialist construction of sex and gender, and thus determine a person's sex or gender based on their assigned sex at birth for the purposes of the law.<sup>109</sup> Therefore, within Idaho's jurisdiction, a transgender or gender non-conforming individual may not be covered under Idaho law. To alleviate this problem, the Idaho courts should reject the essentialist construction and codification of a binary sex and gender, and instead broadly construe sex and gender to include multiple sexes and gender identities. This would bring transgender and gender non-conforming individuals under the protection of Idaho's laws and remove the need for the courts to guess or otherwise adjudicate an individual's legal sex, resulting in a uniform application of the law for all people. Because courts should construe laws using the tools the legislature gives them,<sup>110</sup> to aid the courts in broadening the definition of sex and gender, the Idaho legislature should pass a law expanding the definition of sex and gender within the Idaho Code. This could be accomplished through a gender-neutral language bill.<sup>111</sup> Through this legislative action, Idaho would not only be legally recognizing the complexities of gender and sex in American culture, but would also allow the courts to fully include transgender and gender non-conforming Idahoans under the law.

#### IV. IDAHO STATE LAW SURVEY: THE PROTECTIONS AFFORDED TO TRANSGENDER AND GENDER NON-CONFORMING INDIVIDUALS

Currently, the State of Idaho's facial recognition and/or protection of transgender and gender non-conforming individuals is at best sparse.<sup>112</sup> The only time a statute directly acknowledges a non-binary sex or gender is during the termination of parental relations with a child.<sup>113</sup> This statute prohibits a court from taking into account a person's "transsexualism" when determining if a person has a disability for the purposes of terminating a parent-child relationship.<sup>114</sup> Because the

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109. *See Olsen v. Olsen*, 98 Idaho 10, 16, 557 P.2d 604,610 (1976) (in dicta the court cites a marriage case from the United Kingdom where the U.K. court adopted an essentialist view of gender and sex concerning a trans-woman; this is the nearest indication of what sex means for the purposes of Idaho law).

110. When applying the law, courts generally construe the code in light of definitions provided by the legislature to help clarify intent. *See Caminetti v. United States*, 242 U.S. 470, 484 (1917).

111. *Infra* Part V.A, accompanying text.

112. *See generally* THE WILLIAMS INSTITUTE, *supra* note 83.

113. IDAHO CODE ANN. § 16-2002 (2009).

114. *Id.*

Idaho Code lacks facial acknowledgment or protection of transgender and gender non-conforming individuals, it is necessary to survey the laws and case law to understand how transgender and gender non-conforming individuals fit into the law. Ultimately, because Idaho's laws and case law do not encompass transgender and gender non-conforming individuals, it becomes necessary to adopt a broad definition of sex and gender in order to bring transgender and gender non-conforming Idahoans within the protection of the law. This section will survey: the Constitution of the State of Idaho, employment law in Idaho, marriage and family law in Idaho, and quality life laws<sup>115</sup> in Idaho.

#### A. Idaho State Constitution

Within the Idaho State Constitution, there is no specific provision that guarantees the rights of transgender or gender non-conforming individuals.<sup>116</sup> In fact, the pertinent provisions of the Idaho Constitution securing individual rights refer only to "men."<sup>117</sup> However, that does not mean that the Idaho State Constitution does not provide equal protection for more Idahoans. Clause I of the Idaho State Constitution provides: "All men are by nature free and equal, and have certain inalienable rights, among which are enjoying and defending life and liberty; acquiring, possessing and protecting property; pursuing happiness and securing safety."<sup>118</sup> Clause II of the Idaho State Constitution provides:

All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform or abolish the same whenever they may deem it necessary; and no special privileges or immunities shall ever be granted that may not be altered, revoked, or repealed by the legislature.<sup>119</sup>

When these two clauses are construed in light of one another, they provide for equal protection of all Idahoans equivalent<sup>120</sup> to the equal protection afforded under the Fourteenth Amendment of the United States's Constitution.<sup>121</sup> Thus, through equal protection, other citizens can bring claims of unequal treatment under Idaho's laws.

To evaluate equal protection claims under the Idaho State Constitution, the court must follow a three-part framework set out by the U.S. Supreme Court: first the court must identify the classification that is being challenged; second the court must determine the standard under

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115. The term "quality of life laws" describes the laws that permit transgender and gender non-conforming individuals to amend their birth certificates, to make name changes, etc., in order to confirm their identity.

116. *See generally* IDAHO CONST. art. 1.

117. *See* IDAHO CONST. art. 1, § 1.

118. *Id.*

119. IDAHO CONST. art. 1, § 2.

120. *See* Rudeen v. Cenarrusa, 136 Idaho 560, 568, 38 P.3d 598, 606 (2001).

121. U.S. CONST. amend. XIV.

which the classification will be judicially reviewed; and finally, the court must determine whether the appropriate standard was satisfied.<sup>122</sup> No case on point was located from either the Idaho Supreme Court or the Idaho Court of Appeals that addresses the interpretation of the equal protection clauses of the Idaho State Constitution in light of transgender or gender non-conforming individuals.<sup>123</sup>

However, the Idaho Supreme Court has found that classifications that perpetuate gender stereotypes are usually invalid under the Idaho State Constitution.<sup>124</sup> For example, in *Murphy v. Murphy*, the court held that an Idaho law, which only allowed alimony to be awarded to an indigent wife, violated the equal protection principle of the Idaho Constitution.<sup>125</sup> The husband contended that the statute that required him to pay alimony violated the constitution, as it excluded men.<sup>126</sup> Within the Supreme Court's reasoning it concluded that if classes of individuals within the law are designated because of or to perpetuate gender stereotypes, they are generally unconstitutional; stating in regards to the Idaho alimony law that only provided support to women:

Classifications which perpetuate or encourage sexual stereotypes necessarily burden those persons—of either gender—whose social and economic preferences or conditions do not conform to the stereotypical model. To allow the state to create such classifications, at least in the absence of a substantial relationship between the classifications and an otherwise valid state goal, would be abhorrent to art. I, § 2 of the Idaho Constitution. We therefore hold that former I.C. § 32–706 violates the equal protection clauses of both the Idaho Constitution and the United States Constitution.<sup>127</sup>

Thus, in construing the Idaho State Constitution, the Idaho Supreme Court held that the alimony statute violated the Idaho Constitution as its classification based on the gender norm that women do not work while men do, was not connected to the goal of providing for needy spouses who depended on their partner for support during the marriage.<sup>128</sup> The logic employed by the Idaho Supreme Court could be applied to transgender and gender non-conforming individuals based on the same principle: transgender people are not conforming to gender

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122. *Rudeen*, at 569, 38 P.3d at 607.

123. Through my research I have been unable to uncover any cases that directly apply the Idaho State Constitution to transgender or gender non-conforming individuals.

124. *Murphy v. Murphy*, 103 Idaho 720, 723, 653 P.2d 441, 444 (1982) (*affirming* U.S. v. Orr, 440 U.S. 268, 283 (1978)).

125. *Id.*

126. *Id.* at 721–22, 653 P.2d at 442–43.

127. *Id.* at 723, 653 P.2d at 444.

128. *Id.*

expectations<sup>129</sup> and forcing them to do such violates the equal protection clause.

The Supreme Court of the United States adopted a similar logic in the landmark case *Price Waterhouse v. Hopkins*.<sup>130</sup> In that case, a senior office manager was denied a partnership position for an accounting firm because she was perceived of as acting too “macho” and not acting like a woman “should” act.<sup>131</sup> The office manager filed a Title VII action against her employer for discrimination because of sex.<sup>132</sup> In its reasoning the United States Supreme Court stated, regarding discrimination based on gender expectations:

As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for “ [i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.’ ” An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not. Title VII lifts women out of this bind.<sup>133</sup>

The Supreme Court also noted that this construction of Title VII, much like Idaho’s alimony bill, was meant to broadly help people.<sup>134</sup> Penalizing someone for conforming or failing to conform to gender expectations is unacceptable.<sup>135</sup>

Recently the Supreme Court’s logic used in *Price Waterhouse v. Hopkins* was adopted and applied by the Eleventh Circuit Court of Appeals to the Fourteenth Amendment’s equal protection clause in *Glenn v. Brumby*.<sup>136</sup> In that case, a trans-woman filed an action against her employer, the Georgia General Assembly’s Office, for wrongful termination based on sex; a violation of the Fourteenth Amendment’s equal protection clause.<sup>137</sup> The Eleventh Circuit asserted that discrimination based on someone’s status as a transgender individual is equivalent to discriminating against someone for failing to meet gender expectations, stating: “a person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes . . . There is thus a congruence between discriminating against transgender and transsexual individuals and discrimination on the basis of gender-

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129. See *supra* Part II.A, text discussing gender expectations.

130. 490 U.S. 228, 251 (1989).

131. *Id.* at 236.

132. *Id.*

133. *Id.* at 251 (citations omitted).

134. *Id.* at 240.

135. *Id.* at 251.

136. *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011).

137. *Id.* at 1113–14.

based behavioral norms.”<sup>138</sup> Thus the Eleventh Circuit acknowledged that sex and gender are broader than mere biological categories, but instead manifestations of what American culture expects people to act like.<sup>139</sup> In reasoning that transgender and gender non-conforming discrimination is discrimination on the basis of sex for the purposes of the equal protection clause of the Fourteenth Amendment, the court concluded that:

[t]he nature of the discrimination is the same; it may differ in degree but not in kind, and discrimination on [the basis of conforming or failing to conform to gender stereotypes] is a form of sex-based discrimination that is subject to heightened scrutiny under the Equal Protection Clause. Ever since the Supreme Court began to apply heightened scrutiny to sex-based classifications, its consistent purpose has been to eliminate discrimination on the basis of gender stereotypes.<sup>140</sup>

Thus the Eleventh Circuit held that discrimination against someone on the basis of their non-conformity to gender expectations violated the equal protection clause.<sup>141</sup> If the Idaho Supreme Court were to adopt this of logic in light of its own used in *Murphy v. Murphy*,<sup>142</sup> and broadened the class of sex to include transgender and gender non-conforming individuals, it could bring transgender and gender non-conforming individuals within the equal protection of Idaho’s Constitution; thereby more equally protecting transgender and gender non-conforming Idahoans. However the adoption of this logic would still leave holes in law that miss transgender and gender non-conforming individuals; and therefore, the courts would still need a law broadly defining sex and gender in order to fully include transgender and gender non-conforming Idahoans under the law.

#### B. Employment Protections in Idaho

At the time of the writing of this comment, sixteen states and the District of Columbia have adopted laws that prohibit employment discrimination based on gender identity.<sup>143</sup> Idaho is not among these states.<sup>144</sup> Idaho has no statutory provision prohibiting employment dis-

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138. *Id.* at 1316.

139. *Id.*

140. *Id.* at 1319.

141. *Id.*

142. *Murphy v. Murphy*, 103 Idaho 720, 723, 653 P.2d 441, 444 (1982).

143. *Non-Discrimination Laws that Include Gender Identity and Expression*, TRANSGENDER L. & POL’Y INST., <http://www.transgenderlaw.org/ndlaws/index.htm> (last visited Apr. 10, 2013).

144. *Id.*

crimination based on a person's gender identity specifically.<sup>145</sup> However there are, at the time of this writing, proposals to amend the Idaho Human Rights Act to include both sexual orientation and gender expression as protected statuses.<sup>146</sup> Under the current Idaho Human Rights Act, it is against the law to fire or refuse to hire anyone based on race, color, religion, sex, national origin, or disability.<sup>147</sup> Yet no case on point was located where the Idaho Supreme Court or the Idaho Court of Appeals defined what the scope of sex is for the purposes of the statute.<sup>148</sup> Thus it is unknown if Idaho will continue with an essentialist view of sex and gender or take a broad construction of sex and gender. The Idaho Supreme Court has, however, stated that a claim for discrimination based on gender expectation is a valid claim to bring under the Idaho Human Rights Act.<sup>149</sup>

Several western states have construed the meaning of sex in similar statutes.<sup>150</sup> For example, the Washington Court of Appeals ruled that sex discrimination does not extend to protecting exempt workers from gender-based dress codes.<sup>151</sup> In that case, a male worker in a grocery store brought a sex discrimination suit against his employer for wrongful termination.<sup>152</sup> The court held that the Washington statute only prohibited discrimination on the basis of immutable characteristics between men and women, e.g. pregnancy, and not the physical expression of gender.<sup>153</sup> In explaining its reasoning, the Washington Appellate Court stated, in regards to the remedy for people who do not conform to the gender regulations of employment: "the employee who objects to an employer's grooming code may reject the constraint and seek other em-

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145. IDAHO CODE ANN. § 67-5909 (2009) (the Idaho Human Rights Act providing that it is prohibited to fire or refuse to hire anyone based on It shall be a prohibited act to discriminate against a person because of, or on a basis of, race, color, religion, sex, national origin, or disability). There are also Idaho municipalities that have adopted employment protection laws for transgender and gender non-conforming individuals. *See* James Tidmarsh, *Ketchum becomes the third Idaho city to pass LGBT non-discrimination ordinance*, LGBTQNATION (Jan. 23, 2013), <http://www.lgbtqnation.com/2013/01/ketchum-becomes-third-idaho-city-to-pass-lgbt-non-discrimination-ordinance/>; *see also* Associated Press, *City of Moscow passes anti-discrimination law*, IDAHO STATE J. (Apr. 2, 2013), [http://www.idahostatejournal.com/news/state/article\\_74b7deca-3b8f-5030-94d9-02826d97daa9.html](http://www.idahostatejournal.com/news/state/article_74b7deca-3b8f-5030-94d9-02826d97daa9.html).

146. Andrew Crisp, *Idaho Lawmakers to Host 'Add the Words' Panel Wednesday, Feb. 6*, BOISE WEEKLY, Feb. 1, 2013, <http://www.boiseweekly.com/boise/idaho-lawmakers-to-host-add-the-words-panel-wednesday-feb-6/Content?oid=2809189>.

147. IDAHO CODE ANN. § 67-5909 (2012).

148. Through my research I was unable to locate any case on point construing the meaning of "sex" in the Idaho Human Rights Act.

149. *See generally* Idaho Comm'n on Human Rights v. Campbell, 95 Idaho 215, 506 P.2d 112 (1973) (stating that a claim for sex discrimination based on a policy enforcing hair length restrictions on men only stated a claim in which relief could be granted under the Idaho Human Rights Act).

150. *See, e.g.*, WASH. REV. CODE § 49.60.180 (2012).

151. *Albertson's, Inc. v. Washington State Human Rights Comm'n*, 544 P.2d 98, 99 (Wash. App. Div. 1 1976).

152. *Id.* at 101.

153. *Id.*

ployment, or subordinate to the policy in order to obtain or retain the job.”<sup>154</sup> This harsh remedy could easily allow discrimination against transgender and gender non-conforming individuals, as these individuals often do not portray the expected gender norm that an employer would demand.<sup>155</sup>

In order to bring transgender and gender non-conforming individuals under the protections of Idaho’s Human Rights Act, the term “sex” should be expanded to include transgender and gender non-conforming workers. Transgender and gender non-conforming workers generally are discriminated against at work or fired because they are portraying an atypical gender associated with their assigned sex.<sup>156</sup> Because sex and gender expectations are interrelated and associated with one another,<sup>157</sup> limiting the construction of “sex” to only immutable characteristics would allow for employers to discriminate or fire a female employee for not acting like a woman just as easily as firing a trans-woman for not portraying a man’s gender expression. This could easily subvert the purpose of the Idaho Human Rights Act’s anti-discrimination principle, as it would only be discrimination for an employer to fire or refuse to hire someone because of an immutable characteristic associated with a biological sex. Thus the Idaho legislature should adopt a broad definition of sex and gender to include transgender and gender non-conforming people, in order to extend the protections of the Idaho Human Right’s Act to all Idahoans.

### C. Marriage and Family Protections in Idaho

Marriage and family are essential parts of the fabric of American culture. However, through invidious and facially discriminatory laws and practices,<sup>158</sup> many LGBTQ people within American culture are unable to have the full protection of their marriage and family. Below is a survey of the protections Idaho affords to transgender and gender non-conforming individuals’ marriage and family.

*Marriage.* Under the Idaho Constitution, marriage is defined as between one man and one woman.<sup>159</sup> This restriction was passed via referendum in 2006.<sup>160</sup> The intent of the statute was to both prohibit the

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154. *Id.*

155. The court also discussed how the presentation of the employees of a store is a foundational part of running a business, and should be permitted on most occasions. *Albertson’s, Inc.*, 554 P.2d at 101.

156. *See supra* Part II.A, accompanying text.

157. *See supra* Part II. A, accompanying text.

158. *See infra* Part IV.C., text accompanying *Marriage*.

159. IDAHO CONST. art. III, § 28.

160. *See Idaho voters approve gay marriage ban*, KHQ NEWS, <http://www.khq.com/Global/story.asp?S=5648293> (last visited Apr. 10, 2013).

granting of same-sex marriages and acknowledging the validity of same-sex marriages granted by other states.<sup>161</sup> However, no case on point was found authored by either the Idaho Supreme Court or the Idaho Court of Appeals directly challenging or interpreting this amendment.<sup>162</sup> Furthermore, there is no definitional section that defines what constitutes a “man” and a “woman.”<sup>163</sup> However in dicta, the court has discussed an essentialist view of sex that would hold that a man and a woman is the sex assigned at birth for marriage.<sup>164</sup> In that case, a husband challenged the payment of alimony to his wife.<sup>165</sup> However, in the dicta of its dissenting opinion, the Idaho Supreme Court opined on the absurd notion of awarding alimony to a trans-sexual woman who was formerly the husband of a relationship.<sup>166</sup> While the court has not officially adopted this logic, it is the nearest indication of what the construction of the term sex is in Idaho.

While Idaho has not formally addressed the issue of transgender or gender non-conforming marriage, the Kansas Supreme Court plainly adopted the essentialist view of sex for the purposes of marriage.<sup>167</sup> In *In re Estate of Gardiner*, a father’s son petitioned the court to declare his father’s marriage to his mother, a trans-woman, to be void under Kansas’s same-sex marriage ban; thus naming him the sole heir of his father’s estate.<sup>168</sup> In reaching its determination, the Kansas Supreme Court reasoned:

The words “sex,” “male,” and “female” in everyday understanding do not encompass transsexuals. The plain, ordinary meaning of “persons of the opposite sex” contemplates a biological man and a biological woman and not persons who are experiencing gender dysphoria. A male-to-female post-operative transsexual does not fit the definition of a female. The male organs have been removed, but the ability to “produce ova and bear offspring” does not and never did exist. There is no womb, cervix, or ovaries, nor is there any change in his chromosomes.<sup>169</sup>

Thus for the purposes of Kansas’s ban on same-sex marriage, the court adopted a very narrow view of sex as represented by only the presence of biological indicators.<sup>170</sup> Recently, a Texas court adjudicated whether an Iowa marriage between a trans-man and a woman violated

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161. See Lisa Shultz, *No Faith, No Credit, No Union*, 56 ADVOCATE IDAHO 20 (2013).

162. Through my research, I have been unable to locate a case on point where either the Supreme Court of Idaho or the Idaho Court of Appeals was asked to interpret or analyze art. III, § 28 of the Idaho State Constitution.

163. See generally IDAHO CONST. art. III, § 28.

164. See *Olsen v. Olsen*, 98 Idaho 10, 16, 557 P.2d 604, 610 (1976).

165. *Id.* at 11, 557 P.2d at 605.

166. *Id.* at 16, 557 P.2d at 610.

167. *In re Estate of Gardiner*, 42 P.3d 120 (Kan. 2002).

168. *Id.* at 122–23.

169. *Id.* at 135.

170. *Id.*

Texas ban on same-sex marriage in a divorce proceeding.<sup>171</sup> In ruling that the couple was not husband and wife under the Texas statute, the Texas state court adopted the definition of sex, for the purposes of marriage, is the assigned sex at birth.<sup>172</sup> This ruling allowed the wife to claim much of the property acquired during the marriage.<sup>173</sup>

In contrast, a recent Minnesota Federal District Court ruled that for the purposes of marriage, sex at the time of marriage is determinate in a one-man, one-woman marriage statute.<sup>174</sup> In *Radtke v. Miscellaneous Drivers & Helpers Union Local*, an insurance board ruled that the marriage between an insurance policy holder and his transgender wife was not a marriage as defined by the Minnesota opposite-sex only marriage statute.<sup>175</sup> The district court ruled that the marriage was valid, as sex is not determined by biology or by the sex assigned at birth, but the present sex of the person at the time of marriage.<sup>176</sup> The court flatly rejected the interpretation of sex that is based on the one assigned at birth, concluding:

[a]n individual's sex includes many components, including chromosomal, anatomical, hormonal, and reproductive elements, some of which could be ambiguous or in conflict within an individual. The assigned sex of an individual at birth is based only on observation of anatomy at birth, which itself may change when the individual reaches puberty.<sup>177</sup>

Here the court acknowledges the complexities that exist in humans regarding sex and gender; complexities that a narrow definition of sex and gender does not accurately define an individual's identity, and leaves outside the law. In Idaho, the legislature should define sex and gender broadly so that the court could adopt this definition of sex and gender, to ensure more Idahoans' marriages are protected.

*Family.* Under the Idaho Code, a person's "transsexualism," "transvestitism,"<sup>178</sup> or sexual preference or orientation cannot be considered as

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171. Trudy Ring, *Judge Rules Texas Transgender Man's Marriage Valid*, THE ADVOCATE (December 06, 2011), <http://www.advocate.com/news/daily-news/2011/12/06/judge-rules-texas-transgender-mans-marriage-valid>.

172. *Id.*

173. *Id.*

174. *Radtke v. Misc. Drivers & Helpers Union Local*, 867 F.Supp.2d 1023 (D. Minn. 2012).

175. *Id.* at 1027.

176. *Id.* at 1031–33.

177. *Id.* at 1032.

178. Transvestitism is an older term used to describe people who "cross-dress," and in a modern context broadly gender non-conforming individuals. See *Transvestite, Definition of Terms*, GENDER EQUITY RESOURCE CENTER, [http://geneq.berkeley.edu/lgbt\\_resources\\_definiton\\_of\\_terms#intersex](http://geneq.berkeley.edu/lgbt_resources_definiton_of_terms#intersex) (last accessed Feb. 1, 2013). The Berkeley Gender Equity Resource Center Defines Transvestite as: "Individuals who regularly or occasionally wear the

a disability during proceedings surrounding parent-child relationships.<sup>179</sup> Generally the Idaho Supreme Court has affirmed this.<sup>180</sup> In *McGriff v. McGriff*, the court ruled that a husband's sexual orientation could not be taken, by itself, as basis for awarding or denying custody, stating: "sexual orientation, in and of itself, cannot be the basis for awarding or removing custody."<sup>181</sup> However the court did state that a status could be taken into account, if it harmed the children in some way.<sup>182</sup> The Idaho Supreme Court has not, however, taken a case that has taken a person's gender identity into account during custody proceedings.<sup>183</sup>

In other Western states, courts have taken into account a parent's transgender identity when awarding custody.<sup>184</sup> For example, Washington has taken the status of a transgender person into account when awarding the custody of children.<sup>185</sup> In *Magnuson v. Magnuson*, the Washington Court of Appeals held that a trial court's determination that the surgery and transition of the children's father, a trans-woman, would render their environment unstable, despite the finding that she was the primary parent.<sup>186</sup> In a dissenting opinion, the court contended the children's need for a stable home, was in fact merely the trial court awarding primary custody to the mother because of the status of the father as a trans-woman.<sup>187</sup>

Thus in the case of child custody, it would seem that the State of Idaho has already ruled that the gender expression of the parent is an impermissible basis to award custody or terminate a parent-child relationship.<sup>188</sup> However if an Idaho appellate court does take up this case, it would be appropriate to broadly interpret transsexualism and transvestitism to include transgender and gender non-conforming individuals, in order to fully protect the relationships those parents have with their children.

#### D. Quality of Life

This section concerns an individual's ability to use the state's mechanisms and access medical care to correct the state's assignment of their identity. This may include the ability to change an individual's

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clothing socially assigned to a gender not their own, but are usually comfortable with their anatomy and do not wish to change it (i.e. they are not transsexuals)." *Id.*

179. IDAHO CODE ANN. § 16-2002 (2009).

180. *See McGriff v. McGriff*, 140 Idaho 642, 649, 99 P.3d 111, 118 (2004) (holding that sexual orientation alone cannot be determinative in deciding custody and only through a showing of harm can it be considered in determining custody).

181. *Id.*

182. *Id.*

183. Through my research, I have been unable to find a reported case where the Idaho Supreme Court or the Court of Appeals has taken up a case interpreting this statute.

184. *See, e.g.*, *In re the Marriage of Magnuson*, 170 P.3d 65 (Wash. App. Ct. 2007).

185. *Id.* at 66.

186. *Id.* at 67-69.

187. *Id.* at 68-69.

188. IDAHO CODE ANN. § 16-2002 (2009).

name, the ability to amend the assigned sex on a birth certificate, and/or access medical treatment.<sup>189</sup>

*Name Change.* A person's name is central to their construction of an identity.<sup>190</sup> It is how people both relate to themselves and how other people relate to them. Additionally a name serves an identification function for the government and other organizations contracting with the individual. The process of altering an individual's name occurs on a daily basis after weddings and when children are born.<sup>191</sup> When an individual's gender or sex identity is incongruous with the name given to them at birth, they may want to change it.<sup>192</sup> In Idaho, any person under the current statute is permitted to alter their name.<sup>193</sup> The statute requires that the applicant appear before magistrate and give cause as to why they are requesting a name change.<sup>194</sup> At that time people can object and present cause as to why the court should deny the change.<sup>195</sup> It is, however, fully within the court's discretion to deny the name change.<sup>196</sup> The statute does not require a finding of fraud or intention to commit an illegal act in order to deny the name change.<sup>197</sup> Instead, it is within the discretion of the court to deny the name change.<sup>198</sup> Thus if a court had cause to deny a transgender or gender non-conforming applicant based on a policy concern about gender change, under this statute they could. However, no case was located that was appealed to either the Idaho Supreme Court or the Idaho Court of Appeals challenging this issue.<sup>199</sup>

In a recent Oklahoma case, a trial court judge did exercise his discretion and denied a transgender woman a name change.<sup>200</sup> In that case, a trans-woman, Steven Charles Harvey, was seeking to change her name to Christie Ann Harvey as part of her transition.<sup>201</sup> However the district court denied her name change, discussing that it was against

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189. See GRANT, ET AL., *supra* note 12, 3–8.

190. See Michael A. Gilbert *Beyond Appearances: Gendered Rationality and the Transgendered*, in GENDER BLENDING 66–67 (Bonnie Bullough, Vern Bullough, and James Elias eds. 1997) discussing how the construction of a gender identity is all encompassing including dress, appearance, and name; this holds true for transgender and gender non-conforming individuals as well as the general population).

191. It is traditional in American culture to change one's, usually the woman's, last name after marriage to signify that the couple is married.

192. See Gilbert, *supra* note 190, at 66–67.

193. IDAHO CODE ANN. § 7-804 (2012).

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

199. Through my research, I have been unable to locate any cases where a transgender or gender non-conforming individual challenged this provision of the Idaho Code.

200. In Re Harvey, 293 P.3d 224 (Okla. Civ. App. Div. 1 2012).

201. *Id.*

public policy and fraud to aid someone in a transition, stating, “[a] so-called sex-change surgery can make one appear to be the opposite sex, but in fact they are nothing more than an imitation of the opposite sex.”<sup>202</sup> He further went on to support his argument, using biblical law, proclaiming:

[i]t is notable that Genesis 1:27-28 states: “So God created man in his own image, in the image of God created he him; male and female created he them. And God blessed them, and God said unto them, be fruitful, and multiply, and replenish the earth (. . . .)” The DNA code shows God meant for them to stay male and female.<sup>203</sup>

However, on appeal, the Oklahoma Court of Civil Appeals reversed holding that a denial of a name change must be based on a finding of an attempt to commit fraud, or that the applicant has another illegal purpose behind their name change.<sup>204</sup> Thus the Oklahoma appellate court reversed and remanded.<sup>205</sup> Unlike the Idaho statute, the Oklahoma statute does require a finding of fact to check judicial discretion similar to what happened in the trial court. Another related cause of concern for transgender and gender non-conforming individuals seeking to change their name is that the statute requires that the name be published in the paper.<sup>206</sup> This is done so creditors of the individual seeking the name change can still pursue them for collections and unpaid debts.<sup>207</sup> This can cause privacy concerns for someone who does not want to be “out”<sup>208</sup> about their gender identity.<sup>209</sup> In small towns, it may even invite harassment or discrimination against the individual.<sup>210</sup>

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202. Trudy Ring, *Transgender Name Change Not OK With Bible-Quoting Oklahoma Judge*, ADVOCATE.COM (Sept. 16, 2012, 3:47 PM), <http://www.advocate.com/politics/transgender/2012/09/16/oklahoma-judge-cites-bible-denying-transgender-name-changes>.

203. *Id.*

204. In the Matter of the Application of Steven Charles Harvey to Change His Name, No. 110,048, 2012 WL 6740155, \*1 (Okla. Civ. App. Div. 1 2012).

205. *Id.*

206. IDAHO CODE ANN. § 7-803 (2009).

207. *Id.*

208. Similar to being out about one’s sexual orientation, some transgender and gender non-conforming individuals will freely tell people that they are transgender or gender non-conforming. However, a person’s life may require, or they may prefer, to keep their identity hidden to avoid discrimination and unequal treatment. *See generally Coming Out as Trans*, OHIO UNIVERSITY LGBT CENTER, <http://www.ohio.edu/lgbt/resources/transcomingout.cfm> (last visited Apr. 10, 2013).

209. While eliminating the newspaper reporting system may seem to be drastic and potentially leave creditors without notification of name change, the modern trend is that credit-reporting agencies no longer use newspaper filings to monitor name changes and instead employ third-party corporations to monitor electronic court filings and other documents for name changes. *See How do credit-reporting agencies compile credit reports?*, *Credit Reports*, U. FED. CREDIT UNION, <https://www.ufcu.org/learning/credit/reports/index.php> (last visited Apr. 10, 2013) (discussing how credit agencies compile credit profiles); *see also How Credit Reports Are Compiled, Fair Credit Reporting*, IN.GOV, <http://www.in.gov/dfi/2589.htm> (last visited March 4, 2013) (discussing how modern report-

*Birth Certificate Correction.* Similar to name change, some transgender and gender non-conforming individuals may seek to correct their birth certificate to accurately reflect their identity.<sup>211</sup> Currently forty-seven states and the District of Columbia will allow transgender and gender non-conforming individuals to amend their birth certificate to accurately reflect their sex.<sup>212</sup> Some states require a genital reconstructive surgery while others just require a showing that the sex of an individual has changed.<sup>213</sup> There are only three states that will not amend a person's birth certificate to correct the sex.<sup>214</sup> Idaho is one of these states.<sup>215</sup> Under the current Idaho statute, there is no formal prohibition against a transgender or a gender non-conforming individual petitioning the state for a sex correction on their birth certificate.<sup>216</sup> The administrative code too provides no formal prohibition against a person amending their sex on their birth certificate.<sup>217</sup> However, upon inquiry to the Idaho Department of Vital Statistics, the current policy of the department is to not allow the correction of a person's sex on their birth certificate after it is issued.<sup>218</sup>

California recently addressed the issue of amending the sex of a birth certificate issued in California to an individual now residing in another jurisdiction that does not permit such an amendment.<sup>219</sup> In that case, a Kansas resident who was born in California petitioned California to issue a new birth certificate to correct her sex.<sup>220</sup> The California District Court denied this application because she was no longer a resident and because Kansas refused to amend her birth certificate.<sup>221</sup> On appeal, the California Appellate Court reversed, holding that denying the amendment of the birth certificated issues in California to a person no

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ing agencies use constantly updated electronic databases to form credit reports that monitor court filings).

210. *See id.*

211. *Supra* Part II.A, accompanying text.

212. *Sources of Authority to Amend Sex Designation on Birth Certificates*, LAMBDA LEGAL, <http://www.lambdalegal.org/publications/sources-of-authority-to-amend> (last updated Jan. 3, 2012).

213. *Id.*

214. *Id.*

215. *Id.*

216. *See* IDAHO CODE ANN. § 39-250 (2009).

217. *See* IDAHO ADMIN. CODE r.16.02.08.201 (2006).

218. THE WILLIAMS INSTITUTE, *supra* note 83, at 10. However, recently the Idaho Transportation Department announced that it will permit a transgender or gender non-conforming individual to alter the sex indicator on a driver's license without proof of having undergone a sexual reassignment surgery. Leo Morales, *Idaho Amends Policy for Changing Driver's Licenses*, ACLU OF IDAHO (Apr. 23, 2013), <http://acluidaho.org/Idaho-amends-policy-for-changing-drivers-licenses>.

219. *Somers v. Superior Court*, 172 Cal. App. 4th 1407 (Cal. App. Dep't Super. Ct. Div. 1 2009).

220. *Id.* at 1411.

221. *Id.*

longer living in California violated the equal protection clause of the Fourteenth Amendment of the United States Constitution and the California Constitution.<sup>222</sup> In its reasoning, the court holds that only permitting residents of California to correct their California birth certificate created a class of transgender individuals that was treated differently than those that reside in the state of California.<sup>223</sup> Accordingly, the California Appellate Court reversed and remanded the case.<sup>224</sup>

Because, Idaho does not allow transgender people to correct the sex on their birth certificates—under the reasoning used by the California court—Idaho may run afoul of the equal protection clause of the Fourteenth Amendment and of the Idaho Constitution if it permits other individuals to amend their birth certificate.

*Access to Medical Care.* Transgender and gender non-conforming individuals not only require medical treatment for many of the same reasons as the general population, e.g., sickness; however, unlike the general population, transgender and gender non-conforming individuals may also require access to medical care, to confirm their gender identity.<sup>225</sup> This could include hormone therapy,<sup>226</sup> body modification, and genital corrective surgery.<sup>227</sup> Given the extensive use of medical services that a transgender or gender non-conforming individual may require in order to fulfill their gender identity, this extensive interaction with doctors and healthcare practitioners may result in discrimination based on a transgender or gender non-conforming person's status.<sup>228</sup> For example, a doctor may feel that it is against their moral beliefs to treat a transgender or gender non-conforming individual for any reason.<sup>229</sup> This requires a transgender or gender non-conforming individual to have to change insurance or continually seek out medical professionals willing to treat them.<sup>230</sup> This type of discrimination poses a greater challenge in

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222. *Id.* at 1412.

223. *Id.* at 1416.

224. *Id.*

225. *See* SAMONS, *supra* note 55, at 3–5.

226. Hormone replacement therapy is a form of therapy used to aid a transgender person in correcting their sex if they wish, by introducing hormones that alter their appearance. *See* *Hormone Replacement Therapy*, OHIO U. LGBT CENTER, <http://www.ohio.edu/lgbt/resources/transitioning.cfm> (last visited Jan. 30, 2013). For example, this may include the introduction of estrogen for trans-women and testosterone for trans-men. *Id.* However, it is important to note that not all transgender or gender non-conforming individuals choose to have gender confirmation procedures including hormone replacement therapy. *Id.*

227. *See* SAMONS, *supra* note 55, at 3–5.

228. *See* *Transgender Health Resources*, THE AM. MED. STUDENT ASS'N, <http://www.amsa.org/AMSA/Homepage/About/Committees/GenderandSexuality/TransgenderHealthCare.aspx> (last visited Feb. 24, 2013) explaining that a transgender or gender non-conforming individual may require a range of medical care from general medical care to hormone replacement therapy and sexual reassignment surgery.

229. *See* Susan Donaldson James, *Trans Man Denied Cancer Treatment; Now Feds Say It's Illegal*, ABC NEWS 1–2 (Aug. 8, 2012), <http://abcnews.go.com/Health/transgender-bias-now-banned-federal-law/story?id=16949817>.

230. *Id.*

Idaho, where a rural area may only have a limited number of doctors. If a doctor in a rural area declines to treat a transgender or gender non-conforming individual, the next doctor may be located hours away. In Idaho, there is no mandate prohibiting discrimination against a transgender or gender non-conforming individual seeking medical care, transition related or general medical care.<sup>231</sup> Thus, an Idaho doctor may legally deny a transgender or gender non-conforming person access to medical treatment to confirm their identity based solely on their status.<sup>232</sup>

In a recent decision, a federal district court judge found that the Idaho Department of Correction's denial of medical access to a transgender inmate violated the Eighth Amendment.<sup>233</sup> Here, the defendant-inmate was housed at an Idaho Correctional facility and adamantly contended that he suffered from Gender Identity Disorder.<sup>234</sup>

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231. See IDAHO CODE ANN. § 67-5909(5)(a) (2009).

232. The scope of this comment is limited applying the current anti-discrimination in public accommodation law that exists in Idaho. See IDAHO CODE ANN. § 67-5902 (2009) (defining public accommodation to include any business offering services to the public). Idaho's broad anti-discrimination law applies to hospitals and doctors offices. See *id.* Thus hospitals and doctor's office in Idaho may not discriminate against people based on a person's race, color, religion, sex or national origin. IDAHO CODE ANN. § 67-5909 (2009). This comment is not specifically addressing First Amendment claims brought by medical parishioners who have a prejudice against transgender and gender non-conforming individuals rooted in their religious beliefs; and according to the doctors, justifying a denial of medical treatment to transgender and gender non-conforming patients. However, the claim of a religious belief used to discriminate against, and deny healthcare to, transgender and gender non-conforming individual is analogous to a line of cases ruling on a doctor's refusal to artificially inseminate a lesbian couple based on the doctor's religious beliefs. *N. Coast Women's Care Med. Grp., Inc. v. San Diego Cnty. Superior Court*, 189 P.3d 959 (Cal. Sup. Ct. 2008). There the court held that a neutral and generally applicable anti-discrimination law that required equal access to medical care regardless of a person's sexual orientation was valid and constitutional, even if it incidentally burdens a particular religious exercise. *Id.* at 965–67. This also aligns with society's interest in having healthy and productive citizens. However in contrast, some state laws that allow medical providers to deny abortions and contraceptives to women based on religious beliefs in defiance of many state's anti-discrimination laws. See, e.g., compare IDAHO CODE ANN. § 18-611 (2012) (allowing medical providers to discriminate in the providing of their medical services on the basis of conscience), with IDAHO CODE ANN. § 67-5909 (2009) (prohibiting discrimination in public accommodation based on race, color, religion, sex or national origin). Because of the inconsistencies in this area of the law, this issue should be addressed in a different comment. For a more in-depth discussion on religious objections by medical professionals to treating patients, see Tricia K. Fujikawa Lee, *Emergency Contraception in Religious Hospitals: The Struggle Between Religious Freedom and Personal Autonomy*, 27 U. HAW. L. REV. 65 (2004).

233. *Gammatt v. Idaho State Bd. of Corr.*, No. CV05-257-S-MHW, 2007 WL 2186896 (D. Idaho July 27, 2007).

234. *Id.* Gender Identity Disorder was the diagnosis used by mental health professionals to diagnose transgender and gender non-conforming individuals. Eric Cameron, *APA to Remove "Gender Identity Disorder" from DSM-5*, HRC BLOG (Dec. 4, 2012), <http://www.hrc.org/blog/entry/apa-to-remove-gender-identity-disorder-from-dsm-5>. However this term has fell out of favor with many gender scholars and mental health professionals as

After several unsuccessful diagnoses and repeated requests to see a specialist to treat him, the inmate attempted suicide and later performed a self-castration.<sup>235</sup> However, against his protests, the facility refused to treat him for Gender Identity Disorder and only offered testosterone to replace the hormones lacking in his body as a result of the castration.<sup>236</sup> In the court's reasoning, the state violated the Eighth Amendment's guarantee of medical care to prisoner as the staff failed to treat the inmate to the point of deliberate indifference.<sup>237</sup> While this case is, admittedly, generally inapplicable to the general population of Idaho, its premise is not. Transgender and gender non-conforming individuals need to access medical care in order to correct their identity. The denial of this treatment can result in negative health consequences to the individual. In order to stop this, Idaho should prohibit discrimination of medical treatment based on an individual's status as a transgender or gender non-conforming individual.

Recently, under the Affordable Care Act, the Attorney General stated that it will be illegal to deny insurance or medical treatment to transgender and gender non-conforming individuals; citing a broad interpretation of section 1557's antidiscrimination mandate based on sex.<sup>238</sup> If Idaho adopted this broad interpretation of sex within the current statute prohibiting discrimination based on sex in public accommodation,<sup>239</sup> the State would be able to cover transgender individuals within the current statute; and thus protect transgender and gender non-conforming individuals from discrimination when seeking medical treatment.<sup>240</sup>

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it ignores the social construction of gender and suggests that something is wrong with the individual from not conforming to gender norms. *Id.* Gender Dysphoria is the modern term used to diagnose someone experience emotional distress over one's gender identity. *Id.*

235. *Gammett*, No. CV05-257-S-MHW, 2007 WL 2186896 at \*4-8.

236. *Id.*

237. *Id.* at \*16-17.

238. M. Dru Levasseur, *Affordable Care Act and Nondiscrimination*, LAMBDA LEGAL (Aug. 7, 2012), <http://www.lambdalegal.org/blog/aca-and-nondiscrimination>.

239. See IDAHO CODE ANN. § 67-5909(5)(a) (2009) (prohibiting discrimination in public accommodation on the basis of sex).

240. Note, this comment is not addressing whether the state should have to provide medical treatment to transgender individual, but is limited to discussing the application of anti-discrimination public accommodation laws to transgender and gender non-conforming individuals so they can access medical treatment without being discriminated against based on status. In nations with socialized healthcare and an equality mandate, some do cover gender confirmation surgery in order to not discriminate against transgender and gender non-conforming individuals. See *B.C. Government Now Pays for Surgery Changing Women into Men*, TIMES COLONIST (Apr. 6, 2013), <http://www.timescolonist.com/news/local/b-c-government-now-pays-for-surgery-changing-women-to-men-1.105676>. In the United States, the American Medical Association supports private insurance providers to remove barriers to transgender patients to access treatment and considers the denial of treatment as discrimination. See AMERICAN MEDICAL ASSOCIATION HOUSE OF DELEGATES, RESOLUTION 122-A-08 REMOVING FINANCIAL BARRIERS TO CARE FOR TRANSGENDER PATIENTS 1-4 (Dec. 2008), available at [http://www.tgender.net/taw/ama\\_resolutions.pdf](http://www.tgender.net/taw/ama_resolutions.pdf). At the state level, some states have began prohibiting private insurance providers from discriminating based on an individual's status as transgender or gender non-conforming. See, e.g., *Oregon Bans Insurer Anti-*

V. DISCUSSION: EXPANDING THE DEFINITION OF SEX AND  
GENDER IN IDAHO

Transgender and gender non-conforming individuals are currently left outside the scope of the law in Idaho.<sup>241</sup> Admittedly, it is difficult to force a restructuring of culture to accurately reflect the complexities of sex and gender that are naturally part of human variation.<sup>242</sup> Culture is slow to change, and the change is gradual as people become educated, and the population's views on gender and sex are redefined.<sup>243</sup> However as an institution, the State of Idaho and the courts of Idaho have the ability to acknowledge the reality that sex and gender are far more complex than the judicially enforced sexual and gender binary; and thereby, extend the protection and application of the law to transgender and gender non-conforming people. This would eliminate "institutional-discrimination"<sup>244</sup> currently in the law and bring transgender and gender non-conforming individuals under the full protection of the law. To effectuate this re-definition of sex and gender, the mechanism that this comment urges the state of Idaho to adopt is a bill that would broadly define sex and gender under Idaho law that would bring transgender and gender non-conforming individuals under the protections of the law. This would aid judges in applying the protection of Idaho's laws.<sup>245</sup>

A. The Solution

There are several approaches to implement a broad definition of sex and gender in the Idaho Code. The most basic approach, and the approach this comment suggests to use, is to pass a bill that redefines sex and gender under the Idaho Code broadly enough to reflect the complex-

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*Transgender Discrimination*, AMAWIRE (Jan. 23, 2013), <http://www.ama-assn.org/ams/pub/amawire/2013-january-23/2013-january-23-glbts.html>. For a full discussion on mandating state covered gender see Nikki Burrill & Valita Fredland, *The Forgotten Patient: A Health Provider's Guide to Providing Comprehensive Care for Transgender Patients*, 9 IND. HEALTH L. REV. 69 (2012).

241. See *supra* part IV, accompanying text.

242. Generally cultural change is gradual; for a general discussion of cultural change see Dennis O'Neil, *Processes of Change*, CULTURE CHANGE: AN INTRODUCTION TO THE PROCESSES AND CONSEQUENCES OF CULTURE CHANGE, [http://anthro.palomar.edu/change/change\\_2.htm](http://anthro.palomar.edu/change/change_2.htm) (last updated Oct. 19, 2006).

243. See *supra* part II.A and accompanying text; see also O'Neil, *supra* note 242.

244. Institutional-discrimination is distinguished from prejudice or bigotry: Institutional discrimination is the structuring of laws and practices in institutions and governments within in a culture that deny protection or coverage of the law to minority groups within the culture; prejudice or bigotry is the explicit discrimination against a group by another within a culture based on the perception of the former group. See Christopher McCrudden, *Institutional Discrimination*, 2 OXFORD J. OF LEGAL STUD. 303, 306–09 (1982).

245. See *supra* part III.C and accompanying text discussing the sexing of individuals for the purposes of marriage.

ity that exists within human gender and sex; thereby, including transgender and gender non-conforming individuals under the protections of the law. While this proposal seems daring, it is not without precedent in the United States. Recently several states have passed “gender-neutral”<sup>246</sup> language statutes.<sup>247</sup> According to the National Conference of State Legislatures, at least thirty states have passed laws aimed at revamping and rewording their state’s laws in order to remove sexist and non-inclusive, phrases and statements from their laws.<sup>248</sup> As of February 8, 2013<sup>249</sup> Washington State’s Senate passed a 500-page statute that would eliminate phrases that were gendered or only in the masculine and replace them with more gender inclusive phrasing.<sup>250</sup> Thus phrases like “policeman” that only refer to “men” would be replaced with “police officer,” which has no gender preference.<sup>251</sup> The authors of the Washington bill aim is to eliminate sexist language, and thereby reduce some institutionalized sexism within Washington State, on the premise that altering rhetoric changes the way people relate to each other.<sup>252</sup> This in turn would help reinforce to the all Washingtonians that sexism is not acceptable.<sup>253</sup> The measure, however, is not without criticism.<sup>254</sup> One of the critiques of the legislation, applicable to this comment, is that the bill still uses phrases like “he or she” as opposed to “individual” or “person.”<sup>255</sup> The use of these terms still leaves out transgender and gender non-conforming individuals or requires the court to fit these individuals into the law, thus making the laws less

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246. Gender-neutral language is a literary movement that aims to: eliminate terms that differentiate between people based on sex, and eliminate terms used in the masculine that are suppose to apply to all sexes and genders. *See Tips for Using Inclusive, Gender Neutral Language*, MARQUETTE UNIVERSITY: WRITING ACROSS THE CURRICULUM, <http://www.marquette.edu/wac/neutral/NeutralInclusiveLanguage.shtml> (last modified July 7, 2011). For example, instead of “firemen” the gender-neutral phrase is “firefighter,” or instead of “freshmen” the gender-neutral phrase is “first year student.” *See id.*

247. Robert Stanton, *State language shifts into gender-neutral*, HUSTON CHRONICLE (Feb. 8, 2013), <http://www.chron.com/news/houston-texas/houston/article/State-language-shifts-into-gender-neutral-4264532.php>.

248. *Id.*

249. S. 5077, 2013 Leg., Reg. Sess. (Wa. 2013), available at <http://apps.leg.wa.gov/billinfo/summary.aspx?bill=5077&year=2013#history>.

250. Associated Press, *WA Senate Passes Gender-Neutral Language Measure*, THE SEATTLE TIMES (Feb. 8, 2013), [http://seattletimes.com/html/localnews/2020316699\\_apwagenderneutrallaw.html](http://seattletimes.com/html/localnews/2020316699_apwagenderneutrallaw.html). Subsequently, the governor of the Washington signed the bill into law on April 2013. Rachel La Corte, *Gov. Inslee signs gender-neutral language bill*, THE SEATTLE TIMES (Apr. 22, 2013), [http://seattletimes.com/html/localnews/2020838939\\_apwaxrgenderneutrallaw.html](http://seattletimes.com/html/localnews/2020838939_apwaxrgenderneutrallaw.html).

251. Associated Press, *supra* note 250.

252. Rachel La Corte, *Gender-Neutral Language Bill Weighed in Washington State*, THE HUFFINGTON POST (Feb. 3, 2013), [http://www.huffingtonpost.com/2013/02/03/gender-neutral-language-bill\\_n\\_2612544.html](http://www.huffingtonpost.com/2013/02/03/gender-neutral-language-bill_n_2612544.html).

253. *Id.*

254. Steven Dolan, *Gender neutrality in the law: Not quite neutral*, THE SEATTLE TIMES (Feb. 13, 2013), <http://blogs.seattletimes.com/opinionnw/2013/02/13/gender-neutrality-in-law-not-quite-neutral/>.

255. *Id.*

than gender neutral and equal.<sup>256</sup>

Idaho could easily adopt a statute that is similar to the one pending in Washington State. However in order to cover transgender and gender non-conforming individuals under the Idaho Code, unlike the Washington law, the Idaho law's scope of gender neutrality would have to be broader. Specifically in addition to rewording statutes to be more gender neutral—e.g. replacing “he or she” with “individual”—the law would have to include a provision that broadly defines sex and gender for the code. This broadness would not only eliminate sexist references currently in the code, but also extend the law's definitions of sex and gender to include transgender and gender non-conforming individuals. Doing so would simultaneously reinforce the premise to all Idahoans that sexism is not acceptable, and acknowledge the existence and worth of transgender and gender non-conforming Idahoans.

Mechanically, the rhetoric of the definition of sex a gender could be one all-encompassing statement that applies to the entire code, or it could be done on a law-by-law basis where a commission is formed to examine the code and define or redefine sex and gender as needed. Illinois, for example, formed a gender-neutral commission to examine the Illinois code and generate a report on rewording the Illinois code to be more gender neutral.<sup>257</sup> Idaho could commission a similar committee that would go through the Idaho Code, mark up, and amend the definition of sex and gender in various Idaho statutes. The rhetoric of the definition could be formatted in a variety of ways. California, for example, has explicitly included transgender and gender non-conforming individuals within various sections of its code by defining gender to include sex and gender expression.<sup>258</sup> The text of the definition states that gender: “means sex, and includes a person's gender identity and gender expression. ‘Gender expression’ means a person's gender-related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth.”<sup>259</sup> This expansive definition would explicitly extend the protections of Idaho's laws to transgender and gender non-conforming Idahoans. Another good example of the text of a definition of sex and gender that Idaho could adopt to include transgender and gender non-conforming individuals under the protections of the law is that of Hawaii. The text of Hawaii's anti-discrimination in public accommodations statute states that it is:

Unfair discriminatory practices that deny, or attempt to deny, a person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of

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256. *Id.*

257. *See* 5 ILL. COMP. STAT. 90/5 (West 2013).

258. *See, e.g.,* CAL. PENAL CODE § 422.56 (West 2013).

259. *Id.*

public accommodation on the basis of . . . sex, including gender identity or expression . . . are prohibited.<sup>260</sup>

Furthermore, the statute defines gender identity expression as: “a person's actual or perceived gender, as well as a person's gender identity, gender-related self-image, gender-related appearance, or gender-related expression, regardless of whether that gender identity, gender-related self-image, gender-related appearance, or gender-related expression is different from that traditionally associated with the person's sex at birth.”<sup>261</sup> Unlike the California statute that includes sex and gender expression under the term gender, here Hawaii has included gender expression expressly within the text of the code and provided an expansive definition of what gender expression means. Together these two provisions of the Hawaii code cover both transgender and gender non-conformation individuals under the protections of the law. Idaho could adopt either the text of the California statute or the Hawaii statute for either a code wide definition of sex and gender or a law-by-law definition of sex and gender that would bring transgender and gender non-conforming Idahoans under the protections and applicability of Idaho's laws.

### B. Impacts

Statutorily defining sex and gender in broad manner to include transgender and gender non-conforming individuals under the protections of Idaho's law would not only yield benefits to individual transgender and gender non-conforming individuals, but also yield substantial benefits and the State of Idaho. First, broadly defining sex and gender to include transgender and gender non-conforming individuals would acknowledge the reality of sex and gender existing within American culture and give state recognition to these individuals and remove the institutional transgender and gender non-conforming discrimination that currently exists in Idaho's laws.<sup>262</sup> Doing so, would allow transgender and gender non-conforming individuals to be both protected under the state's laws and allow them to bring claims for violations of the Idaho's non-discrimination laws; thus providing remedies for discriminatory actions and reinforcing the assertion that discrimination based on an individual's status as a transgender and gender non-conforming individual is not acceptable in the State of Idaho. For individuals, this broad definition of sex and gender definition would help to create a healthy, safe, and supportive culture for transgender and gender non-conforming individuals in the Idaho.

In addition to guaranteeing the health, safety, and well-being of transgender and gender non-conforming Idahoans, broadly defining sex

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260. HAW. REV. STAT. § 489-3 (West 2013).

261. HAW. REV. STAT. § 489-2 (West 2013).

262. See generally McCrudden, *supra* note 244, discussing institutional discrimination.

and gender in the Idaho code to include transgender and gender non-conforming individuals would save the Idaho's taxpayers considerable revenue.<sup>263</sup> As discussed above,<sup>264</sup> transgender and gender non-conforming individuals face substantial discrimination based on their status. This discrimination results in lower annual salaries of transgender and gender non-conforming individuals than comparatively educated individuals in the general population,<sup>265</sup> which in turn generates less tax revenue for the State of Idaho. Furthermore, because transgender and gender non-conforming individuals are fired or not promoted at high rates<sup>266</sup> because of discrimination based on their status, they become eligible for public assistance.<sup>267</sup> This translates into millions of dollars in taxpayer dollars funding transgender and gender non-conforming individuals who are forced to use public assistance.<sup>268</sup> For example, Massachusetts paid approximately three million dollars annually in unemployment benefits alone for transgender and gender non-conforming individuals.<sup>269</sup> Thus, including transgender and gender non-conforming individuals within the definition of sex and gender under the Idaho laws would potentially translate into millions of dollars in tax revenue generated for the state.

Besides generating tax revenue for Idaho, including transgender and gender non-conforming individuals under the protections of Idaho laws would also encourage them to remain in Idaho and contribute to the state's economy. Generally, in the United States, many LGBTQ individuals relocate from rural areas to urban areas.<sup>270</sup> This phenomenon is due to a variety of factors in including the discrimination and negative impacts of living in a rural area.<sup>271</sup> By defining "sex" and "gender" to include transgender and gender non-conforming individuals, and there-

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263. See JODY L. HERMAN, THE WILLIAMS INSTITUTE, THE COST OF EMPLOYMENT DISCRIMINATION AGAINST TRANSGENDER RESIDENTS OF MASSACHUSETTS (2011), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Herman-MA-TransEmpDiscrim-Apr-2011.pdf>.

264. See *supra* Part II.B (discussing transgender and gender non-conforming individuals in America).

265. *Supra* Part II.B (discussing income rates as compared to the education level of gender non-conforming individuals in America).

266. See *supra* Part II.B (discussing transgender discrimination in America).

267. HERMAN, *supra* note 263, at 2.

268. *Id.*

269. *Id.*

270. Caroline Harmon, *Urban Implications of Growth of Gay and Lesbian Populations in Suburbs*, THIS BIG CITY, <http://thisbigcity.net/urban-implications-growth-gay-lesbian-populations-suburbs/> (last visited Apr. 10, 2013); see also Culton, *supra* note 86, at 74 (discussing that some LGBTQ individuals also go to urban areas because the more visible and supportive communities); see also Bridges, *supra* note 91 (discussing the urban populations of LGBTQ people).

271. See *supra* Part II.B (discussing the effects on LGBTQ individuals living in a rural setting).

by extending protections of the law to them, transgender and gender non-conforming Idahoans would be able to address this discrimination. This would encourage transgender and gender non-conforming individuals to remain in Idaho, which would result in more productive transgender and gender non-conforming individuals contributing to the market and overall economy of the state of Idaho, as transgender and gender non-conforming individuals could work and live in Idaho without the fear of being fired for their identity.<sup>272</sup>

## VI. CONCLUSION

While the current state of the law in Idaho does not adequately cover transgender and gender non-conforming Idahoans, this status quo does not have to be maintained. As more transgender and gender non-conforming individuals become educated and more open about their identities, the need to afford equal protection becomes more important than ever.<sup>273</sup> In order for Idaho to afford full protection under its laws, the Idaho legislature should adopt a law that would create a provision in the code that broadly defines sex and gender to include transgender and gender non-conforming individuals. By doing so, courts would be able to equally apply the law to transgender and gender non-conforming individuals where they have failed to do so in the past. By bringing transgender and gender non-conforming Idahoans into the scope and protections of Idaho's laws, Idaho will be a safer and healthier place for them to live. The desperation felt by Ms. Carlson<sup>274</sup> does not have to be the future for transgender and gender non-conforming Idahoans.

*Robert Anderson\**

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272. See Meghann M. Cuniff, *Big show of support for Boise anti-discrimination ordinance*, IDAHO STATESMAN (Nov. 13, 2012), <http://www.idahostatesman.com/2012/11/13/2345562/big-show-of-support-for-boise.html#storylink=misearch>.

273. Richard Pérez-Peña, *College Health Plans Respond as Transgender Student Gain Visibility*, N.Y. TIMES (Feb. 12, 2013), [http://www.nytimes.com/2013/02/13/education/12sexchange.html?\\_r=2&](http://www.nytimes.com/2013/02/13/education/12sexchange.html?_r=2&) (discussing the increasing visibility of transgender and gender non-conforming individuals in America).

274. See *supra* Part I, discussing Ms. Carlson's story.

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