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TRANSSEXUALS AND THE FAMILY MEDICAL LEAVE ACT

CHARLES THOMAS LITTLE

INTRODUCTION

Imagine yourself as a female employee at a job you love. During a routine doctor's visit, you learn that you have breast cancer, requiring a mastectomy.[1] Fortunately, your employer is covered by the Family Medical Leave Act ("FMLA"),[2] meaning that the employer is required to allow you up to twelve weeks of unpaid leave for the medical treatment of your breast cancer.[3] If all goes well, the mastectomy will be a successful modality of treatment for your breast cancer, and you will be allowed return to your former employment.[4]

In contrast, imagine you were born as a female but feel incredibly uncomfortable with your legal female sex. You are likely a transsexual.[5] These feelings rise to such a level of uncomfort that surgery to modify your physical sex characteristics is considered. If you are a transsexual, even if you are employed by a company subject to the FMLA's regulation, you may be unable to undergo a mastectomy to change your gender expression.

Despite the apparent incongruence between the deference given by FMLA to the requests of female and transsexual employees, the underly-

1. American Cancer Society, *What Are the Key Statistics for Breast Cancer?*, http://www.cancer.org/docroot/CRI/content/CRI_2_4_1X_What_are_the_key_statistics_for_breast_cancer_5.asp?sitearea= (last updated Sept. 18, 2006) (estimating one in eight U.S. women will develop breast cancer); BreastCancer.org, *Mastectomy*, http://www.breastcancer.org/tre_surg_mastectomy.html (last viewed Oct. 30, 2006) (discussing differing types of mastectomy surgeries).

2. 29 U.S.C. § 2611(4) (2000) (defining employer for purposes of the FMLA).

3. 29 U.S.C. § 2612(a)(1)(D) (2000) ("an eligible employee shall be entitled to a total of 12 work weeks of leave during any 12-month period for one or more of the following: . . . Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.").

4. *Cf.* Cristine Nardi, *When Health Insurers Deny Coverage for Breast Reconstructive Surgery: Gender Meets Disability*, 1997 Wis. L. Rev. 777 (1997).

5. *Rentos v. Oce-Office Sys.*, 1996 U.S. Dist. LEXIS 19060, *16 (S.D.N.Y 1996) ("[t]ranssexualism is the enduring, pervasive, compelling desire to be a person of the opposite sex.").

ing interests implicated in both scenarios are essentially the same. Both individuals have constitutionally mandated liberty to select the appropriate medical treatment. Furthermore, both scenarios implicate privacy rights to be free from unwarranted intrusion into that selection process.

This article suggests that to protect transsexuals' rights of liberty,[6] privacy,[7] speech,[8] expression,[9] and association[10] interests in gender expression, courts and employers should consider more flexible and adaptable standards for transsexuals seeking FMLA leave for sex-reassignment surgery ("SRS"). While there is a dearth of cases pertaining to transsexuals and Title VII, there have been no reported cases or writings by scholars discussing the availability of FMLA for transsexuals. The current FMLA statutes and regulations likely fail to provide even minimal protection for transsexuals' constitutional rights or privacy interests.

This comment will examine these implications for transsexuals seeking FMLA leave to undergo SRS. Section I of this comment will provide background information necessary to pinpoint and understand these issues. First, this Section will consider various definitions and include a brief discussion of gender pertinent to transsexuals and the SRS process. Second, this Section will define the standard of care (SOC) for the SRS process. Next, this Section will examine the current state of the law related to transsexuals, focusing on federal employment discrimination and analyze the constitutional rights and privacy interest implicated when transsexuals seek to modify their gender expression by

6. *See Lawrence v. Texas*, 539 U.S. 558, 562 (2003) ("[l]iberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.").

7. *Doe v. Magnusson*, 2005 U.S. Dist. LEXIS 6143, *8 (D. Me. 2005) (defining privacy as "constitutional safeguards apropos 'the individual interest in avoiding disclosure of personal matters.'").

8. U.S. Const. amend. I ("Congress shall make no law . . . abridging the freedom of speech."); *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 126 S. Ct. 1297, 1308-1310 (2006) ("freedom of speech prohibits the government from telling people what they must say.").

9. *See U.S. v. Am. Libr. Assn.*, 539 U.S. 194, 211 (2003) ("[t]he purpose of the First Amendment is to protect private expression."); *Reno v. ACLU*, 521 U.S. 844, 885 (1997) ("[t]he interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship.").

10. *See Rumsfeld*, 126 S. Ct. at 1311 (discussing the right to associate as it pertains to freedom of expression); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 620 (1984) (the First Amendment right to "intimate associations" includes "deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life."); *NAACP v. Alabama*, 357 U.S. 449, 462 (1958) (explaining the First Amendment imposes "limitations upon governmental abridgment of freedom to associate and privacy in one's association.").

undergoing SRS. Thereafter, Section II will detail ways in which the FMLA, as currently written, may be interpreted either to deny or afford protection to transsexuals. Finally, this comment concludes by suggesting a broader and privacy-focused mode of analysis for transsexuals seeking FMLA leave.

BACKGROUND

A. NECESSARY DEFINITIONS

To most people, particularly heterosexual Americans, the transsexual is a mystery. Yet some sources speculate that there are over 10,000 transsexuals in the United States who have completed SRS.[11] American television shows like Jerry Springer, and movies like *The Crying Game*,[12] *Ma vie en rose*,[13] and *Transamerica*,[14] have injected transsexuals into the living rooms of many Americans.[15] While I hesitate to label the appearance of transsexuals on Jerry Springer as "progress," their presence in the media, at the least, increases transsexual visibility to society as a whole.[16] But, despite this increased visibility, many Americans still do not understand the gravity of the issues facing transsexuals.[17]

What is a transsexual? Definitions vary and suggest incongruous results.[18] Some definitions of transsexual are derogative. For instance,

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11. *See Enriquez v. W. Jersey Health Sys.*, 777 A.2d 365, 375 (2001), *cert. denied*, 785 A.2d 439 (2001) (stating that as many as one in fifty thousand people may be affected by Gender Identity Disorder); *see also* Kristine W. Holt, *Comment: Reevaluating Holloway: Title VII, Equal Protection, and the Evolution of a Transgender Jurisprudence*, 70 Temp. L. Rev. 283, 284-85 (1997) (stating that there are as many as "225,000 diagnosed transsexuals who are cross-living and awaiting SRS"); Saru Matambanadzo, *Engendering Sex: Birth Certificates, Biology and the Body in Anglo American Law*, 12 Cardozo J.L. & Gender 213, 216 (2005) (citing a study estimating that "25,000 people in the United States have undergone SRS and 60,000 individuals who consider themselves to be candidates for such surgery. The article further notes that there are "at least 1,500 transsexual individuals" in the United Kingdom).

12. *The Crying Game* (Miramax Films 2002) (motion picture).

13. *Ma vie en rose* (Haut et Court 1997) (Belgian motion picture whose title in English means "my life in pink.").

14. *Transamerica* (IFC Films 2005) (motion picture in which Felicity Huffman depicts a "MTF" transsexual).

15. Jennifer L. Nye, *The Gender Box*, 13 Berkley Women's L.J. 226, 256 n. 125 (1998) (providing an example of a "Jerry Springer" episode).

16. Matambanadzo, *supra* n. 11, at 213 (2005) ("[t]ransgender individuals are one of the most marginalized groups in the United States.").

17. *See Enriquez*, 777 A.2d at 367-68 (providing an example of the discomfort co-workers, due to a lack of understanding, experienced by co-workers during Enriquez's gender transition).

18. *See* Dictionary.com, *Transsexual*, http://dictionary.reference.com/browse/transsexual (last accessed Sept. 23, 2006) (providing several definitions and usages of the word

one dictionary defines transsexuals as "having the characteristics of one sex and the supposed psychological characteristics of the other."[19] Another source defines transsexual as "a person who strongly desires to assume the physical characteristics and gender role of the opposite sex."[20] This definition leaves undefined the critical terms of gender and sex. One way of explaining gender is as "a way of perceiving things as masculine or feminine, including physical traits, dress, and behavior."[21] In contrast, sex refers to "whether a person is anatomically male or female."[22] However, the reality is that sex, gender, and transsexuals do not fit nicely into clean categories. All too often the terms "sex" and "gender" are confused when the terms are used synonymously and interchangeably for one another.[23] This confusion is increased by the use of the term transgender as an "umbrella" term including intersexuals,[24] transvestites, drag queens, and hermaphrodites.[25] Such definitions lack

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"transsexual"); *see also* John M. Ohle, *Constructing the Trannie*, 8 J. Gender Race & Just. 237, 246, 275 (Spring 2004) (defining transsexual as "one who feels that their gender identity does not conform to the gender identity ze was assigned at birth." As this article later explains, the term "ze" is the neutral form of both him and her. This definition of transsexual is probably the best fit for the purpose of discussion within this article).

19. *See* Erin McKean, ed., *The Oxford American Dictionary and Thesaurus* 1626 (Oxford University Press 2003) (This definition facially belittles the transsexual by including the word "supposed" as part of its definition. While there is not absolute medical certainty relating to the psychological impact of transsexual individuals, this hardly means the psychological process of transsexuals is "supposed." [emphasis added]).

20. Robert B. Costello, ed., *Webster's College Dictionary* 1418 (Random House, 1992) (Describing transsexuals as "a person who has undergone surgical and hormonal treatment for this purpose." Contrary to this definition, not all transsexuals have surgical or hormonal treatment).

21. *See* Gender Public Advocacy Coalition, *Glossary of Terms*, http://www.gpac.org/gpac/glossary.html (accessed March 5, 2006); *Enriquez*, 777 A.2d. at 371 (defining sex as having the anatomy of male or female and contrasting this with gender, defined as "whether a person has qualities society considers masculine or feminine.").

22. *Enriquez*, 777 A.2d at 371.

23. *See* Costello, *supra* n. 20, at 1387 (defining sex as "1. Either of the main divisions (male and female) into which living things are placed on the basis of their reproductive functions. 2. The fact of belonging to one of these. 3. Males or females collectively." The definition misreports the biological definition of sex by defining sex in terms of reproductive function. Expression of male or female characteristics, aside from reproductive functionality, is better defined as gender).

24. An excellent fictionalized account of the life of an intersexual individual may be found in *Middlesex* by Jeffrey Eugenides (Picador, 2002). This novel details the life of an interssexed individual raised as a female, who upon failing to develop female stereotypical physical characteristics lives the remainder of her life as a male.

25. *See* Ohle, *supra* n. 18, at 246. (Transgender implies "one who transcends gender norms." A transvestite is one who dresses in opposite gender generally for sexual arousal); *see also* Dictionary.com, *Drag Queen*, http://dictionary.reference.com/browse/drag%20queen (accessed Mar. 4, 2006) (drag queens are generally males who perform in female garments); *The Oxford American Dictionary and Thesaurus* 686 ("hermaphrodite" means a person born with both sex organs); Nye, *supra* n. 15, at 229 (the term "hermaphrodite" is now

clarity, given that transsexuals vary widely in dress, gender expression, and the extent to which they undergo SRS.

For all of these reasons, the general term "transsexual" is difficult to define.[26] While not all transgendered individuals undergo SRS, some undergo medical procedures to modify their biological sex and gender.[27] In this comment, I use the term "transsexual" to refer individuals who are medically transforming themselves from being a man to a woman, or vice versa, attempting to modify gender expression through SRS, or those who have succeeded in doing so.[28] In other words, defining the term in this way limits it to individuals who are medically transforming themselves from being a man to a woman or vice versa. The definition is limited here in large part because this comment will focus on the FMLA, which involves medical treatment. Furthermore, limiting the term in this way will promote uniformity throughout this comment and avoid the definitional problems inherent in the transsexual experience.

B. GENDER THEORY

Despite the lack of a uniform definition of the term "transsexual," there is a wealth of writing addressing transsexuals, gender theory, and sexual orientation.[29] These writings address this topic with much more detail and aptitude than my background allows me to do. Nevertheless, the connections between transsexuals, gender and sexual orientation must be addressed here, however cursorily, to set the framework for analysis and transsexuals and the FMLA.

Generally, gender is viewed, reinforced, and legalized as a binary construct: male and female.[30] When children are born, a physician de-

encompassed by the term "intersexual."); Matambanadzo, *supra* n. 11, at 216 (stating the term transgender is used as an "umbrella term" for "diverse groups of people, sometimes including intersexual people, drag queens, cross-dressers, and even bearded ladies.").

26. Moreover, the sources previously cited are mere reference materials that do not purport to be nuanced in psychological or sociological definitions.

27. *See Hispanic AIDS Forum v. Estate of Joseph Bruno*, 195 Misc. 2d 366, 367 (N.Y. 2003) (stating that only a small amount of transgendered individuals undergo SRS).

28. *See e.g. Underwood v. Archer Mgt. Services, Inc.*, 857 F. Supp. 96, 98 (D.D.C. 1994) (defining transsexualism as "the medical transformation from being a man to a woman.").

29. *See* Hazel Beh and Milton Diamond, *Ethical Concerns Related to Treating Gender Nonconformity in Childhood and Adolescence: Lessons from the Family Court of Australia*, 15 Health Matrix 239 (2005); Julie A. Greenberg, Symposium: *Therapeutic Jurisprudence: Defining Male and Female: Intersexualiy and the Collision Between Law & Biology*, 41 Ariz. L. Rev. 265 (1999); Ohle, *supra* n. 18; Nye, *supra* n. 15; Jillian Todd Weiss, *The Gender Caste System: Identity, Privacy and Heternormaity*, 10 Law & Sexuality 123 (2001); Dylan Vade, *Expanding Gender and Expanding the Law: Toward a Social and Legal Conceptualization of Gender That Is More Inclusive Of Transgender People*, 11 Mich. J. Gender & L. 253 (2005); Matambanadzo, *supra* n. 11, at 215-18.

30. *See e.g.* Greenberg, *supra* n. 29, at 276-78 (suggesting that some non-Western cultures embrace a third, intermediate sex).

termines their biological sex by inspection of their genitals.[31] That medical determination of sex is reinforced through traditionally accepted norms of gender behavior and augmented by the constructs of our medical establishment, socialization, law, and media.[32] These norms and constructs typically serve to stifle expression of gender characteristics outside of those of the born sex, making that expression socially unacceptable. Historically, individuals expressing gender contrary to their biological sex were shunned by society.[33]

Transsexuals, particularly those transitioning from one gender to another, represent a split from the binary view most of us bring to sex and gender.[34] This split can make some people uncomfortable by challenging traditional societal norms.[35] Many commentators suggest that it would be easier to address issues faced by transsexuals if society and courts would abandon their binary construct of sex and gender expression in favor of a continuum.[36] Indeed, the analysis of many courts provides short shift to the complex gender issues intrinsic in the transsexual experience.[37] Despite the inclusion of transsexuals in many pieces of Gay, Lesbian, Bisexual and Transgendered (GLBT) legislation and policy

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31. Leslie Pearlman, *Transsexualism as Metaphor: The Collision of Sex and Gender*, 43 Buffalo L. Rev. 835, 849 (1995) (stating that doctors generally make determinations of biological sex by "the size of the penis or clitoris and the 'capacity of the vagina' to be penetrated by a penis).

32. Vade, *supra* n. 29, at 285 ("[d]octors' gender assignments, although subjective assignment done by human beings, are relegated to a different truth realm than any other gender assignments.").

33. *See e.g.* Jordan Balagot, *In Memory of Gwen Araujo*, http://www.transyouth.net/stories/gwen_araujo.html (Oct. 19, 2002) (Harassment and violence are not uncommon for both transsexuals and members of the GLBT. Gwen Araujo, a transgendered youth, was brutally murdered on October 4, 2002 when it was discovered that she was not a biological female); David Westscott, *Anti-Gay quotes from the Family Research Council*, http://www.hatecrime.org/subpages/hatespeech/frc.html (accessed Feb. 28, 2006) (providing one disparaging comment related to homosexuals: "involvement in homosexuality can kill you") (quote credited to Family Research Council Web site, http://www.frc.org/); *Estate of Teena Brandon v. County of Richardson*, 624 N.W.2d 604, 640 (Neb. 2001) (This case details the civil action against various munipalities by a representative of Brandon Teena, a transgender female living as a male, who was raped and murdered after her born sex was discovered. The plight of Brandon Teena was depicted by actress Hillary Swank in the film Boys Don't Cry. *Boys Don't Cry* (Fox Searchlight Pictures 1999) (motion picture)).

34. *See* Greenberg, *supra* n. 29, at 275-76 ("[a] binary sex paradigm does not reflect reality.").

35. By this I mean the presumption that males and females are expected to conform in dress and action to traditional societal notions of masculinity and feminity.

36. Ohle, *supra* n.18, at 279; Vade, *supra* n. 29, at 273-87.

37. *See e.g. Farmer v. Brennan*, 511 U.S. 825, 829 (1994) (In this case, the Court analyzes claims under Eighth Amendment raised by a transsexual; it is the only U.S. Supreme Court case to address transsexuals. The entirety of the Court's preliminary discussion of transsexuals occupies a single page. The underlying court of appeals decision relegates its discussion of transsexuals to a single footnote. *Farmer v. Circuit Court of Md. for Balt.*

reform programs,[38] transsexuality may have little to do with traditional ideas of sexual orientation.[39] The transsexual experience is by its nature so vast, expansive, and indefinite that courts need to employ a more nuanced and flexible analysis when dealing with legal issues pertinent to transsexuals. As many commentators have suggested, "sex should not be limited to physical characteristics of the body."[40]

C. The Detailed Medical Requirement for Sexual Reassignment Surgeries

In order to express their internal gender identity, some transsexuals undergo surgical operations to realign their bodies in a manner more consistent with their individual gender identity.[41] There are a vast multitude of sexual reassignment surgeries available to enable transsexuals to realign their gender.[42] While there is currently no absolute ban on SRS in the United States at present, a variety of factors restricting access to SRS can operate effectively to suppress attempts to physically conform physical to internal gender identity. This may be tantamount to a banning a transsexual from exercising his or her freedoms and liberties

County, 31 F.3d 219, 220 n. 1 (4th Cir. 1994)); *see also Holloway v. Arthur Andersen & Co.*, 566 F.2d 659 (9th Cir. 1977).

38. *See e.g.* P.A. 93-1078, S.B. 3186 (Jan. 1, 2005) (amending the Illinois Human Rights Act, 775 Ill. Comp. Stat. § 5/1-101 et seq. (1979), effective January 1, 2006, to include gays,lesbians and bisexuals as groups entitled to protection from discrimination in housing, employment, financial credit, public accommodation, and sexual harassment in higher education).

39. *See Underwood*, 857 F. Supp. at 98 (holding in dicta that courts have distinguished transsexuals from homosexuals).

40. *See* Pearlman, *supra* n. 34, at 866; *Enriquez*, 777 A.2d at 373 ("a person's sex or sexuality embraces an individual's gender.").

41. *See e.g. Schroer v. Billington*, 424 F. Supp.2d 203, 205 (D.D.C. Cir. 2006) (stating that transsexuals take "steps . . . to conform the patient's external manifestation of sex to his or her gender identity. The process commonly involves three stages: presenting oneself full-time as the gender corresponding to one's identity (the "real life" test), hormone therapy, and sex reassignment surgery.").

42. Vade, *supra* n. 29, at 268-269 (listing the wide variety of surgical operations available to transsexuals seeking SRS, including mastectomy, liposuction, tracheal shave, vaginoplasty with penile inversion, simple penile amputation, and so forth); Matambanadzo, *supra* n. 11, at 217 (The author lists SRS surgeries for a MTF transsexual including "castration, hormonal treatment, construction of functioning female genitalia, breast implants, electrolysis, and in some cases, cosmetic reconstruction to feminize facial features. The SRS for a FTM may include the following: "hormonal treatment, mastectomy, hysterectomy, and in some cases the construction of a phallus."); *Davidson v. Aetna Life & Casualty Ins. Co.*, 420 N.Y.S. 2d 450, 454 (N.Y. Sup. Ct. 1979) (listing some surgical options such as augmentation, mammonplasty, rhinoplasty and plastic surgery); *Smith v. Rasmussen*, 249 F.3d 755, 757 (8th Cir. 2001) (stating that SRS involves several different procedures including hormone treatment and psychological counseling).

relating to gender expression.[43]

First, transsexuals face the issue of funding. SRS is rarely covered under private insurance[44] and is often denied to transsexuals who are eligible for public medical assistance.[45]

Assuming a transsexual is somehow able to finance the SRS procedure, he or she then faces a second hurdle – the medical community. Transsexualism was only added to the Diagnostic and Statistical Manual of Medical Disorders (DSM) in 1980.[46] At this point, any transsexual seeking to realign his body with his internal gender expression must follow established medical protocol laid down by the DSM.[47] While there are multiple standards of care,[48] the predominant standard is that developed by the Harry Benjamin International Gender Dysphoria Associa-

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43. *See e.g. Cotting v. Kan. City Stock Yards Co.*, 183 U.S. 79, 101 (1901) (the effect of a statute may create such a burden as to be "tantamount to a denial of equal protection.").

44. *See Davidson*, 420 N.Y.S. 2d 450 (N.Y. Sup. Ct. 1979) (holding an insurance company financial responsible for its insured's SRS).

45. 42 U.S.C. § 1396 et seq. (2000) (Medicaid); *see also*, *Wilder v. Va. Hosp. Assn.*, 496 U.S. 498, 502 (1998) (explaining the Medicaid system); Ohle, *supra* n. 18, at 261-262 ("[w]hile state Medicare programs cannot have a blanket prohibition on covering sex reassignment surgery . . . the state is still able to deny coverage on a case-by-case basis."). Under Medicare, the eligibility of a transsexual seeking SRS must be proved to be medically necessary. Because there is "considerable debate" over the effectiveness of SRS as to its "experimental" or medically necessary, courts often uphold denial of benefits.; *see also Rasmussen*, 249 F.3d 755, 760 (8th Cir. 2001) (reversing a decision to grant Medicaid benefits for a phalloplasty, stating that "[m]edicaid programs do not guarantee that each recipient will receive the level of health care precisely tailored to his or her particular needs."); *Berger v. Div. of Medical Assistance*, 11 Mass. L. Rep. 745 (2000) (reversing denial of Medicaid to pay for reconstructive breast surgery for a post-operative MTF transsexual); *Pinneke v. Pressier*, 623 F.2d 546 (8th Cir. 1980) (affirming the decision of the district court to force Iowa to grant Medicaid benefits for SRS due to arbitrary and non-uniform decision making process determining which surgeries would receive Medicaid funding); *Rush v. Parham*, 625 F.2d 1150 (5th Cir. 1980) (reversing and remanding grant of Medicaid benefits to a transsexual); *Hare v. State*, 666 N.W.2d 427, 429 (Minn. App. 2003) (overturning the denial of Medicaid benefits despite state statutory limit excluding coverage of SRS to those individuals who "began receiving gender reassignment services prior to July 1, 1998."), *Doe v. State*, 257 N.W.2d 816, 820 (Minn. 1977) (overturning the denials of Medicaid benefits for SRS); Kari E. Hong, *Categorical Exclusion: Exploring Legal Responses to Health Care Discrimination Against Transsexuals*, 11 Colum. J. Gender & L. 88, 103 n. 77 (2002) (noting that "[f]orty-two states have exclusions barring coverage for SRS and horomones.").

46. *See* Nye, *supra* n. 15, at 232-33 (noting that homosexuals were removed from the DSM in 1973); *see also* The American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, 538-39 (4th ed. 1994); accord *Enriquez*, 342 N.J. Super. at 506.

47. *See* Nye, *supra* n. 15, at 232-33.

48. *See e.g.* Phyllis Randolph Frye & Alyson Dodi Meiselman, *"Family" and the Political Landscape for Lesbian, Gay, Bisexual and Transgender People (LGBT): Same-Sex Marriages have Existed Legally in the United States for a Long Time Now*, 64 Alb. L. Rev. 1031, 1067 n. 237 (2001) (Appendix A details another proposed SOC advocated at the 1997 Inter-

tion: The Standards of Care For Gender Identity Disorders (hereinafter collectively referred to as "Benjamin SOC").[49]

Under that standard, the analytical process followed by most physicians in deciding whether to allow transsexuals to undergo surgeries raises significant barriers of time and resources. To begin with, In order to gain access to SRS involving genitals or breasts, transsexuals must first be identified as having gender dyspohoria or gender identity disorder.[50] Under the Benjamin SOC, one letter of recommendation from a mental health care provider is required for hormone therapy and breast surgery, while two letters are required for genital surgery.[51] Of the two letters written for genital surgery, one must be written by a psychiatrist or clinical psychologist with a Ph.D. and one letter may be written by a therapist with a master's degree.[52]

Additionally, in order for a transsexual to seek medical treatment with hormones, that individual must: (1) attain 18 years of age; and (2) demonstrate knowledge of what hormones medically can and cannot do and their social benefits and risks; and (3) either show (a) a documented real life experience of at least three months prior to the administration of hormones (i) Real life experience refers to living in your opposite born gender in any of the following circumstances: (a) maintaining full or part-time employment; (b) functioning as a student; (c) functioning in community-based volunteer activity; (d) to undertake some combination of items 1-3; (e) to acquire a (legal) gender-identity appropriate first name; (f) to provide documentation that persons other than the therapist know that the patient functions in the gender role,[53] or (ii) a period of psychotherapy of a duration specified by the mental health professional after the initial evaluation (usually a minimum of three months).[54]

For genital surgery, the SOC is even more stringent, including evaluation of the following factors: (1) attaining the legal age of majority in the patient's nation; (2) usually twelve (12) months of continuous hormonal therapy for those without a medical contraindication; (3) twelve (12) months of successful continuous full time real-life experience (periods of returning to original gender may indicate ambivalence about proceeding and generally should not be used to fulfill this criterion); (4) if required

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national Conference on Transgender Law and Employment Policy, Inc. However, this SOC has not gained much acceptance within the medical community).

49. Walter Meyer III, *Harry Benjamin International Gender Dysphoria Association's Standards of Care For Gender Identity Disorders*, 6th ed. http://www.hbigda.org/Documents2/socv6.pdf (last updated Feb. 2001).

50. Greenberg, *supra* n. 29, at 289.

51. Benjamin SOC, *supra* n. 48, at 7-9.

52. *Id.*

53. *Id.* at 13.

54. *Id.*

by the mental health professional, regular responsible participation in psychotherapy throughout the real life experience at a frequency determined jointly by the patient and the mental health professional (psychotherapy per se is not an absolute eligibility criterion for surgery); (5) demonstrable knowledge of the cost, required lengths of hospitalizations, likely complications, and post-surgical rehabilitation requirements of various surgical approaches; and (6) awareness of different competent surgeons.[55]

Commentators express serious concerns about the limitations imposed by the prevailing SOC.[56] One concern is that in medicalizing transsexuals, there exists the potential for abuse of the SRS process; that is to say, an SRS may be medically necessary yet may not be prescribed.[57] In light of the divergent nature of transsexuals, a broader and more flexible SOC is needed in determining eligibility for SRS. For instance, if the only available option for SRS is strict adherence to the SOC, there should be exceptions granted in narrowly limited situations, such as those where the physical or mental well-being of the transsexual is compromised by being forced to wait for medical approval of a SRS.

D. The Dearth of the Law Pertinent to Transsexuals

Despite the precision of the medical requirements for acceptance for SRS, there is a dearth of conflicting laws, regulations, and ordinances dealing with the legal rights of transsexuals. Only recently have some states[58] and municipalities[59] enacted antidiscrimination statutes to pro-

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55. *Id.* at 20.

56. *See e.g.* Vade, *supra* n. 29, at 287 ("I am concerned about doctors having the power to define a person's gender. Gender should be self-determined, period. Telling someone that they cannot be their self-identified gender is like telling a person they cannot be themselves.").

57. *See* Pearlman, *supra* n. 31, at 866 ("Sex reassignment surgery is viewed as medically necessary to return the pre-operative transsexual to his or her purported sex. The medical community has reached a consensus in treating transsexualism: radical surgery is the only successful form of treatment"); Nye, *supra* n. 15, at 236 ("We must seriously question whether transsexualims is a 'disease' requiring medical intervention or whether it is a cultural symptom of the dis-ease evoked by challenging the traditional Western sex and gender code.").

58. *See e.g.* N.M. Stat. § 28-1-7 (2003) (unlawful to discriminate against gender identity in employment decisions); R.I. Stat. § 28-5-7 (2001) (same, based on gender identity and expression); M.S.A. § 363A.03 (Minn. 2003) (defining sexual orientation as including "having or being perceived as having a self-image or identity not traditionally associated with one's biological maleness or femaleness); M.S.A. § 363A.08 (Minn. 2003) (unlawful to discriminate against sexual orientation, which includes gender expression under a literal reading); D.C. Code § 2-1402.11 (2006) (as amended by D.C. Law 16-58) (unlawful to discriminate in employment decisions based on gender identity and expression); *see also* Gender Public Advocacy Coalition, *GenderLaw Guide to the Federal Courts and 50 States*, http://www.gpac.org/violence/GenderLAWGuide.doc (accessed Mar. 10, 2006) (providing an

tect transsexuals. Fewer states have adopted hate-crime statutes protecting transsexuals.[60] While these state laws appear to be expanding so as to become more protective of transsexuals,[61] this positive shift is offset by cases denying transsexuals access to many of the basic legal protections afforded to society at large.

Yet the daily life of transsexuals raises many legal concerns. In effectuating their gender expression and following the medical requirements under the prevailing SOC, transsexuals may make changes to their birth certificates, driver's licenses, and passports.[62] These changes are akin to changes made by heterosexuals who marry and wish to change their names.[63] However, unlike their heterosexual counterparts, transsexuals seek to modify not only their name, but also their sex on these documents. In most instances, transsexual name changes are allowed provided the change is not intended to commit fraud or decep-

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overview by state of laws prohibiting employment discrimination and hate crime laws encompassing gender expression).

59. *See e.g.* N.Y.C. Admin. Code § 8-102(23) (2002) (amending New York City Human Rights Law's definition of gender to include "gender identity, self-image, appearance, behavior or expression . . . different from that traditionally associated with the legal sex assigned to that person at birth."); N.Y.C. Admin. Code § 8-107 (2005) (outlawing employment discrimination based on this definition of gender); *see also* Sheryl I. Harris, Esq., *Employment Discrimination Protections for Transgender People in California*, http://www.transgenderlaw.org/resources/caoverview.htm (accessed Mar. 1, 2006) (stating that as of January 2001, four municipalities in California have passed antidiscrimination measures applicable to transgendered individuals); *accord* GenderLaw Guide, *supra* n. 61, at 5 (the guide lists certain California municipalities prohibiting discrimination for gender expression. The guide also specifies that some metropolitan areas such as Atlanta and Chicago also have ordinances prohibiting discrimination based on gender expression); Sean Cahill, *Same-Sex Marriage in the United States*, 74 (Lexington Books 2004) (chart detailing non-discrimination laws pertaining to sexual orientation and gender expression by state as of April 2004).

60. *See e.g.* Cal. Pen. Code § 422.6 (2004); Cal. Civil Code § 422.6 (2004); D.C. Code § 22-3701 (2006); Haw. Rev. Stat. § 706-662(6)(b); Haw. Rev. Stat. § 846-51 (defining gender identity and expression); N.M. Stat. Ann. § 31-18B-3 (2003); Mo. Rev. Stat. § 557.035 (1999); Pa. Stat. Ann. 18 § 2710; 18 Pa.C.S. § 2710 (2002); 13 Vt. Stat. §§ 1455 (1999). It should be noted that while a number of states have statutes addressing crimes committed that are based on gender, those statutes are not included in this footnote. Statutes criminalizing offenses based on gender may be implied to include crimes based on gender expression and identity. However, this inference could also be wholly disregarded by a court. For instance, one court determined that forcing a transsexual to use a restroom corresponding with her biological sex was not discriminatory under Minnesota's Human Rights Act, which prohibits discrimination based on sexual orientation. *Goins v. West Group*, 635 N.W.2d 717 (Minn. 2001).

61. *Manago v. Barnhart*, 321 F. Supp. 2d 559, 561 (E.D.N.Y. 2004) (mentioning that the underlying case, involving a transsexual seeking Social Security disability benefits, "arises at a time when legal protections for transsexuals are being expanded.").

62. *See e.g. K. v. Health Div.*, 560 P.2d 1070 (Or. 1988) (describing a transsexual's efforts to change the sex and name on her birth certificate).

63. *Id.*

tion.[64] The right to change a birth certificate is sometimes limited to situations where a transsexual has undergone a full SRS[65] (for example denying name changes to individuals who are in the SRS process but where the change has not yet become permanent).[66] This standard for transsexuals stands in sharp contrast to the standards for name changes by other citizens.[67] For instance, a woman who is marrying or divorcing is normally free to change her name in any way without providing any proof of the change in her marital status. The discrepancy between these treatments suggests the legal rationale denying some transsexuals the right to change their name is a legal fiction.

Additionally, transsexuals undergoing SRS face obstacles to the "real-life test" of living as the opposite gender, a requirement under the Benjamin SOC, because some states and municipalities ban cross-dressing. These statutes banning cross-dressing may be susceptible to constitutional attacks for vagueness.[68] In short, while some laws are evolving,

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64. *See* Associated Press, *Records System Changes Block Transgender Marriage*, 11 Gay Chicago Magazine 18, 19 (Mar. 16-26, 2006) ("only three states, Tennessee, Idaho and Ohio refused to provide residents with a new or amended birth certificate after sex change surgery."); *Anonymous v. Weiner*, 270 N.Y.S.2d 319 (N.Y. Sup. Ct. 1966); *Darnell v. Lloyd*, 395 F. Supp. 1210, 1214 (D.C. Conn. 1975) (the state must show "some substantial state interest" for refusing to change the legal sex on a birth certificate); *In re Anonymous*, 582 N.Y.S.2d 941 (N.Y. Civ. Ct. 1992); In re Ladrach, 513 N.E.2d 828 (Ohio. Prob. 1987); *K. v. Health Div.*, 560 P.2d 1070 (Or. 1977); *Anonymous v. Mellon*, 398 N.Y.S.2d 99 (N.Y. Sup. Ct. 1973); *see also* 410 Ill. Comp. Stat. § 535/17 (1997) (prescribing how to change a birth certificate in Illinois); but *c.f. In re Marriage of Simmons*, 825 N.E.2d 303 (Ill. App. 2005), appeal denied sub nom, *Simmons v. Simmons*, 839 N.E.2d 1037 (Ill. 2005) (court refused to uphold the validity of a transsexual's marriage where a birth certificate had been changed from female to male).

65. *See* Ohle, *supra* n. 18, at 255, 280 n. 92 ("[c]urrently, twenty-four states have specific statutes that allow the change of sex status after the completion of sexual reassignment surgery"; this source contains a full list of these states in the note referenced herein).

66. *See In re Maloney*, 2001 WL 908535 (Ohio App. 2001) (court affirming the denial of petitioner's request for a name change), *rev'd*, 774 N.E.2d 239 (Ohio 2002); *In re Bicknell*, 771 N.E.2d 846 (Ohio 2002) (allowing two lesbian partners a change of name).

67. *In re Ladrach*, 513 N.E.2d 828, 829 (Ohio 1987) (Petitions to change names are generally granted "so long as there is no intent to defraud creditors or deceive others and the applicant acted in good faith.").

68. *See e.g. Doe v. McCann*, 489 F. Supp. 76 (S.D. Tex. 1980) (holding unconstitutional ordinances prohibiting appearance in public dressed as the opposite sex); *City of Chi. v. Wilson*, 389 N.E.2d 522 (Ill. 1978) (same, noting that "[t]he notion that the State can regulate one's personal appearance, unconfined by any constitutional strictures whatsoever, is fundamentally inconsistent with 'value of privacy, self identity, autonomy, and personal integrity that . . . the Constitution was designed to protect."); *Cincinnati v. Adams*, 330 N.E. 2d 463 (Ohio 1975) (granting defendant's motion to dismiss as ordinance prohibiting cross-dressing was found to be impermissibly vague); *Star v. Gramley*, 815 F. Supp. 276 (C.D. Ill. 1993) (upholding prison regulation denying a male the right to wear makeup, bra, and panties); *Star v. Warden of Statesville Correctional Ctr.*, 918 F. Supp. 1142 (N.D. Ill. 1995) (same); *City of Columbus v. Rogers*, 324 N.E.2d 563 (Ohio 1975) (upholding ordinance

serious burdens still exist precluding transsexuals from following the medical requirements of the Benjamin SOC.

One mixed area of law is the validity of transsexual marriages. While the right to marry is fundamental,[69] this fundamental right is generally not extended to transsexuals.[70] Under both federal and state Defense of Marriage Acts ("DOMA"), marriage is restricted to opposite sex couples.[71] Cases involving the validity of post-operative transsexual marriages cut both ways.[72] Most courts rely on the precedents set by an older English case[73] and evaluate the validity of marriage by looking to four factors to determine gender: "(1) chromosomal factors, (2) gonadal factors, (3) genital factors and (4) psychological factors."[74] On the other hand, one court has held that a post-operative transsexual assumes the gender of his or her desired sex upon completing the SRS process.[75] Furthermore, the validity of a transsexual's parentage rights may be implicated for transsexuals not biologically producing children.[76] These cases

prohibiting cross dressing); *Champagne v. Dubois*, 1995 Mass. Super. LEXIS 62 (Dec. 11, 1995) (denying First Amendment and Equal Protection claims where male prisoners were restrained from wearing female attire); *People v. Gillespi*, 202 N.E.2d 565 (N.Y. Ct. App. 1964) (affirming vagrancy statute as applied to cross-dressers).

69. *See Loving v. Virginia*, 388 U.S. 1, 12 (1967) (holding that "marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival") (quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)).

70. *See e.g. Littelton v. Prange*, 1999 Tex. App. LEXIS 7974 (1999) (invalidating the marriage of a post-operative transsexual); *see also* Evan Gerstmann, *Same-Sex Marriage and the Constitution*, 85 (Cambridge University Press 2004) (stating that because the right to marry is fundamental, the logical question is, "why would same-sex marriage not be included under the fundamental right to marry?").

71. *See* 1 U.S.C. § 7 (2000) (defining marriage); 28 U.S.C. § 1738C (2000) (federal DOMA laws); *see also* 750 Ill. Comp. Stat. § 5/212(a)(5) (2005) (an example of a state DOMA law).

72. Cases invalidating transsexual marriages include the following: *In re Estate of Gardinier*, 42 P.3d 120 (Kan. 2002); *Littleton*, 9 S.W.3d 223 (Tex. 1999), *Ladrach*, 513 N.E.2d 828; *K. v. Health Div.*, 560 P. 2d 1070 (Or. 1977); *Anonymous v. Anonymous*, 325 N.Y.S.2d 499 (N.Y. Sup. Ct. 1971). One case upholding transsexual marriage is *M.T. v. J.T.*, 355 A.2d 204 (N.J. 1976), *cert. denied*, 71 N.J. 345 (1976).

73. *Corbett v. Corbett*, 2 All. E.R. 33 (P. 1970) (U.K.).

74. Ohle, *supra* n. 18, at 257.

75. *M.T.*, 355 A.2d. at 211.

76. *See* Rainbownetwork.com, *Transsexual Father Retains Custody Rights*, http://www.rainbownetwork.com/News/detail.asp?iData=23601&iCat=29&iChannel=2&nChannel=News (last accessed June 14, 2005) (discussing one Florida court's recently decision to allow a FTM transsexual to retain custody of his biological children after nearly a seven year battle over custody. Normally, custody determinations are evaluated using the highly subjective standard of best interest of the child. Despite putting her children in danger, the mother had been awarded preliminary custody.); *see also* tgcrossroads.org, *Transsexual Dad's Custody Fight Intensifies*, http://www.tgcrossroads.org/news/archive.asp?aid=182 (last accessed May 3, 2005); *Kantaras v. Kantaras*, 884 So. 2d 155 (Fl. App. 2005) (for the actual case proceedings discussed in these articles); *see also* Dean Spade, *Resisting*

represent the beginning of a patchwork quilt; since the body of law pertaining to transsexuals is still largely underdeveloped.

In the face of this dearth of law, there is a pronounced need to clarify and reform the legal standards involving transsexuals. Multiple legal issues face transsexuals, but those in urgent need of address are those relating to custody and marriage. While the current climate suggests that the nation opposes gay marriage, transsexual marriages do not present identical issues. If a transsexual is able to legally change the sex on a birth certificate, then he or she should be allowed to enter into a valid marriage with a member of the opposite sex to protect the transsexual's privacy interest. Additionally, in the absence of medical or psychological certainty that transsexual parents might be a detriment to their children, transsexuals should be allowed the same parentage rights as any other citizen. While this comment cannot address each of the extensive and complex legal issues raised by transsexuals, it is clear that the present family and custody laws lag far behind the social and medical reality of their lives.

E. Title VII and the Transsexual

Another area of the law which currently fails to address and protect transsexuals is employment discrimination law. Federal law protects most individuals from employment actions based on sex, but fails to protect transsexuals.[77] Pursuant to Title VII, it is unlawful for an employer to discriminate by taking action based on the employee's sex.[78] Within the past year, the Supreme Court has denied certiorari on a case which could have resolved a split in the circuits regarding Title VII's application to transsexuals.[79] While decisions from the Sixth Circuit and at least two district courts[80] protect transsexuals from sex discrimination

Medicine, Re/modeling Gender, 18 Berkely Women's L.J. 15, 37 at n. 8 (2003) (collecting cases concerning parental rights of transsexuals).

77. Similarly, cases involving claims by transsexuals under color of state and local employment discrimination laws go both ways. Compare *Rentos*, 1996 U.S. Dist. LEXIS 19060, *24 (denying motion to strike transsexual's complaint of employment discrimination under state and local law) with *Sommers v. Iowa Civ. Rights Com.*, 337 N.W. 2d 470 (1983) (affirming the dismissal of a transsexual's claim of employment discrimination based on Iowa's Human Right Act); *see also Wood v. C.G. Studios, Inc.*, 660 F. Supp. 176 (E.D. Pa. 1987) (denying hermaphrodite recovery under the Pennsylvania Human Rights Act for claims of employment discrimination based out of a previous corrective surgery).

78. 42 U.S.C. §§ 2000(e)-2(a)(1) (2000).

79. *City of Cincinnati v. Barnes*, 126 S. Ct. 624 (Nov. 7, 2005).

80. *Mitchell v. Axcam Scandiapharm, Inc.*, 2006 U.S. Dist. LEXIS 6521, *5 (W.D. Pa. Feb. 21, 2006) (denying defendant-employer's motion for summary judgment, which argued that a MTF transsexual failed to state a viable cause of action for harassment and discrimination for failing to "conform to the stereotypes" of her biological gender); *Tronetti v. TLC Healthnet Lakeshore Hosp.*, 2003 U.S. Dist. LEXIS 23757 at *13 (W.D.N.Y. Sept. 26, 2003)

under Title VII,[81] other circuits[82] and district courts[83] have refused to allow transsexuals to recover for sex discrimination.

One of the earliest cases on this issue is *Holloway v. Arthur Andersen & Co.*[84] There, a male to female ("MTF") transsexual was fired shortly after beginning hormone treatment.[85] The Eighth Circuit held that Congress had only traditional views of "sex" in mind when it passed Title VII. The court reasoned that transsexuals are not members of a suspect class because they lack any immutable characteristics and are not a discrete and insular minority.[86] For these reasons, the court held that Holloway was not entitled to protection under Title VII as a transsexual. A few years later, the Seventh Circuit reached the same result,[87] holding that sex is not synonymous to sexual identity and

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(refusing to follow the Ulane line of decisions, thus allowing a MTF transsexual claim of discrimination based on gender stereotyping).

81. *See Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005); Smith v. City of Salem, 378 F.3d 566 (6th Cir. 2004); *see also* Thomas Ling, *Smith v. City of Salem: Title VII Protects Contra-Gender Behavior*, 40 Harv. Civ. Rights-Civ. Libs. L. Rev. 277, 278 (2005) ("Smith correctly disaggregates concepts of sex from gender so as to bring equal opportunity and autonomy for individuals in the workplace. It recognizes that sex discrimination generally does not focus on biological parts, but rather on socially constructed gender attributes.").

82. *See Holloway v. Arthur Andersen & Co.*, 566 F.2d 659 (9th Cir. 1977); *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984); *Spearman v. Ford Motor Co.*, 231 F.3d 1080 (7th Cir. 2000).

83. *See Etsitty v. Utah Transit Authority*, 2005 U.S. Dist. LEXIS 12634, *12 (D. Utah June 24, 2005) (denying transsexuals protection under Title VII because sex discrimination does not encompass sexuality or sexual orientation); *Sweet v. Mulberry Lutheran Home*, 2003 U.S. Dist. LEXIS 11373, *1 (S.D. Ind. June 6, 2003) (granting employer's summary judgment motion because of controlling Seventh Circuit precedent disallowing the protections of Title VII to transsexuals); *Oiler v. Winn-Dixie La.*, 2002 U.S. Dist. LEXIS 17417, *28 (E.D. La. Sept. 16, 2002) (granting employer's summary judgment motion because "this is not a situation where the [transsexual] failed to conform to a gender stereotype."); *Voyles v. Ralph K. Davis Medical Center*, 403 F. Supp. 456, 457 (N.D. Cal 1975) ("in enacting Title VII, Congress had no intention of proscribing discrimination based on an individual's transsexualism, and only recently has it attempted to include conduct within the reach of Title VII which is even remotely applicable to the complained-of activity here.").

84. *Holloway*, 566 F.2d 659; *see also Sommers v. Budget Mktg., Inc.*, 667 F.2d 748 (8th Cir. 1982) (a case preceding Holloway, holding that transsexuals are not entitled to protection under Title VII); *see also Dillon v. Frank*, 1992 U.S. Lexis 766, *23 (6th Cir. 1992) ("[w]e interpret Title VII to proscribe only specified discriminatory action. What Title VII proscribes, although vitally important, is equally exceeded by what it does not.").

85. *Holloway*, 556 F.2d at 661, n. 1 (the Court in Holloway gives short service to the issue of why Holloway was fired, stating in a footnote only that Holloway was terminated because her appearance was "disruptive and embarrassing to all concerned.").

86. *Id.* at 663-64 (holding that transsexuals are not part of a suspect class; however, Justice Goodwin in her dissent argues that once the transsexual is post-operative, he or she may have a colorable claim for relief).

87. *Ulane*, 742 F.2d 1081.

preference.[88]

Subsequently, in *Price Waterhouse v. Hopkins*,[89] the Supreme Court allowed a female employee to recover damages when she was fired for failing to conform to female gender stereotypes involving her walk, dress, hair and assertiveness.[90] Following *Price Waterhouse*, some lower courts have allowed transsexuals to recover under Title VII based on a similar gender stereotyping theory.[91] For instance, in *Barnes v. City of Cincinnati* the Sixth Circuit affirmed the district court's decision that transsexuals fall within the ambit of those protections by prohibition against sex discrimination.[92] In that case, Philip Barnes was a police officer with the City of Cincinnati from 1981 until 1999.[93] Many of Barnes' fellow officers knew that she was a transsexual.[94] In 1999, she was promoted to the rank of sergeant.[95] All recently promoted sergeants with the City of Cincinnati enter a probationary period upon their promotion.[96] Barnes ultimately failed her probationary period due to alleged deficiencies in grooming standards and failure to maintain command presence; she was terminated as a result.[97] The City claimed that promoting "competent and capable" officers and regulating uniformity in the appearance of its officers promoted a high opinion of the police by the public and this is rationally related to a governmental interest in excluding transsexuals.[98]

The court rejected that argument.[99] The district court there applied a Title VII analysis and concluded that Barnes had suffered disparate treatment based on the kind of sex stereotyping prohibited by Price Waterhouse.[100] The court reasoned that Barnes suffered an adverse employment action, not because of her status as a transsexual per se, but rather as a result of her failure to conform to masculine stereotypes.[101]

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88. *Id.* at 1085.
89. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).
90. *Id.* at 235.
91. *See e.g. Barnes*, 401 F.3d 729; *City of Salem*, 378 F.3d 566.
92. *Id.*
93. *Barnes*, 2005 U.S. Dist. LEXIS 26207, *1.
94. *Id.* at *8.
95. *Id.* at *2.
96. *Id.*
97. *Id.* at *6-7.
98. *Id.* at *29-30.
99. *Id.* at *30.
100. *Id.* at *14 (combining the analysis of *Price Waterhouse*, 490 U.S. 228, forbidding gender stereotyping, with *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864 (9th Cir. 2001) (holding the prohibition of gender stereotyping applies equally to men and women).
101. *Barnes*, 2005 U.S. Dist. LEXIS 26207, *18-19 (discussing Barnes' failure to comport with conventional masculine stereotypes by wearing makeup).

The court found direct evidence[102] of such stereotyping and held that Barnes met her burden of production. As to Barnes' Equal Protection claim, the court held that the City had engaged in gender stereotyping of masculine behavior.[103]

This approach used by the Sixth Circuit affords transsexuals more protection than the narrow reading of "sex" in Title VII employed by the earlier cases described above.[104] When employment decisions are based on impermissible gender considerations, transsexuals should be protected by Title VII. Additionally, although the experience in other nations is not dispositive here, it is suggestive. Other nations such as New Zealand and the United Kingdom afford protections to transsexuals in the employment arena.[105] Just so here, Title VII should be expansively viewed to protect transsexuals from sex discrimination. At a minimum, the Act should protect transsexuals from being fired or demoted solely on the basis of their gender expression, in the same way that every other American is uniformly protected on the basis of his or her sex and gender.

F. Constitutional Implications of the Transsexual

As with Title VII, case law pertaining to the constitutional interests of transsexuals is neither protective nor particularly instructive. One reason is that most of these cases deal with prisoners. Since prisoners possess only limited constitutional protections, and certainly not all transsexuals are prisoners, these cases stop short of defining the exact boundaries of constitutional protections that should be afforded to transsexuals. Nevertheless, these cases do shed some light on the constitutional rights of transsexuals. Before addressing the cases pertaining to specific parameters of transsexuals' constitutional protections, a more generalized discussion of these protections is in order.

One constitutional protection applicable to transsexuals is privacy. The right of privacy is not mentioned explicitly in the text of the United States Constitution,[106] but has been defined as the "right to be left alone" and was described by Justice Brandeis as a right "most valued by civilized man."[107] The Supreme Court has made clear that the right to

102. *See Price Waterhouse*, 490 U.S. at 250; *see also McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (discussing the indirect analysis of Title VII claims).

103. *Barnes*, 401 F. 3d at 736.

104. Compare *Ulane*, 742 F.2d 1081, with *Barnes*, 401 F. 3d at 736.

105. Ohle, *supra* n.18, at 264 (arguing that the United States should follow the trends set by the European Union, New Zealand, and Australia in preventing employment discrimination against transsexuals).

106. *Aid for Women v. Foulston*, 2006 U.S. App. LEXIS 2366, *36 (10th Cir. Jan. 27, 2006) (citing *Eastwood v. Dept. of Corrections of Okla.*, 846 F.2d 627, 630 (10th Cir. 1988)).

107. *Olmstead v. U.S.*, 277 U.S. 438, 478 (1928).

privacy is "implicit in the concern of ordered liberty."[108] To date, the Court has expanded the constitutional right of privacy to include procreation,[109] abortion,[110] the use of contraceptives[111] and the right to engage privately in consensual homosexual conduct.[112] Loosely synthesizing these cases suggests a privacy interest exists for reproductive decisions, as well as sexual relations, sexual identity, and acceptance or rejections of social gender roles within the context of sexual acts.

Applying the right of privacy to transsexuals is difficult, because transsexuals do not fit neatly into any of these categories. Instead, the transsexual experience is fluid and involves each of these privacies in degrees. The act of sex[113] is implicated by the transsexual experience: a MTF transsexual unable to undergo SRS might be forced to abstain from sexual activity due to intense discomfort with her natural male genitals. However, the transsexual experience is not wholly a sexual relations matter; rather, it is broader and implicates other privacies. For instance, a post-operative transsexual may not sexually procreate in the traditional manner, meaning that privacy decisions about abortion will not be an issue for a MTF transsexual. Nevertheless, the ambit of privacy protection for procreation is broader than this limitation. The Supreme Court's decisions relating to procreation suggest recognition of much more than a woman's right to elect for an abortion; instead, these decisions pertain to the right to control the physicality of one's body. Just so here, the decision of transsexuals to restructure their genitals implicates controlling the physicality of one's body. Far from merely addressing sex, abortion and reproduction, these cases intimate broader protections. The cases hold that the Constitution mandates protections for private, consensual decisions involving sexual intimacy, autonomy and dignity. When a transsexual decides to express his or her gender and sexuality, each of these privacy interests is implicated. Moreover, other privacy interests are implicated by transsexuals' disclosure of pri-

108. *Whalen v. Roe*, 429 U.S. 589, 598 n.23 (1977).

109. *Carey v. Population Serv. Intl.*, 431 U.S. 678 (1977).

110. *See Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood v. Casey*, 510 U.S. 1309 (1994).

111. *See Griswold v. Conn.*, 381 U.S. 479 (1965); *see also Eisenstadt v. Baird*, 444 U.S. 934 (1979) (extending the privacy rights affecting contraceptives to unmarried individuals).

112. *Lawrence*, 539 U.S. 558 (2003); *Romer v. Evans*, 517 U.S. 620 (1996).

113. *Y.G. v. Jewish Hosp. of St. Louis*, 795 S.W. 2d 488, 498 (Mo. 1996) (stating that "[s]exual relations, for example, are normally entirely private matters.") (citing *Cox Broadcasting Co. v. Cohn*, 420 U.S. 469 (1975)); *Doe v. Blue Cross Blue Shield of R.I.*, 794 F. Supp. 72, 74 (D.R.I. 1992) (allowing transsexuals to sue under pseudonymous names and holding that "one's sexual practices are among the most intimate part of one's life."); *Lawrence*, 539 U.S. at 567 (stating that sexual behavior is the most private human conduct); *Foulston*, 2006 U.S. App. LEXIS 2366, *66 (stating that "the right to privacy protects intrusion into personal sexual and medical matters.").

vate medical matters[114] and the decision as to undergoing medical treatment,[115] which implicate liberty interests.

Transsexuals are not explicitly protected by the federal constitution,[116] so if they are to possess any fundamental right under the Constitution, these rights must be implied. Historically, in evaluating the existence of implied fundamental rights courts take one of three distinct approaches. First, courts using the "penumbral approach"[117] look to the implications of the Constitutional amendments as a whole. Applying that approach to transsexuals, privacy concerns are embodied within the First Amendment's protection of freedoms of expression and symbolic speech,[118] the Fourth Amendment's security in person against unreasonable search and seizures,[119] and the broad concept of liberty guaranteed

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114. *See O'Reilly v. Rutgers*, 2006 U.S. Dist. LEXIS 2341 (D.N.J. Jan. 19, 2006) (stating that "[t]he right to privacy extends to protect individuals' interest in avoiding disclosure of personal matters"); *Doe v. Tris Comprehensive Mental Health, Inc.*, 690 A.2d 160 (N.J. 1996) (allowing a homosexual, HIV-positive individual to sue anonymously in recognition of his "private and personal information.").

115. *Cruzan v. Dir., Mo. Dept. Health*, 497 U.S. 261, 278 (1990) (holding that "a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment." One inference to this is that the converse is also true: a competent person has a "constitutionally protected liberty interest" in deciding to accept desired medical treatment); *Union P. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891) ("No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."); *Sard v. Hardy*, 379 A.2d 1014, 1021 (Md. 1977) (a "patient's fundamental right of physical self-determination mandates the scope of a physician's duty to disclose therapeutic risks and alternatives"); *Geler v. Akawie*, 818 A.2d 402, 417 (N.J. 2003) (finding a "physician's duty to fill any informational gaps that preclude a meaningful exercise of patient's self-determinative rights."); *Miller v. Kennedy*, 522 P.2d 852, 863 (Wash. 1974) (jury question as to "whether any standard of nondisclosure should deprive a patient of his right of self-determination."); *Foody v. Manchester*, 482 A.2d 713, 717 (stating the right of medical self-determination has long been recognized at common law); 42 U.S.C. § 1395(cc)(f) (1990) (the Federal Patient Self-Determination Act ("PDSA") requires health care providers to discuss medical advance directives, which implies federal recognition of medical self-determination); *see also* 42 U.S.C. §§ 1395(i-3) (1990), 1395(l), 1395(bbb) (for other mentions of the PDSA).

116. *Cf. supra* nn. 65-67 (discussing protections for transsexuals under certain state laws and constitutions).

117. *See Griswold*, 381 U.S. at 484.

118. Arguably, SRS is a form of symbolic expression, as it manifests one's emotions and thoughts pertaining to gender. *See* U.S. Const. amend. I; *see also Cohen v. Cal.*, 403 U.S. 15 (1971) (indicating that freedom of speech includes wearing a coat displaying the words, "FUCK THE DRAFT"); *see also Virginia v. Black*, 538 U.S. 343 (2003) (extending the freedom symbolic speech to cross burning); *but see Regan v. Taxation with Representation*, 461 U.S. 540, 549-50 (1997) (holding in dicta that while government may not infringe on free speech, there is no affirmative duty to eliminate obstacles it did not create).

119. U.S. Const. amend. IV.

by the Fourteenth Amendment.[120] This "penumbral approach" also takes into consideration the actor's intimacy, dignity, and autonomy, all of which are implicated by transsexuals seeking SRS. Second, courts look to any implied constitutional interests under the Ninth Amendment.[121] Since there is no mention of transsexuals or SRS in the federal constitution, transsexuals retain an implied fundamental right to obtain SRS when viewing their Ninth Amendment rights in conjecture with their First Amendment rights of free expression and speech. Third, courts look to the broad concept of liberty contained within the Fourteenth Amendment.[122] Under that analysis, transsexuals arguably have an implied fundamental liberty interest in gender expression, and this liberty interest is not afforded deference when they are denied access to SRS.

Privacy rights are generally viewed as containing two elements: (1) the right to confidentiality, and (2) the right to autonomy.[123] The first element refers to avoiding disclosure of private matters.[124] The second element reflects an allowance of the individuals' "independent judgment."[125] If transsexuals, in modifying their gender to conform to their own self-image, have an implied fundamental right of privacy, they are protected from governmental action intrusive on that right.[126] Based on this privacy right, it follows that transsexuals have a legitimate expectation that their privacy will be protected and remain confidential[127] from government intrusion. The question then arises as to how the government can honor that privacy right. This constitutionally implied privacy right is infringed upon when transsexuals are "forced to disclose infor-

120. *See* U.S. Const. amend. XIV; *but see DeShaney v. Winnebago County*, 489 U.S. 189, 195 (1989) (while the Due Process Clause precludes deprivation of life, liberty and property without due process, there is no obligation on the State to prevent these effects from occurring in other ways).

121. *See* U.S. Const. amend IX ("the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people"); *see also* Griswold, 381 U.S. at 486-87 (Goldberg, J., concurring) (explaining that the Ninth Amendment, by itself, is not a source of implied fundamental rights).

122. *Griswold*, 381 U.S. at 502-03 (White, J., concurring).

123. *Webb v. Goldstein*, 117 F. Supp. 2d 289, 296 (E.D.N.Y. 2000) (citing *Doe v. N.Y.C.*, 15 F.3d 264, 267 (2nd Cir. 1994) (defining the right to confidentiality as "the individual interest in avoiding disclosure of personal matters and the right to autonomy as "the interest of independence in making certain kinds of important decisions.").

124. *Foulston*, 2006 U.S. App. LEXIS 2366, *36-37.

125. *Id.*

126. *Magnusson*, 2005 U.S. Dist. LEXIS at *8 (explaining that three privacy facets exist: "The first is the right of the individual to be free in his private affairs from governmental surveillance and intrusion. The second is the right of an individual not to have his private affairs made public by the government. The third is the right of an individual to be free in action, though, experience, and belief from governmental compulsion.").

127. *Foulston*, 2006 U.S. App. LEXIS 2366 at *37.

mation regarding personal sexual matters."[128] While some transsexuals may "pass" for the gender they are attempting to attain, others may not.[129] As to "passing" transsexuals, society may generally honor their privacy rights by affording those interests the protections any other general privacy interest.[130] However, there are transsexuals who do not "pass." That is to say, most members of society will readily be able to deduce on sight that the individual is a transsexual of some sort. At that moment, those transsexuals are involuntarily forced to disclose their gender identity, which is information relating the highly personal matter and private matter. In practical effect, non-passing transsexuals are deprived daily of their privacy rights. To add insult to injury, transsexuals are not protected under Title VII or the ADA. In light of this, transsexuals, particularly those who do no pass, should be afforded greater legal protection by recognizing an implied fundamental constitutional right of privacy when seeking SRS. Without this recognition, transsexuals are left vulnerable, which can have a chilling effect on their free speech.[131]

While current case law fails to define the ambit of transsexuals' constitutional and privacy interests, some inferences can be drawn from cases involving transsexual prisoners. Balancing the scope of medical treatment for transsexuals with their limited rights as prisoners is a con-

128. *Id.* at 61.

129. *See The Issue of Passing*, http://transsexual.org/passing.html (viewed on Mar. 26, 2006) (defining passing as "the act of successfully appearing as a desired definition of person in the world." This site also details the different types of "passing," including physical and societal passing. Physical passing refers to a reduction of inapposite gender characteristics, whereas Social passing refers to not being detected by society as a transsexual.); *see also* Pandora, *To Pass or Not to Pass, That is the Question*, http://www.trans-health.com/displayarticle.php?aid=57 (viewed on Mar. 26, 2006) (discussing the societal hierarchy created within the trans-community by the phenomena of passing); *Passing*, Wikipedia, http://en.wikipedia.org/wiki/Passing (viewed on Mar. 26, 2006) (indicating that passing applies not only to transsexuals but to individuals passing for a different social class, culture, or race in addition to gender); Susan Etta Keller, *Operations of Legal Rhetoric: Examing Transsexual and Judicial Identity*, 34 Harv. C.R.-C.L.L. Rev 329 (1999) ("[a]n individual transsexual's gender presentation may be so coherent that at any particular moment it draws no attention.").

130. *See e.g. Planned Parenthood*, 505 U.S. 833 (1992), *rev'd and remanded*, 14 F.3d 848 (3d Cir. 1995) (striking down a state regulation banning contraceptives based on privacy rights and allowing individuals to make such decisions independent of government intrusion).

131. Despite any chilling effect these regulations have, Transsexuals go to great and often dangerous lengths to effectuate their gender expression. For instance, one such practice common among MTF transsexuals is utilizing free-form silicone to develop breasts, hips and other feminine secondary sex characteristics. *See e.g. Illinois v. Ellison*, 426 N.E.2d 1058 (Ill. App. 1991) (describing the criminal prosecution of an individual who, though not a medical professional, injected a transsexual with free-form silicone, causing her death); *Schwenk v. Hartford*, 204 F.3d 1187, 1193 (9th Cir. 1999) (noting that before her incarceration, this MTF transsexual illegally obtained female hormones).

stant theme in these cases. In one prisoner case, Judge Posner reasoned that while a prison has an obligation to offer prisoners medically necessary treatment, it is not "required by the Eighth Amendment to give a prisoner medical care that is as good as he would receive if he were a free person."[132] While Posner acknowledged that gender dysphoria is a "serious medical condition,"[133] he concluded that providing SRS would be too cost prohibitive for the prison.[134] Similarly, in *Heard v. Franzen*, a female-to-male ("FTM ") transsexual prisoner sought SRS concurrent with a medically necessary hysterectomy.[135] Heard claimed that not granting her request for SRS denied constituted cruel and unusual punishment under the Eight Amendment. This argument fell on deaf ears, as the court held that Heard's status as a prisoner limited her privacy interest, and therefore the Eighth Amendment was not implicated.[136] Similarly, the Seventh Circuit in another case has held that while transsexual prisoners have a right to receive treatment for gender dysphoria as a medical condition, there is no right to a chosen type of treatment.[137] At present, no state penal system pays for SRS, though some provide hormone treatment at the level the transsexual was receiving prior to incarceration.[138]

Prisoners are afforded even less protection for their medical confidentiality. For instance, in *Petty v. Goord*, a prisoner alleged unlawful dissemination of his HIV status, arguing that it was a private matter.[139] As a result of this unauthorized disclosure, Petty suffered harassment and attempted suicide numerous times.[140] The Southern District of New York dismissed Petty's privacy claim on the basis that qualified immu-

132. *Maggert v. Hanks*, 131 F.3d 670, 671 (7th Cir. 1997); *see also Long v. Nix*, 86 F.3d 761, 766 (8th Cir. 1996) (affirming the denial of a MTF transsexual prisoner's right to dress as a female and stating that the request would allow the prisoner to "exists in prison on his own terms, rather than in conformity with prison regulations.").

133. *Id.* at 671.

134. *Id.* at 672.

135. 1980 U.S. Dist. LEXIS 11909, *1-2 (N.D. Ill. June 12, 1980).

136. *Id.* at 4-5.

137. *Meriwether v. Faulkner*, 821 F.2d 408, 413 (7th Cir. 1987) (stating "it is important to emphasize, however, that she does not have a right to any particular type of treatment. . . .").

138. Kirk Mitchell, *Inmate seeks operation to switch genders*, Chi. Tribune, § 5C, 6 (Mar. 29, 2006).

139. 2002 U.S. Dist. LEXIS 21197, *2 (S.D.N.Y. Oct. 31, 2002); *see also Doe v. Magnusson*, 2005 U.S. Dist. LEXIS 6143 (another example of a case involving the disclosure of an inmates' HIV status); *Petty v. Goord*, 2002 U.S. Dist. LEXIS 21197 (S.D.N.Y. 2002) (same).

140. *Murray v. U.S. Bureau of Prisons*, 1997 U.S. App. Lexis 1716, *11 (6th Cir. 1997) ("[s]ince transsexualism is a recognized medical disorder, and transsexuals often have serious medical need for some sort of treatment, a complete refusal by prison officials to provide a transsexual with any treatment at all would state an Eighth Amendment claim for deliberate indifference to medical needs. [Citations omitted]. However, where, as here, the prisoner is receiving treatment, the dosage of which is based on the considered professional judgment of a physician, we are reluctant to second-guess that judgment.").

nity under the Eleventh Amendment precluded the validity of this claim.[141] According to the court, because the state of the law pertaining to the privacy interests of prisoners with HIV was not settled in 2002, the prison officers were immune from suit.[142] The transsexual, like a HIV-positive individual, is a relatively new phenomenon. Disclosure of a prisoner's transsexual status should be no more morally permissible than the disclosure of HIV status.[143] However, because the law pertaining to transsexuals and SRS is largely an unsettled, disclosures of transsexuals medical status' may be protected by government immunity under the Eleventh Amendment.

In sum, while the transsexual prisoner cases provide some analogy to the rights of transsexuals who are not incarcerated, the prisoner cases are limited in defining exactly what privacy rights a non-incarcerated transsexual has, because prisoners enjoy only limited freedoms and rights.[144] If transsexuals have an implied constitutional right or a privacy interest in gender expression, then governmental disclosure of this information should be limited to those situations that present a compelling governmental interest.[145] Government action should not inhibit or present barriers to the SRS process.[146] However, as discussed below, FMLA requirements and enforcement may be tantamount to government action resulting in the denial of transsexual's implied fundamental right to privacy, freedom of speech, expression, and association. Whenever compelling governmental interests are present, they should be weighed against the significant privacy interest of transsexuals. Even absent a finding of a fundamental privacy interest, transsexuals should be entitled to SRS without governmental intrusion because the process

141. *Id.* at *15 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (2002)) (Under the Eleventh Amendment, government actors such as prison employees enjoy qualified immunity for conduct not clearly violative of a clearly established right).

142. *Id.* at **19-20 (district court decisions do not establish the state of the law for purposes of Eleventh Amendment analysis).

143. *See Devilla v. Schriever*, 245 F.3d 192, 197 (2d Cir. 2001) (noting that statements about transsexualism may disclose secrets).

144. *Houchins v. KQED, Inc.*, 438 U.S. 1, 5 at n. 2 (1978) (clarifying that prison inmates "retain certain fundamental rights of privacy" but leaving the scope of those rights ill-defined); *see e.g. Maggert*, 131 F.3d at 671 (a prison does not have to give a prisoner "medical care that is as good as he would receive if he were a free person.").

145. *See Foulston*, 2006 U.S. App. LEXIS 2366, at *1119 (stating that the question is whether a "reporting statute serves any significant state interest"); *but see Webb v. Goldstein*, 117 F. Supp. 2d 289, 297 (E.D.N.Y. 2000) (employing a lesser standard by weighing substantial state interest balanced with privacy interests).

146. *See The Civil Rights Cases*, 109 U.S. 3, 17-18 (1883) (holding that state action may occur by endorsement of the practice of a private business); *but see Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 358 (1974) (holding in dicta that despite the nature of the business and substantial interplay between the state and the utility, action by the utility did not constitute state action).

involves profound and complex interests in the expression of individual feelings implicating personal dignity, autonomy, and intimacy.

ANALYSIS: THE FMLA AND THE TRANSSEXUAL

While there is a general dearth of case law and scholarly writing pertaining to transsexuals, my research revealed no cases or articles whatsoever pertaining to transsexuals seeking FMLA leave for SRS. In private employment, transsexuals may seek FMLA leave to obtain SRS. While the need to recognize transsexuals' privacy rights suggests that a FMLA request should be granted in these situations, literal interpretations of the FMLA may present barriers to transsexuals seeking FMLA leave for SRS.

Congress enacted the FMLA to allow employees[147] the opportunity to take reasonable leave from work by mandating more medical leave than employers might otherwise be able or willing to grant.[148] The scope of the FMLA is limited to only employers who have fifty or more employees within a seventy-five mile radius.[149] Generally, the FMLA entitles employees to take up to twelve weeks of unpaid leave from work for the adoption or birth of a child, care of a closely related family member, or for a serious health condition.[150] When the employee returns to work from leave, he or she must be placed in a position equivalent position to the one left behind.[151] Additionally, an employer may not discriminate against an employee who has decided to take FMLA leave by any retaliatory employment action.[152]

The current construction of the FMLA presents a number of problems in the context of an employer and transsexual employee rela-

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147. 29 U.S.C. § 2611 (2) (2000) (defining "employee" under the FMLA); 29 C.F.R. § 825.110 (1995) (same); *Duckworth v. Pratt & Whitney, Inc.*, 152 F.3d 1, 9 (1st Cir. 1998) (defining "employee" inclusive of past, present and future employees); *Miller v. Defiance Metal Prods.*, 989 F. Supp. 945, 947 (N.D. Ohio 1997) (stating that "Congress intended definitions of 'employ' and 'employee' under the Act to be broadly inclusive. . . .").

148. 29 U.S.C. §§ 2601(a)(4) (2000) ("there is inadequate job security for employees who have serious health conditions that prevent them from working for temporary periods."); 2601(b)(2) (stating one purpose of the FMLA is to "entitle employees leave to take reasonable leave for medical reasons.").

149. *See* 29 U.S.C. §§ 2611(4)(A)(i) & (ii)) (2000); *see also Terry Lynn Dill v. Save-a-Lot, Ltd.*, 2000 U.S. Dist. LEXIS 16678, *5 (N.D. Miss. Aug. 29, 2000) (excluding an employer from the FMLA because of a lack of employees within seventy-five miles as required under 29 U.S.C. § 2611(2)(B)(ii) (2000); *Humenny v. Genex Corp.*, 390 F.3d 901 (6th Cir. 2004) (same); 29 C.F.R. §825.111(b) (1995) (regulation pertaining to 29 U.S.C. § 2611(2)(B)(ii)).

150. 29 U.S.C. § 2612(a) et. seq. (2000).

151. 29 U.S.C. § 2614(a) (2000) (reinstatement); 29 C.F.R. § 825.216(a) (2000) (same); *Watkins v. J&S Oil Co.*, 164 F.3d 55, 59 (1st Cir. 1998) (construing the return to an equivalent position to mean "substantially equal or similar, not necessarily identical or exactly the same.").

152. *See e.g. U. of Chi. Hosp.*, 2003 U.S. Dist. LEXIS 20965 at *15.

tionship. This section will analyze these barriers and suggest that employers and courts adopt a broader interpretation of the FMLA to afford deference to the fundamental implied constitutional rights and privacy interest of transsexuals.

A. TRANSSEXUALS PRESENT A SERIOUS HEALTH CONDITION

First, the FMLA may present difficulties to transsexuals seeking FMLA leave for SRS by its definition of a serious health condition.[153] Such a condition is defined under the FMLA as "physical or mental condition" that involves either "incapacity" or "continuous treatment by a health care provider."[154] The FMLA requires that the "serious health condition" be documented by a health care provider.[155] The employee bears the burden of proving that the requested medical condition is serious.[156] Failure to present the employer with a "serious health condition" may result in denial of FMLA rights.[157] As applied to transsexuals, questions arise as to whether the variety of seemingly disjointed surgeries which can be part of the overall SRS process qualify as a "serious health condition."[158] The FMLA explicitly includes mental conditions.[159] The DSM IV defines treatment of transsexuals as including both a mental and physical health care treatment. Accordingly, transsexuals undergo both physical and mental health care treatment

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153. 29 U.S.C.S. § 2611(11) (2000) (defining "serious health condition"); 29 C.F.R. § 825.114 (1995) (same); *Thorson v. Gemini, Inc.*, 205 F.3d 370, 377 (8th Cir. 2000) (stating that the issue of whether and employee has a "serious health condition" is a mixed question of fact and law), cert. denied, 531 U.S. 871 (2000); *Haefling v. UPS*, 169 F.3d 494, 499 (1999), *cert. denied*, 528 U.S. 820 (1999) ("whether an illness of injury constitutes a serious health condition under the FMLA is a legal question that the employee may not sidestep . . . merely by alleging his condition to be so.").

154. *Id.*

155. *See Bauer v. Dayton-Walther Corp.*, 910 F. Supp. 306, 311 (E.D. Ky. 1996) (denying employee's FMLA request for medical leave where the serious medical condition was due to a rectal bleed, but condition was not diagnosed by a physician); *Brohm v. JH Props*, 947 F. Supp. 299, 302 (W.D. Ky. 1996) (denying an anesthesiologist's FMLA request for time off for undiagnosed sleep apnea); *Roche v. St. Lukes Shawnee Mission Health Sys.*, 46 Fed. Appx. 867 (8th Cir. 2002) (holding "elective outpatient eye surgery" is not a "'serious health condition,' entitling [employee] to FMLA protections.").

156. *Sims*, 2 F. Supp. 2d at 1264 (citing *Diaz v. Ft. Wayne Foundry Corp.*, 131 F.3d 711, 713 (7th Cir. 1997); *Olsen v. Ohio Edison Co.*, 979 F. Supp. 1159, 1165 n. 7 (N.D. Ohio 1997)).

157. *See Michels v. Sunco Home Comfort Serv.*, 2004 U.S. Dist. LEXIS 25152, *9-10 (E.D. Pa. 2004) (no claim of action where no serious health condition is presented).

158. *Cf. Price v. City of Fort Wayne*, 117 F.3d 1022, 1024 (7th Cir. 1997) (stating that "several diagnoses, if temporally linked, no one of which rises alone to the level of a serious health condition, if taken together may constitute a serious health condition for purposes of the FMLA.").

159. *See supra* n. 149 (defining serious health conditions).

throughout the SRS process.[160]

The Benjamin SOC includes psychiatric treatment. Making determinations about whether psychiatric treatments as part of the SRS process constitute a "serious health condition" may be complicated.[161] Whether a transsexual's mental healthcare problems qualify as "serious" includes some subjective analysis on a case-by-case basis.[162] Despite the prevalence of mental disorders,[163] a mental disorder by its nature is more difficult to prove than a physical condition requiring medical attention. In the case of transsexuals, the lack of a uniform view regarding the psychological component of the medical treatment complicates the issue and may lead to employers viewing a transsexual's seeking SRS as outside the "serious health condition" definition.[164] At worst, this may lead physicians, mental health care providers, employers, and judges to inject their personal views on transsexuals into their medical examination and deny them FMLA leave where it is inappropriate for them to do so.[165]

Next, the FMLA's definition of health care providers[166] may also prove problematic for transsexuals seeking SRS.[167] The FMLA recognizes treatment offered by a doctor authorized to practice medicine or surgery and others "capable of providing health care,"[168] including clinical psychologists and clinical social workers.[169] This regulation may deny transsexuals the right to satisfy the mental health care component of the Benjamin SOC through seeking treatment by non-clinical social

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160. *See supra* n. 49, 51-55.

161. *See e.g.* Captain Miranda W. Turner, *Psychiatric Disabilities in the Federal Workplace: Employment Law Considerations*, 55 A.F. L. Rev. 313, 314-15 (2004) ("determining whether an individual in disabled . . . can be difficult in cases where the alleged disability is psychiatric in nature.").

162. *See e.g. Kamtaprassad v. Chase Manhattan Corp.*, 2001 U.S. Dist. LEXIS 21532, *12-19 (S.D.N.Y. 2001) (allowing plaintiff's FMLA claim to survive summary judgment, but detailing the difficulties she faced in advocating her disability claim based on depression).

163. Turner, *supra* n. 162, at 313 ("approximately 22.1% of adult Americans suffer from mental disorders.").

164. *Davidson v. Aetna Life & Casualty Insurance Co.*, 420 N.Y.S. 2d 450, 452 (1979) (discussing the evolution of psychological theory on transsexuals' medical treatment).

165. *See Crandall v. Jo Daivess County*, 2006 U.S. Dist. LEXIS 1172 at *9-11 (N.D. Ill. 2006) (denying employer's motion for summary judgment where the underlying claim involves a the claim that situational depression is a serious medical condition within the contemplation of the FMLA); *but see Maggert*, 131 F.3d at 670, 671 (transsexuals have a "serious psychiatric disorder.").

166. *See* 29 U.S.C. § 2611 (6)(A) (2000) (defining "health care provider" under the FMLA).

167. *See Sanders v. May Dept. Stores Co.*, 315 F.3d 940, 944 n.4 (8th Cir. 2003) (declining "to address whether [SRS] qualifies as a serious health condition under the FMLA."); *but cf.*, *Nix*, 86 F.3d 761, 765 n. 3 (the Eighth Circuit has "held that transsexualism is a serious medical need. . .").

168. 29 C.F.R. § 825.118(a)(1)-(2) (2000).

169. *Id.* at (b)(1)-(2).

workers or therapists. The SOC allows transsexuals preparing for SRS to satisfy some of the mental health care obligations needed to obtain clearance for SRS by seeing therapists or social workers.[170] Such providers are often more affordable than psychologists or psychiatrists.[171] Transsexuals may be further motivated to seek mental health care from a LSW based on the overall expense of a SRS.[172] Given the high cost of the SRS process, the FMLA regulations may further limit access to SRS by imposing a requirement that treatment be provided only by clinical psychologists or social workers.[173] This may prevent some transsexuals from proceeding with psychological treatment to conform gender identity to his or her body.

Another problem with the FMLA's definition of a "serious health condition" is its exclusion of elective or cosmetic surgeries.[174] Determining whether a medical procedure is cosmetic or elective can prove difficult.[175] For example, in *Tozzi v. Adv. Med. Mgt. Inc.*, summary judgment was granted in favor of an employer which denied FMLA leave to an employee who suffered from mental anguish from a bilateral mastectomy resulting after being diagnosed with cancer.[176] Likewise, in *Pownall v. Schriver*, an employee attempted to take time off work[177] after she suspected that one of her breast implants had ruptured and a doctor informed her that it would have to be removed.[178] When her employer inquired about the nature of the surgery to determine if it was elective or not, the employee resigned[179] and was later denied recovery

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170. *See* Benjamin SOC, *supra* n. 49, at 7-9 (stating recommendations for a mental health professional's level of care associated with gender identity disorders).

171. *See e.g. Who Can Diagnose AD/HD?*, http://www.additudemag.com/additude.asp?DEPT_NO=202&SUB_NO=2 (last accessed on Mar. 27, 2006) (citing one of the benefits of seeing a LSW is that they are more affordable; however, this article also notes that a LSW may not be able to diagnose more complicated mental illnesses).

172. *See Maggert*, 131 F.3d at 670, 672 (stating the cost of the SRS process may exceed one hundred thousand dollars in total).

173. *Supra* n. 172 (Since psychologists are generally more expensive that social workers, restricting FMLA coverage to only psychologists may hinder some transsexuals from being able to obtain medical treatment, based on cost).

174. *See* 29 U.S.C. § 2611(a)(B)(v)(c) ("[c]onditions for which cosmetic treatment are administered . . . are not 'serious health conditions.'"); *but cf. Meriweather*, 821 F.2d at 412-13 (quoting the California Appellate Court, which stated it did not believe transsexual surgery "can reasonably be characterized as cosmetic.") (quoting *J.D. v. Lackner*, 80 Cal. App. 3d at 90, 96 (1978)).

175. *See e.g.* Ronald Wheeland, *Cosmetic surgery patients: unfair tax targets?*, No. 5, V. 8 Cosmetic Surgery Times 3 (June 1, 2005) (discussing one of the difficulties facing states considering taxing cosmetic surgery is determining which procedures are truly cosmetic in nature).

176. 2001 U.S. Dist LEXIS 17910 (D. Md. May 24, 2001).

177. *Id.* at *3.

178. 2003 U.S. App. LEXIS 6889 at *2 (6th Cir. Apr. 8, 2003).

179. *Id.* at *5-6.

under the FMLA.[180] By analogy, a transsexual seeking FMLA leave to obtain SRS surgeries might face similar issues. As in Pownall, a MTF transsexual might seek FMLA leave to obtain breast implants or augmentation to appear more feminine. On the other hand, as in *Tozzi*, a FTM transsexual might seek a bilateral mastectomy to appear more masculine.

Relying on the precedents set in *Pownall* and *Tozzi*, and attempting to strike a fair balance between the requirements for trans and non-trans employees,[181] an employer might deny FMLA leave to transsexuals seek either breast augmentation or mastectomy. From a formal equity standpoint, it seems fair to deny FMLA leave to both transsexuals and others for the same medical procedures. However, this seemingly uniform treatment in fact overlooks the complex differences between the two situations. The reasons that transsexuals and non-transsexuals seek "elective" surgeries are inapposite. Elective surgeries such as breast augmentations and liposuction pertain to the private, intimate thoughts all individuals have about their self-image. However, in the case of transsexuals, these surgeries should not be considered "elective" because they pertain to more than just self-image; they pertain to identity. Right or wrong, SRS currently represents the only "cure" for the medical conditions suffered by transsexual.

Because SRS is presently the sole method of treatment, SRS should not be considered an elective or cosmetic surgery under the FMLA. Leave should be granted to transsexuals seeking SRS despite the fact that some SRS processes would be considered elective surgery for non-transsexuals. Furthermore, denying FMLA leave to transsexuals to obtain SRS may force the transsexual to choose between continuing his or her present employment, forgoing SRS, or quitting employment until the SRS process is complete

B. TRANSSEXUALS HAVE "CHRONIC" MEDICAL ISSUES TREATED BY "PERIODIC" VISITS

Other definitions in the FMLA may also prove problematic for transsexuals. FMLA leave is allowed only for an incapacity of three days or more or due to a "chronic serious health problem for which [the individual] receives regular treatment."[182] At first, this definition seems to

180. *Id.* at *8.

181. *Mich. Pork Producers v. Veneman*, 229 F. Supp. 2d 772, 784 (W.D. Mich. 2002) ("the purpose of equity is to do equity"); *vacated by, Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550* (2005)).

182. *Fink v. Ohio Health Corp.*, 139 Fed. Appx. 667, 670 (6th Cir. 2005) (defining the continuing treatment by a health care provider standard); *Evans v. Henderson*, 2001 U.S. Dist. LEXIS 962, *7 (N.D. Ill. 2001) (multiple single-day absences not lasting longer than three consecutive days are not qualifying FMLA leave occurrences).

fit with a transsexual seeking SRS in the sense that the transsexual has a "chronic" health problem.[183] Indeed, many transsexuals have had gender identity disorders for their entire lives.[184] Nevertheless, this presents a problem of proof for the transsexual, because typically the gender dysphoria is not diagnosed early on in his or her life, and therefore no medical documentation exists from this time.[185] The sparse and recent documentation may present an insurmountable barrier to transsexuals seeking to prove a chronic problem.

Additionally, the FMLA definition requiring "periodic visits to health care providers . . . over an extended period of time"[186] may prove problematic for transsexuals seeking SRS. The FMLA statute imposes two distinct temporal limits: (1) "periodic" visits and (2) treatment "over an extended period of time."[187] However, SRS does not represent a single surgery but rather many different surgeries.[188] Viewing the word "periodic" in its broadest sense, the sum total of each different surgery might constitute "periodic" treatment for gender dysphoria.[189] However, narrowly construing "periodic" might lead to a finding that each individual surgery, taken alone, would not be considered as an on-going part of the SRS process.[190] For example, a MTF transsexual who wishes to undergo plastic surgery to feminize her face might accomplish this surgery with three visits to her surgeon. These visits to the health care provider will likely not be "periodic" if that term is defined narrowly, leading to the denial of FMLA leave.[191] Certainly this hypothetical example suggests only an absence of four days, which even the most modest company

183. *See Sabbrese v. Lowe's Home Ctrs., Inc.*, 320 F. Supp. 2d 311 (W.D. Pa. 2004) (allowing intermittent FMLA leave to a diabetic).

184. *See e.g. Schroer*, 2006 U.S. Dist. Lexis 14278 at *1 (providing testimony of a MTF transsexual who stated feeling incongruous with her male gender at a young age).

185. *Id.* (Schroer was not diagnosed with gender dysphoria until decades after she began feeling she was the wrong gender. This situation illustrates the potential for a problem since it is impossible to document the number of years Schroer felt or thought she was living as the wrong gender).

186. *Fink*, 139 Fed. Appx. at 670.

187. *Id.*

188. Transsexual Road Map, *My Timetable*, http://www.tsroadmap.com/start/timetable.html (last updated Sept. 1, 2005) (detailing the four- year process of various surgeries undergone by one transsexual in her process of gender reassignment).

189. *Hodgens v. General Dynamics Corp.*, 144 F.3d 151, 164 (1st Cir. 1998) (stating that because the FMLA is a remedial statute, it "should be construed broadly to effectuate its purpose") (citing *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967)).

190. *See Stiefel v. Allied Domecq Spirits & Wine U.S.A., Inc.*, 184 F. Supp. 2d 886 (W.D. Ark. 2002) (denying FMLA coverage to a woman who suffered a miscarriage because subsequent treatment and incapacity were separated by several months from her miscarriage).

191. *See e.g. Jones v. Denver Pub. Sch.*, 427 F.3d 1315 (10th Cir. 2005) (denying FMLA coverage to an employee for failing to establish the periodic and continuous treatment when he went to the doctor on four separate occasions over time).

allowance of sick or vacation would cover.[192] However, other procedures involving the SRS require much longer recovery time and might require FMLA leave. If a timetable for SRS is developed, shared with the employer, and the employer is informed that the transsexual will be undergoing seemingly unrelated medical procedures with various medical providers, then the employer (viewing "periodic" broadly) may be more inclined to grant FMLA leave. However, the timetable approach would require a work environment with a great deal of openness, sharing, and trust between employer and employee. Unfortunately, such a work environment will not always be present for transsexuals.

Thus, the various surgeries compromising a SRS transition should be viewed in toto, so that the transsexuals undergoing SRS can meet the requirement of treatment over extended time. However, if a narrow definition is adopted, and the employer views the variety of SRS procedures disjunctively, then each request may be viewed as a separate FMLA request, resulting in many, if not all, of these requests being denied by the employer. For these reasons, employers and courts should construe "periodic" and "treatment over an extended time" broadly. In addition, the FMLA regulations need to be clarified and address this concern.

C. The Certification Process Should be Reformed in Order to Balance Transsexuals' Privacy Interests with the Employer's Needs

Another concern for transsexuals seeking FMLA leave is the request and certification process. Absent an emergency situation, any individual seeking to take FMLA leave is required to submit a written request.[193] The employer may then require a certification form submitted from a

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192. *See Strickland v. Water Works & Sewer Bd.*, 239 F.3d 1199 (11th Cir. 2001) (irrespective of whether the employee has utilized its sick or vacation time, the employee may still avail himself of FMLA leave); *but see Cline v. Wal-Mart Stores*, 144 F.3d 294 (4th Cir. 1998) (the employer may, however, force the employee to integrate sick and vacation time into the FMLA leave).

193. 29 U.S.C. § 2612(e) (2000) and 29 C.F.R. §§ 825.301, 302(a) (1995) (defining notice required for foreseeable leave); *see also Price v. City of Fort Wayne*, 117 F.3d 1022, 1026 (7th Cir. 1997) (whether notice was given is a question of fact); *Beaver v. RGIS Inventory Specialists, Inc.*, 144 Fed. Appx. 452, 456 (6th Cir. 2005) (while notice must be adequate to apprise the employer of the need for FMLA leave, it need not to explicitly reference the FMLA); *accord Willis v. Coca Cola Enterprises, Inc.*, 2006 U.S. App. Lexis 7876, *3 (5th Cir. 2006) (employee "must explain the reasons for the needed leave so as to allow the employer to determine that the leave qualifies under the Act."); *Lackey v. Jackson County, Tenn.*, 104 Fed. Appx. 483, 488 (6th Cir. 2004) (providing an example of a vague doctor's note too unspecific to provide the employer notice of a FMLA-qualifying serious health condition); *Cruz v. Publix Super Markets, Inc.*, 428 F.3d 1379 (11th Cir. 2005) (affirming summary judgment for failure to provide sufficient notice).

medical provider.[194] Some employers may require a fitness to return to work certification upon conclusion of FMLA leave.[195] For the certification form to be complete, it must indicate at least the following information:

> (1) the date on which the serious medical condition commenced; (2) probable duration of the condition; (3) appropriate medical facts within the knowledge of the health care provider regarding the condition, and (4) a statement that the eligible employee is needed to care for the son, daughter, spouse, or parent and an estimate of the amount of time that such employee is needed to care for the son, daughter, spouse, or parent; and
>
> (B) for purposes of leave under section 102(a)(1)(D) [29 USCS § 2612(a)(1)(D)], a statement that the employee is unable to perform the functions of the position of the employee.[196]

The FMLA does provide some procedural safeguards for the confidentiality of the employee. For instance, one court held that the certification form need not include a formal diagnosis.[197] Another court held that where the health care provider has provided the certification form, the employer may not contact the employee's health care provider.[198] However, the statute and regulations provide that as a general matter the employer's health care provider may contact the employee's health care provider with questions.[199] When the employer or its agent contacts the health care provider, HIPAA may be triggered.

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194. 29 U.S.C. § 2613(a) (2000) (prescribing the certification process); *accord O'Reilly*, 2006 U.S. Dist. LEXIS 2341 at *9; *Levine v. Children's Museum of Indianapolis*, 61 Fed. Appx. 298, 301 (7th Cir. 2003) ("employer was estopped from arguing that an employee did not suffer a serious health condition only when the employer was on notice that the employee was absent for a health condition that reasonably could be expected to fall within the FMLA's purview, and nevertheless did not seek certification.").

195. 29 C.F.R. 825.310 (1995) (regulations pertaining to circumstances under which an employee may be required to submit to medical evaluation before returning to work); *see e.g. Barnes v. Ethan Allen, Inc.*, 356 F. Supp. 2d 1306 (S.D. Fla. 2005) (allowing summary judgment as to the issue of retaliatory discharge where the employee failed to provide a fitness-to-return to work certification).

196. *See* 29 U.S.C. § 2613(b) (2000); 29 C.F.R. § 825.307 (1995) (pertaining to the sufficiency of the certification); *see also Baldwin-Love v. Elec. Data Sys. Corp.*, 307 F. Supp. 2d 1222, 1229 (M.D. Ala. 2004) (failure to provide a requested certification "renders employee's absences unprotected by the FMLA."); *Harcourt v. Cincinnati Bell Tel. Co.*, 383 F. Supp. 2d 944, 955 (S.D. Ohio 2005) (a certification form containing the information required by the statute is presumptively valid).

197. *O'Reilly*, 2006 U.S. Dist. LEXIS 2341 at *21.

198. *Whitney v. Wal-Mart Stores, Inc.*, 2003 U.S. Dist. LEXIS 22629, *32-33 (D. Me. 2003) ("if employee submits a complete medical certificate . . . the employer may not request additional information from the health care providers.").

199. *Id.*

1. *HIPAA Does Not Protect Transsexuals' Privacy Interests When They Apply for FMLA Leave Through this Certification Process*

The Supreme Court has noted that effective medical treatment requires that some private information must necessarily be disclosed in spite of privacy interests.[200] Due to these privacy concerns relating to medical records,[201] Congress enacted the Health Information Portability Accountability Act ("HIPAA").[202] While HIPAA's regulations have gone through several revisions,[203] it has survived all challenges claiming that it is overbroad and an improper delegation and abuse of authority.[204] In its revised form, HIPAA requires patient consent before disclosure except for disclosures involving subsequent treatment, payment or general healthcare operations.[205]

On its face, HIPAA offers transsexuals protection facially identical to all other members of society: a ban on disclosure of private medical information, absent consent and a few minor exceptions.[206] But the truth that privacy interests in medical information "will vary with the condition"[207] is amply demonstrated by transsexuals. Logically, while medical records inherently contain private information, the privacy interest represented by a medical record detailing treatment for a common cold or flu is marginal compared to a medical record detailing stages of SRS. In contrast, disclosure that a transsexual has undergone SRS could expose him to "discrimination and intolerance,"[208] perhaps even putting him at risk for physical violence.[209] Such disclosure of the medical records of an individual treated for a common cold or flu would be

200. *Whaler*, 429 U.S. at 602.

201. *Khalfani v. Sec. Dept. Veterans' Affairs*, 1999 U.S. Dist LEXIS 2791, *17 (E.D.N.Y. Mar. 10, 1999) (categorizing some information in medical records as "deeply personal.").

202. 42 U.S.C. §§ 1320a-7c, 1320(d); 1395ddd, 1395b-5 (HIPAA); *Logan v. Dept. Veterans' Affairs*, 404 F. Supp. 2d 149, 155 (D.D.C. 2005) (discussing the reasons Congress enacted HIPAA); Ralph Ruebner and Leslie Reis, *Hippocrates to HIPAA: A Foundation for a Federal Physician-Patient Privilege*, 77 Tem. L. Rev. 505 (2004) (arguing that despite HIPAA, a federal physician-patient privilege should be established to afford deference to individual privacy interests).

203. *Citizens for Health v. Thompson*, 2004 U.S. Dist. LEXIS 5745, *10-19 (providing one example of an attack on HIPAA regulations).

204. *See Citizens for Health v. Leavitt*, 428 F.3d 167 (3d Cir. 2005); *S.C. Med. Assn. v. Thompson*, 327 F.3d 346 (2003); *Northwestern Hospital v. Ashcroft*, 362 F.3d 923 (7th Cir. 2004) (illustrating how HIPAA prevented the government from obtaining information from a hospital about late-term abortions).

205. *Thompson*, 2004 U.S. Dist. LEXIS 5745 at *19.

206. *Id.*

207. *Powell v. Schriver*, 175 F.3d 107, 111 (2d Cir. 1999).

208. *Doe v. N.Y.C.*, 15 F.3d 264, 267 (2d Cir. 1999).

209. *Powell*, 175 F.3d at 111 (describing the combination of a patient's HIV and transsexual status as an "unusual condition likely to provoke . . . hostility and intolerance from others.").

unlikely to present such a risk of discrimination, intolerance, violence, or any variant or actualization of these risks.

As it stands, HIPAA fails to consider the gravity of disclosure of a transsexual in the process of sex reassignment. The balance HIPAA attempts to strike between privacy concerns and the needs of the medical community[210] fails to take into account the sensitive constitutional privacy interests of transsexuals. Furthermore, the remedy afforded to all patients subjected to violations of HIPAA by unauthorized disclosures by their healthcare providers is identical: the Secretary of Health and Human Services may elect to take action against medical providers guilty of unauthorized disclosures.[211] There is no private cause of action under HIPAA.[212]

From a policy standpoint, the stated intent of HIPAA appears to contradict the presently available remedy. If nothing else, HIPAA should be reformed to allow private recovery for unauthorized disclosure of highly personable medical information where disclosure results in actual harm.[213] The Secretary of Health and Human Services should appoint an administrative review board for these situations comparable to the processes afforded to Medicaid, Medicare, and Social Security benefit recipients.[214] Since comparable structures are already in place, establishment of a HIPAA abuse review board would not be a burden. Power could be delegated to state agencies to experiment incrementally with different approaches to liability for health care providers.[215] While this

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210. *See Thompson*, 2004 U.S. Dist. LEXIS 5745 at *35 (discussion regulations pertinent to HIPAA).

211. *See Swift v. Lake Park High Sch.*, 2003 U.S. Dist. LEXIS 18684, *9 (stating that "[n]o federal court reviewing the matter has ever found that Congress intended HIPAA to create a private right of action."); *accord Johnson v. Milwaukee County*, 2006 U.S. Dist. LEXIS 6892, *8 (HIPAA creates no private cause of action).

212. *Logan*, 354 F. Supp. 2d 72 3d at 155.

213. *See* Maria Elena Fernandez, *Death Suit Costs City $2.9 Million; Mother of Transgendered Man Wins Case*, Washington Post C01 (Dec. 12. 1998) (describing the death of a transsexual from lack of appropriate medical care, where firemen presumably disclosed the legal sex of a transsexual to emergency room physicians); *see also* Kevin Caruso, *Gay Lesbian Bisexual and Transgendered Suicide*, http://www.preventsuicidenow.com/gay-and-lesbian-suicide.html (last accessed on Feb. 26, 2006) (self-harm in the form of attempted suicide and is a real risk for transsexuals); Paul Cody, *GLBT Suicide*, http://www.unhcc.unh.edu/resources/glbt/glbtsuicide.html (last accessed on Feb. 25, 2006) (suggesting that attempted suicide is 50% higher for transgender individuals than the general population).

214. *See e.g.* 42 U.S.C. § 405(g) (2000) (detailing the appellate process for social security benefits); S.J. Landaas, *Appeals process for the denial of Medicaid funding for augmentative and alternative communication services*, http://www.wpasrights.org/publications/appeals.htm (last updated Apr. 10, 1996) (detailing Medicaid appeal procedures in Washington state).

215. *See Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487-88 (1955) (implicitly suggesting states are allowed to incrementally experiment with solutions to social ailments pursuant to their implied Tenth Amendment police powers).

approach may not be as efficient as a uniform national standard, given the novelty of HIPPA, the lack of a comparable program,[216] and the absence of controlling precedent, state-by-state experimentation with different damages and liability theories will probably yield to the best protection for privacy over time.

2. *Compelled Re-examination of Transsexuals by Employer's Physicians Presents a Situation Ripe for Abuse and Provides no Deference to Transsexuals' Privacy Interests*

Even if a transsexual's physician shares private information with the employer, the company may grow skeptical of the initial diagnosis or need for medical treatment.[217] If the employer disagrees with the need for medical treatment, it may compel the employee to seek a second and even third opinion.[218] While some courts have held that an employer may not challenge the validity of the employee's diagnosis without obtaining these additional opinions,[219] even if the employer fails to require the employee to obtain a second medical opinion, the employer may not be barred from contesting the seriousness of the medical condition.[220]

In the context of transsexuals, these requirements present a grave possibility of abuse by employers. For instance, since the employer chooses the subsequent physician, it might choose to send the transsexual employees to a health care provider it knows to have an unfavorable view of SRS or transsexuals generally. As a result of such prejudice, this provider might medically opine that the transsexual does not suffer from a gender identity disorder. There is the option to obtain a third medical opinion, but the employer controls that determination as well. That denial of medical approval not only stops the sex reassignment process cold but may also cause serious damage to the transsexual's ongoing psychological treatment for gender dysphoria.

216. *But see Bachelder v. Am. W. Airlines, Inc.*, 259 F.3d 1112 (9th Cir. 2001) (using the National Labor Relations Act to interpret and clarify the FMLA).

217. *Saunders*, 315 F.3d at 943; *O'Reilly*, 2006 U.S. Dist. LEXIS 2341 at *18 ("the FMLA does not provide employees with a generalized right to privacy"); *Whitney*, 2003 U.S. Dist. LEXIS 22629 at *34 (stating that privacy is not a concern mentioned in the purpose section of the FMLA).

218. 29 U.S.C. § 2613 (c) (2000); *see e.g. U. of Chi. Hosp.*, 2003 U.S. Dist. LEXIS 20965 at *23; *Sims*, 2 F. Supp. 2d at 1255 (discussing the FMLA procedure if the first and second medical opinions differ).

219. *See id.*

220. Courts are split as to this issue. Compare *Rhoads v. F.D.I.C.*, 257 F.3d 373, 385 (4th Cir. 2001), *cert. denied*, 535 U.S. 933 (2002) (the failure of employer to seek additional medical opinions of its employee's medical condition is not a bar to later contesting the seriousness of that condition) with *Sims*, 2 F. Supp. 2d at 1256 (employer must seek additional medical opinions or be barred from contesting the seriousness of its employee's condition).

As a separate issue, the process requires that the transsexual disclose highly personal information to medical personnel, who in turn disclose that information back to the employer,[221] which might use that information to deny the transsexual FMLA leave or terminate him. This situation creates a conundrum for the transsexual, since most courts have held that transsexuals do not come within the ambit of protection against sex based employment decisions under Title VII[222] or the Americans with Disabilities Act.[223] One solution to the certification problem would be to allow the transsexual to become a part of the decision in selecting a medical provider for the second or third opinion. This would provide the transsexual with a better sense of control over which medical professionals he or she is forced to consult for medical evaluation, while still preserving the employers' right to obtain additional medical opinions. Furthermore, this method puts procedural protections in place for transsexuals' privacy interests.

In short, transsexuals' privacy concerns are implicated under the FMLA leave request and certification process and are not sufficiently protected by HIPAA. Transsexuals, like all other citizens, have privacy expectations related to their medical treatment.[224] In the case of transsexuals, disclosure of this private medical information may have severe implications including physical violence or psychological harm. To prevent these harms particular to transsexuals, the certification and review requirements of the FMLA must be closely examined to build in flexibility and sensitivity.

D. Remedies Provided by the FMLA Are Insufficient for Transsexuals

Finally, the statutory remedies provided by the FMLA are insufficient to protect transsexuals. Generally, the Act[225] provides two distinct causes of action for FMLA interference or retaliation. To state a prima facie case of interference under the FMLA, the employee must not only show her or she was entitled to benefits, made a request for benefits, and

221. *O'Reilly*, 2006 U.S. Dist. LEXIS 2341 at * 21 (At least one court has held that an employee may not choose to whom in the company to direct his or her FMLA request and certification forms. Additionally, submission of these forms constitutes a "waiver of [the] rights to complete confidentiality.").

222. *See supra* nn. 80-83.

223. 29 U.S.C. § 12211(b) (1990) (specifically excluding transsexualism from the meaning of disability under this Act).

224. *See e.g. Ferguson v. City of Charleston*, 532 U.S. 67, 78 (2000) ("the reasonable expectation of privacy enjoyed by the typical patient undergoing diagnostic tests in a hospital is that the results of those tests will not be shared with non-medical personnel without her consent.").

225. 29 U.S.C. § 2615 (2000).

the employer denied the benefits.[226] On the other hand, properly proving a discrimination action under the FMLA involves proof of four elements: (1) the employer is a covered entity; (2) the employee is eligible for FMLA leave; (3) the employee has a serious health condition; and (4) the defendant refused to rehire or return the employee to his/her previous position.[227] Since the FMLA is a "comprehensive enforcement scheme," other causes of action may not be available.[228]

FMLA remedies may include monetary losses and benefits for a period up to twelve weeks.[229] Interest on these amounts, and reasonable attorney's fees may also be recoverable for FMLA actions.[230] However, a court has discretion to reduce FMLA monetary awards if the employer demonstrates it acted in "good faith" and "had reasonable grounds for believing that the act or omission was not a violation of the FMLA.[231]

Liability may also be triggered when an employer "interferes, restrains or denies exercise of or an attempt to exercise" any of the rights detailed in the FMLA.[232] At least one court has construed "interference" to include situations where the employer has failed to notify the employee of her eligibility for FMLA leave.[233] This situation is limited only to situations where the employee "can show he would have structured the leave differently to avoid termination."[234]

While the Act allows damages, even against individuals,[235] liability in the context of FMLA is ineffective to protect transsexuals for a number of reasons. First, even assuming that an employer is held liable

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226. *Carlsen v. Green Thumb, Inc.*, 2004 U.S. Dist. LEXIS 1781 (D. Minn. 2004); *see also King v. Preferred Tech. Group*, 166 F.3d 887, 891 (7th Cir. 1999) (when an employer interferes with the exercise of a FMLA right, employee need only "demonstrate by a preponderance of evidence . . . entitlement to the disputed leave."); *Conoshenti v. Pub. Serv. Elec. & Gas Co.*, 364 F.3d 135, 143 (3d Cir. 2004) (employer interference can result from failing to notify employee of his FMLA rights).

227. *Johnson v. Milwaukee*, 2006 U.S. Dist. LEXIS 68925, *9 (E.D. Wis. 2006).

228. *See Desrochers v. Hilton Hotels Corp.*, 28 F. Supp. 2d 693, 595 (D. Mass. 1998) ("the remedies set forth in § 2617 are the exclusive remedies for violations of the FMLA."); *Jolliffe v. Mitchell*, 971 F. Supp. 1039 (W.D. Va. 1997) (denying plaintiff the right to recover under § 1983); *Lange v. Showbiz Pizza Time*, 12 F. Supp. 2d 1150 (D. Kan. 1998) (denying employee the right to pursue a common law claim of retaliatory discharge).

229. 29 U.S.C. § 2617(a)(1)(A) (2000)(defining damages); *McBurney v. Stew Hansen's Dodge City, Inc.*, 398 F.3d 998, 1002 (8th Cir. 2005) (upholding the grant of summary judgment where the employee failed to produce evidence of FMLA damages).

230. *Id.*

231. 29 U.S.C. § 2617(a)(1)(A)(iii) (2000).

232. *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 89 (2002) (discussing remedies under the FMLA).

233. *Conoshenti v. Pub. Serv. Elec.tr. & Gas Co.*, 346 F.3d 135 (3d Cir. 2004).

234. *Id.* at 143.

235. *Richardson v. CVS Corp.*, 207 F. Supp. 2d 733 (E.D. Tenn. 2001) (individuals may be found individually liable for FMLA violations if they have sufficient ownership control over daily activities and formulate salaries).

under the FMLA, the resulting remedy could fail to serve either compensatory or punitive purposes. For instance, if pre-operative transsexuals are terminated for discrimination in exercising their FMLA rights, her or she may receive compensation in the form of lost wages and benefits. However, the transsexual is then stuck in a state between genders. The result is that the transsexual may be unable to find other employment based on his or her appearance, while being simultaneously unable to complete the SRS due to a lack of funds. Second, allowing courts to reduce damages based on employer "good faith" could result in unfair results for transsexuals. For example, the "good faith" standard is so subjective that it presents a situation where a judge might make a decision to reduce a transsexual's FMLA remedy due to an animus of ill-will.

Finally, the current situation is problematic for employers as well. It may be unfairly impossible for an employer to avoid liability because some pre-operative transsexuals "pass" as undetected. Therefore, the employer might trigger liability by failing to inform the transsexual of eligibility for leave to obtain SRS, even if the employer was unaware the employee is a transsexual. On the other hand, transsexuals should not be required to disclose their individual SRS progress. While employees and employers should certainly be encouraged to openly discuss their respective needs, individual actions do not resolve the current statutory contradiction. This issue will require study and legislative action to amend the interpretive regulations.

CONCLUSION

In sum, more protections have recently been forged for transsexuals' rights relating to marriage and employment discrimination. However, transsexuals seeking SRS still face difficult barriers, including ridicule, isolation, and physical violence, in spite of their constitutional and privacy rights. Under its current construction, the FMLA affords no deference to the transsexual's privacy rights. Allowing FMLA leave for SRS will legitimize transsexuals' constitutional rights and privacy interests. In addition, such an allowance will further the goals of the FMLA by providing job security to transsexuals,[236] who suffer from a serious medical condition requiring short absences from work, and clarity to employers.

From a policy standpoint, allowing transsexuals to take FMLA leave for SRS will benefit transsexuals, employers, and society at large. Transsexuals will benefit because allowing FMLA leave financially facilitates access to SRS. Employers will benefit by retaining qualified transsexual employees, who have resolved a serious health condition,

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236. 29 U.S.C.S. § 2601(a)(4)(2000).

and avoiding unexpected legal liability in dealing with "passing" transsexuals. Finally, society will benefit because allowing FMLA leave will foster dialogue and greater understanding of the transsexual experience. Society will also benefit by integrating transsexuals, instead of marginalizing them by forcing them to forego SRS.

To end, transsexuals, like homosexuals, constitute one of the last groups facing barriers to de jure equality. The history of our nation illustrates that despite our struggles with diversity, strives to treat all people equally. The basic lesson of the need for equality for women and racial minorities in the United States was learned through difficult struggles. Here, we can avoid repeating those same struggles. There is no need to re-learn the same lesson. By modifying the FMLA to allow transsexuals leave for SRS, we take a small step closer to equality for all.