Transsexuals and Critical Gender Theory: The Possibility of a Restroom Labeled Other

Terry S. Kogan
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by

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Introduction

The voices of transsexuals have been ignored in our country and, accordingly, few social and legal institutions have developed to support the unique needs of this minority.¹ Yet one group of feminist theorists who might be expected to ally with transsexuals in their struggle for recognition—scholars I will refer to as "critical gender theorists"²—hold a

¹ It is extremely difficult to determine the prevalence of transsexualism in the United States. One study, based on data from smaller countries in Europe, estimates that roughly 1 per 30,000 adult males and 1 per 100,000 adult females seek sex reassignment surgery (less than 0.01 percent of the population). In the United States, an estimated 6,000 to 10,000 transsexuals had undergone sex reassignment surgery by 1988, suggesting that the transsexual population in the United States is much less than 0.01 percent. See MILDRED L. BROWN & CHLOE ANN ROUNSLEY, TRUE SELVES: UNDERSTANDING TRANSSEXUALISM-FOR FAMILIES, FRIENDS, COWORKERS, AND HELPING PROFESSIONALS 8-9 (1996).


These theorists do not speak with a unified voice on transsexualism. Perhaps the scholar most critical of the transsexual phenomenon is Janice Raymond. Others, including Anne Bolin and Bernice Hausman, while deeply sympathetic to the transsexual's situation, are critical of the impact that medical technology has had on the personal identities that transsexuals construct for themselves. Anne Bolin has produced some of the finest conceptual and empirical work on

[1223]
vision of gender that renders them extremely ambivalent toward the messages that emanate from the transsexual community.

My goals in this paper are twofold. First, I want to examine the troubling tension that exists between transsexual voices and critical gender theorists. Second, I want to explore whether alternative ways of conceptualizing sex, gender, and gender identity can provide a common ground for these groups to ally in the struggle for transsexual rights. To these ends, in Part I, I contrast common features of the autobiographical stories told by many male-to-female (hereinafter “MTF”) transsexuals with the vision of gender subscribed to by critical gender theorists. In Part II, I explore a common pursuit of both transsexuals and critical gender theorists: challenging the Euro-American dimorphic vision of sex and gender. In this section I also introduce two alternative views of gender identity which may provide common conceptual ground to enable critical gender theorists to ally with transsexuals. In Part III, I critique these two alternative views of gender identity and discuss the practicality of translating these views into social policy. It is in this last section of the paper that I explore the possibility of a restroom labeled “Other.”

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transsexualism. Described as a “sympathetic critic,” she is credited with “help[ing] to encourage the idea that there were different alternatives to be explored and that increasing numbers of men and women have opted to live in the opposite gender without going through surgery or have adopted a variety of lifestyles that depart from the dimorphic norms.” GENDER BLENDING 24 (Bonnie Bullough et al. eds., 1997) [hereinafter GENDER BLENDING].

I. Transsexual Voices vs. Critical Gender Theory

I begin by examining the voices of MTF transsexuals, voices which currently predominate the transsexual autobiographical literature. These stories strongly suggest that an MTF transsexual’s gender identity as female is more central to her sense of who she is as a person than is her male biology. I then explore why critical gender theorists find such autobiographical statements so troubling. Finally, I offer personal observations regarding the critique of the transsexual phenomenon presented by these theorists.

A. Voices of Transsexuals

An MTF transsexual often describes herself as a person locked, trapped or imprisoned in the wrong body. Thus, an MTF transsexual’s self-perceived gender identity as female does not match her male genitals. Many transsexuals report that their sense of being a member of the

4. See sources cited supra note 3.

5. While I readily admit there is no “typical” transsexual experience, in the same way that there is no typical lesbian or gay experience, certain common themes emerge from the autobiographical statements of MTF transsexuals.

6. It is important to contrast the description of transsexuals presented in the text with other transgendered identities. Historically, within both the transgendered and the scholarly communities, the term transvestite has been applied to a male with a strong desire to cross-dress, but whose gender identity remains male and who has little interest in altering his biological sex. Very often, psychologists have noted that there is a strong element of sexual gratification associated with such cross-dressing behavior. In contrast, the term MTF transsexual applies to an individual with a male body, but whose internal sense of gender identity is female. Such individuals are deemed to have an intense dislike of their male anatomy, wanting to change it to match their gender identity.

Recent developments in both communities have led many to realize that there is no clear distinction between a transvestite and a transsexual. In particular, it is extremely difficult, if not impossible, to clearly discern the reasons why individuals choose to cross-dress. Accordingly, the once carefully-drawn distinction between transvestites and transsexuals is slowly being abandoned as the term transgendered gains broader acceptance to refer to all such persons. Anne Bolin observes:

The formation of a transgender community denotes a newfound kinship that supplants the dichotomy of transsexual and transvestite with a concept of continuity, indicative of a growing acceptance of nonsurgical options for men wishing to live as women.

An emerging sense of collectivity has propelled the recognition of the multiplicity of gender variant identities.

Anne Bolin, Transforming Transvestism and Transsexualism: Polarity, Politics, and Gender, in GENDER BLENDING, supra note 2, at 26 [hereinafter Bolin, Transforming Transvestism].

As discussed infra notes 97-98 and accompanying text, Kate Bornstein has proposed an even broader usage of the term transgendered to refer to all persons who “transgress gender” norms in any manner, including lesbian and gay persons. See BORNSTEIN, supra note 3, at 134-35.
opposite sex began very early in childhood.\textsuperscript{7} They often describe themselves as having sensed that they were supposed to have been born as girls.

A transsexual's early sense of dissonance between her biological sex and her gender identity (referred to as "gender dysphoria" in the psychological literature\textsuperscript{8}) was centered on her physical body and the meaning that she gave to her body. Not only did she want to present herself in everyday life as feminine;\textsuperscript{9} equally important, she experienced extreme discomfort with her male genitalia.\textsuperscript{10} This discomfort was exacerbated when she reached puberty and began experiencing muscle and genital development and the growth of body hair.

This extreme discomfort ultimately leads most transsexuals to a lifelong desire to conform their bodies, in some way, to their perceived gender identity. Their self-interpretation of their gender identity as female is intimately bound up with their public presentation as a woman. Accord-

\begin{itemize}
\item \textsuperscript{7} One psychologist reports that approximately 85\% of her patients had recognized their gender dysphoria by the time they entered grade school. See Brown & Rounsley, \textit{supra} note 1, at 30.
\item \textsuperscript{8} The term "gender dysphoria" was coined by Norman Fisk in the early 1970s to refer to individuals who "were intensely and abidingly uncomfortable in their anatomic and genetic sex and their assigned gender." Norman Fisk, \textit{Gender Dysphoria Syndrome (The How, What and Why of a Disease)}, \textit{in PROCEEDINGS OF THE SECOND INTERDISCIPLINARY SYMPOSIUM ON GENDER DYSPHORIA SYNDROME} 10 (Donald R. Laub & Patrick Gandy eds., 1973).
\item The American Psychiatric Association now refers to gender dysphoria as "Gender Identity Disorder," which is defined as follows: There are two components of Gender Identity Disorder, both of which must be present to make the diagnosis. There must be evidence of a strong and persistent cross-gender identification, which is the desire to be, or the insistence that one is, of the other sex (Criterion A). This cross-gender identification must not merely be a desire for any perceived cultural advantages of being the other sex. There must also be evidence of persistent discomfort about one's assigned sex or a sense of inappropriateness in the gender role of that sex (Criterion B). The diagnosis is not made if the individual has a concurrent physical intersex condition . . . (Criterion C). To make the diagnosis, there must be evidence of clinically significant distress or impairment in social, occupational, or other important areas of functioning (Criterion D).
\item \textsuperscript{9} See Allen, \textit{supra} note 3, at 102.
\item \textsuperscript{10} See, e.g., Lewins, \textit{supra} note 3, at 54. This experience is shared by female-to-male transsexuals.
\end{itemize}

Mark Rees, \textit{Becoming a Man: The Personal Account of a Female-to-Male Transsexual, in BLENDING GENDERS, supra note 2, at 27, 28.}
ingly, most transsexuals wear clothing and hairstyles culturally identified as female. Virtually all transsexuals cross-dress and remove facial and body hair. 11 Most transsexuals also take female hormones, at least for some period during their lives, in order to further feminize their male bodies by softening skin, reducing growth of body hair, broadening the hips, and enlarging the breasts. 12 Some transsexuals undergo plastic surgery to feminize their facial features, while others undergo vocal cord surgery to raise the pitch of the voice.

The ultimate step is sex reassignment surgery, a top priority for many transsexuals who perceive a driving need to align their genitals with their gender identity. 13 Generally, gender clinics require an individual to undergo extensive counseling and to live full-time as a woman (the so-called “real life test”) before undertaking such surgery. Many transsexuals who do not undergo such surgery lack not the desire but rather the financial resources for this extremely expensive operation. 14

Attitudes of post-operative transsexuals are revealing in understanding the self-interpretation of transsexual gender identity. Many post-operative transsexuals choose to leave the transgendered community after surgery because they no longer consider themselves to be transgendered. They now consider themselves to be women. 15 In contrast to female impersonators, whom transsexuals tend to view as men engaging in gender parody and play, transsexuals do not view themselves as engaging in illusion or impersonation. Rather, they view themselves as expressing their true feminine gender identity. 16 Anne Bolin explains that from “the transsexual’s standpoint, being a male-to-female transsexual was only a tem-

11. In Frank Lewins’ study, 93% of transsexuals were cross-dressing by age 12, before the onset of puberty. See LEWINS, supra note 3, at 73.
12. See ALLEN, supra note 3, at 106.
13. Transsexual autobiographies often share statements similar to that of Claudine Griggs: “I dread the surgery; I dread more a life without it.” GRIGGS, supra note 3, at 3. Much contemporary autobiographical literature views sexual reassignment surgery in the 1990s as “an unremarkable medical procedure available to any man or woman who desires it.” ALLEN, supra note 3, at 102. This is in great contrast to the critical gender theory literature, which constantly asserts that such surgery is dangerous, unsuccessful, and does not psychologically help an individual. See, e.g., RAYMOND, supra note 2, at 140, 169-71.
14. Sex reassignment surgery is estimated to cost between $6,000 and $15,000. See ALLEN, supra note 3, at 106. Based on her studies over a fifteen-year span, Anne Bolin has suggested that, because many transsexuals have in recent years expanded their understanding of themselves to be “part of a newly emerging transgender community that embraces the possibility of numerous genders and multiple social identities,” in the future there may be a decrease in the number of persons who sense an urgent need to conform their bodies to their perceived gender identity. Bolin, Transforming Transvestism, supra note 6, at 25.
15. See, e.g., ALLEN, supra note 3, at 110.
16. See Bolin, Transcending and Transgenderings, supra note 2, at 451. There is a sense in the transsexual community that gay men do not understand the difference between gay female impersonators and MTF transsexuals. See id.
porary condition. Transsexualism was an identity to be outgrown as one eventually became a 'whole' woman. Physical feminization was an important part of this process of personal and social identity transformation." Moreover, because they identify so deeply with the female gender from an early age, MTF transsexuals (irrespective of whether they are pre-operative or post-operative) tend to regard themselves as heterosexual if erotically attracted to males, lesbian if attracted to women, and bisexual if attracted to both.

The autobiographical literature makes clear that transsexuals have a much greater awareness of the intricacies of human gender presentation than do people who have never experienced gender dysphoria. Transsexuals are keenly aware of what it means to present oneself as a woman, an issue far more complex than simply wearing women's clothing. Gender presentation is intimately bound up with one's posture, gait, gestures, and perhaps most importantly, interactions with others in the culture. The ideal towards which most MTF transsexuals aim is the feminine female. Frank Lewin notes that transsexuals want "a body that corresponds to some notion of an ideal image of femininity or... an 'exaggerated view of womanliness.'"

An overview of these autobiographies suggests that, in terms of personal identity, a transsexual's sense of her female gender and its presentation—her gender identity—takes precedence over the individual's biological sexual identity. This state of affairs is perceived as an impossibility by critical gender theorists.

B. Critical Gender Theory and Transsexualism

The scholars I have denominated critical gender theorists attack the assumption that every human being naturally belongs to one of two discrete gender categories (masculine or feminine), which is determined by biologically-given sexual characteristics (male and female). Rather, according to critical gender theory, there is no necessary connection between biological sex and a person's gender presentation. The ways in which men and women present themselves as gendered individuals are

17. Id. at 457.
18. See id. at 451.
19. See LEWINS, supra note 3, at 110-40 (discussion of the "micro" process of becoming a woman).
20. Id. at 130. As discussed infra notes 29-30 and accompanying text, this ideal is the cause of great consternation to many critical gender theorists.
21. See BLENDING GENDERS, supra note 2, at 75.
social constructs, learned performance, and "a social accomplishment." Biology has no causal influence on gender.

This basic approach to gender poses tremendous problems for the critical gender theorist confronting the transsexual phenomenon. Given that gender is socially constructed, a transsexual’s autobiographical statement that he (a male in the eyes of the critical gender theorist) senses himself to have been “born a member of the other gender” makes little sense. According to critical gender theory, while one may be born a sexed being, one is not born gendered. One must learn gender presentation.

Equally troubling to the critical gender theorist is the desire on the part of many transsexuals to undergo hormonal treatment and sex reassignment surgery in order to make his body conform with his perceived gender identity. For a transsexual to insist on a correspondence between his gender identity and his sex is to adopt an essentialist view that there is a necessary tie between a person’s sexed body (as male or female) and a person’s gender. Why can’t transsexuals simply be happy living in the female gender role with which they are most comfortable without altering their biological sex? Why essentialize the “feminine” as necessarily requiring female genitals? In other words, why not simply live as a woman (understood as gender presentation) with a penis?

Critical gender theorists argue that transsexuals construct their social identity in a way that merely reproduces the Euro-American dimorphic vision of gender. Anne Bolin explains:

From its inception, the transsexual identity sustained the Western paradigm that the sexes are oppositional and differences in behavior, temperament, character, emotions and sexual orientation are constituted in biological polarity. This opposition is represented by the genitals, the symbols of reproductive differences and the primary basis for assigning biological sex.26


23. I am italicizing pronouns in this section to show that, in the eyes of critical gender theorists, MTF transsexuals remain men. In contrast, from the point of view of the MTF transsexual, she is and has always been a woman.

24. Some critical gender theorists have even questioned the fundamental nature of biological sex as dimorphic. See, e.g., JUDITH BUTLER, BODIES THAT MATTER: ON THE DISCURSIVE LIMITS OF “SEX” (1993); ANNE FAUSTO-SterLING, MYTHS OF GENDER (1991); KESSLER & MCKENNA, supra note 22; THOMAS LAQUEUR, MAKING SEX (1990); MARTINE ROTHBLATT, THE APARTEID OF SEX: A MANIFESTO ON THE FREEDOM OF GENDER (1995); Gilbert Herdt, Introduction: Third Sexes and Third Genders, in THIRD SEX, THIRD GENDER, supra note 2, at 2 [hereinafter Herdt, Introduction].

25. See, e.g., Bolin, Transcending and Transgenderings, supra note 2, at 452.

26. Id. at 453.
According to critical gender theory, the transsexual phenomenon results from a society which first equates sex with genitals and then conflates sex (genitals) with gender. Transsexuals are unwittingly led to believe that, in order to express their gender identity as a woman, they must undergo genital transformation. Anne Bolin explains:

In the Western paradigm women are people with vaginas; therefore, if a man believes himself to be a woman, he must look the part, down to the genitals. This paradigm has no room for the social woman with male genitals as is found elsewhere in the world. Male-to-female transsexual surgery underscores the Euro-American principles of gender that are regarded as natural and inevitable: that is, that there are only two sexes and that these are inviolable and are determined by genitalia.

In addition, certain critical gender theorists, including Janice Raymond, are extremely troubled by the vision of women and of femininity, the "feminine woman," to which transsexuals aspire. Raymond criticizes this vision as fostering and perpetuating a patriarchal view of women as sex objects.

Some critical gender theorists view transsexuals as nothing more than repressed homosexuals who are unable to come to grips with their sexual orientation and choose radical surgery as a way to reconcile themselves with their homosexuality. As a result of this particular critique of transsexualism, post-operative MTF transsexuals have found themselves rejected by some lesbian and feminist groups, which view them simply as men.

Accordingly, many critical gender theorists consider transsexuals, not as a potentially revolutionary force in society, but rather as an incredibly conservative group whose social demand for sex reassignment surgery merely reinforces the dimorphic structure of gender in a patriarchal society.


28. Bolin, *Transcending and Transgenderings*, supra note 2, at 454. Referencing cases of intersexed persons, critical gender theorists point out how conceptually difficult it is to assign sex and gender in the first place, and note that this difficulty leads our dimorphically-gendered society to simplistically rely solely on genitals. See, e.g., Kessler & McKenna, supra note 22, at 145.

29. See Raymond, supra note 2, at 138.

30. See discussion supra note 20 and accompanying text.

31. See Raymond, supra note 2, at 84, 87, 122-23.

32. MTF transsexuals were excluded from attending the 1994 Michigan Womyn's Music Festival based on a "Womyn born Womyn" policy. See Califia, supra note 3, at 227-30.

The attack on the transsexual phenomenon by critical gender theory is also directed at the medical profession for agreeing to prescribe hormonal therapy and to perform sex reassignment surgery. Specifically, the medical profession is accused of inventing, not discovering, transsexualism as a disorder in the following way. The medical model defines transsexualism as a sustained desire on the part of the individual for sex reassignment surgery. Thus, the solution to the transsexual’s problem, i.e., surgery, is the very way in which the problem is defined in the first place. The fact that a patient says “I want sex reassignment surgery” is used as a strong indicator that the individual is a transsexual, and accordingly, should be allowed to have surgery. In its attack on the medical profession, critical gender theory attacks transsexuals as deceitful accomplices. They are accused of repeating by rote the “correct” autobiographical story necessary to satisfy the medical gatekeepers who declare eligibility for surgery, irrespective of whether or not that story matches the transsexual’s own autobiographical history.

The bottom line for critical gender theory is that the medical model reinforces and perpetuates the heterosexist understanding that there must be a congruence between sex and gender. Transsexuals are the victims of false consciousness, effectively duped by the medical profession into believing that their gender must be tied to their biology. In order to express their perceived female gender identity, transsexuals are unwittingly led to believe that they must undergo surgical genital transformation.

34. See BLENDING GENDERS, supra note 2, at 75-77. Certain critical gender theorists assert that the phenomenon of transsexualism has been defined historically by the development of two medical technologies in the twentieth century, hormonal therapy and sex-reassignment therapy. See Bolin, Transcending and Transgenderings, supra note 2, at 453. All critical gender theorists seem to agree that the pivotal moment signifying the birth of the transsexual phenomenon was the sex reassignment surgery of Christine Jorgensen in 1953. See id. at 455.

35. See Billings & Urban, supra note 2, at 99. Transsexualism is a socially constructed reality which exists in and through medical practice. The problem of transsexual patients does not lie ‘in their minds,’ as sex-change proponent John Money puts it. Money’s statement typifies medicine’s reification of transsexualism as a psychological entity. In contrast, we believe transsexualism is a relationship process sustained in medical practice.

36. See Bolin, Transcending and Transgenderings, supra note 2, at 457. Bolin points out that physicians often require a careful screening of individuals seeking sex reassignment surgery in order to protect themselves from malpractice claims by persons who have regrets after surgery. See id.

37. See id. at 453.

38. Some critical gender theorists criticize the medical professionals who work with transsexuals for ignoring the adverse side effects of both hormonal and surgical treatments. See, e.g., RAYMOND, supra note 2, at 140, 142-43.
cial vaginas and penises rather than towards self-understanding and sexual politics. Sexual fulfillment and gender-role comfort are portrayed as commodities, available through medicine.”

For critical gender theory, transsexualism is not an individual condition but rather a social and political problem caused by a society obsessed with a dimorphic vision of sex and gender. What needs correcting is not the body of the transsexual. Rather, Western society’s refusal to allow men and women to blend gender roles and to express both masculine and feminine attributes needs to be overturned. Critical gender theorists favor a “transgendered” approach to sex and gender over a transsexual approach. Their ideal is the “woman with a penis,” an individual born male who chooses to live his/her life as a woman without undergoing sex reassignment surgery. Accordingly, cross-dressers and transvestites who express their feminine side in their gender presentation, but do not desire to change their birth sex, are the darlings of critical gender theory because their gender-blending directly challenges the Western dimorphic vision of gender. In contrast, transsexuals are considered misled and confused persons.

C. Observations About Critical Gender Theory’s Critique of the Transsexual Phenomenon

Obviously, my goal in this paper is not to pronounce one vision of transsexuality right and the other wrong. At a minimum, such an endeavor would be meaningless because transsexual autobiographical statements are a “micro” social phenomenon, taking place at the level of individual human perception. In contrast, critical gender theory attempts to analyze a “macro” social phenomenon, exploring how broad patterns of cultural thought affect social institutions (such as the medical profession) and individuals. Attempting to judge between transsexual autobiographies and critical gender theory is to compare apples to oranges. Nonetheless, I offer the following observations.

Critical gender theory accurately recognizes an important truth about the transsexual phenomenon. The advent in the mid-twentieth century of the medical opportunity for hormonal therapy and sex reassignment surgery offered persons experiencing gender dysphoria a radically new way to deal with the emotional trauma concerning their gender identity. Moreover, the appointment of the psychiatric profession as the purveyor of admission tickets to sex reassignment surgery effectively forced transsexuals to carefully sculpt their identity stories in order to gain admittance to this new-found salvation.

40. See ALLEN, supra note 3, at 95.
Having accurately exposed this historical phenomenon, critical gender theory has faltered. As evident in the work of Janice Raymond, critical gender theory has ignored the most basic fact of all—for transsexuals, gender dysphoria is a central part of their ontological experience, an experience that begins for many at a very young age. To dismiss transsexualism as part of a “transsexual empire” is to deny the importance of that experience to the transgendered individual’s life story.

The explanation presented by critical gender theory that transsexual autobiographies are the products of false consciousness is deeply troubling. Social reform in support of any oppressed minority must begin by paying close attention to the personal perceptions of members of that community. The stories told by individuals in the community must be taken seriously. The assertion that the self-perceptions of transsexuals as embodied in their autobiographical stories are only the result of their having been duped by the medical profession and by a heterosexist, patriarchal society smacks of intellectual elitism, and fails to give transsexuals the respect that is their due. Moreover, the accusation of false consciousness loses much of its impact in light of evidence indicating that gender dysphoria is first experienced by many transsexuals at an extremely young age.

The etiology of transsexualism remains highly controversial. Some theories of gender dysphoria find their roots in a psychological model. Other theories suggest that transsexualism has biological origins in prenatal or peri-natal sex hormones. Still other theories propose etiological models that combine both psychological and biological causes. The one thing on which virtually everyone who has worked with transsexuals agrees is that the condition is not subject to “correction” through psychological counseling. Whatever the cause of a transsexual’s sense of gender dysphoria, that condition appears to be highly resistant to change.


43. See, e.g., Susan Coates, Gender Identity Disorder in Boys: The Search for a Constitutional Factor, in A QUEER WORLD, supra note 42, at 108-33 (suggesting that gender identity disorder in boys results from a constitutional affective disorder combined with a traumatic experience of maternal/childhood interaction).

44. See, e.g., Walter O. Bockting, Transgender Coming Out: Implications for the Clinical Management of Gender Dysphoria, in GENDER BLENDING, supra note 2, at 48-52.
Accordingly, though of continuing interest to scientists studying human sexuality, the reasons why a person experiences gender dysphoria must recede into the background when considering political and social goals. Instead of exploring ways to cure transgendered people or to enlighten them as to their false consciousness, those concerned with protecting the rights of and fostering the lives of transsexual persons must explore new ways in which these individuals can understand and negotiate the immutable reality of their psychological lives. An important goal must be to discover a range of alternatives to which transsexuals can turn to assist them in coping with the cognitive dissonance experienced between their gender identity and their bodies. In pursuing this goal, it is simply wrong to advocate the outright banning of sex reassignment surgery, as would seem to be the position of many critical gender theorists. After close consultation with caring professionals, surgery may in fact be the most appropriate choice for some individuals attempting to deal with severe gender dysphoria. Another choice might be hormonal therapy without genital surgery. Yet another choice might be for the transgendered individual to live full-time as a member of the opposite gender, without any medical intervention whatsoever. This choice would fulfill the critical gender theorist’s ideal of a biological male living as a “woman with a penis.” As Anne Bolin notes:

The recently emerging transgendered identity offers an account of gender as a social product. The transgenderist may or may not feminize: some appear androgynous and others pass. The possible permutations within transgenderism are innumerable and lay bare the point that gender is not biology but is socially produced. The transgenderist harbors great potential either to deactivate gender or to create in the future the possibility of “supernumerary” genders as social categories no longer based on biology.

What is most important is that we not lose sight of the autobiographical experiences of transgendered persons. Once an array of alternatives for transgendered identity is recognized and presented, the autonomy of a transgendered person to choose that alternative which is best for him/her must be rigorously respected. The suggestion of some critical gender theorists that transsexuals should focus on changing social attitudes toward gender, instead of focusing on changing their bodies, insen-

45. Within the transsexual community itself, the extent to which the medical profession should continue to serve as the gatekeeper to surgery (as opposed to giving decision-making autonomy to each individual transsexual) is a highly controversial issue. See, e.g., Dallas Denny & Jan Roberts, Results of a Questionnaire on the Standards of Care of the Harry Benjamin International Gender Dysphoria Association, in GENDER BLENDING, supra note 2, at 320-36.

46. Bolin, Transforming Transvestism, supra note 6, 30-31.
satively discounts the lived experience of transsexuals and thus ignores the need to foster and improve that experience.

II. Reconciling Transsexual Voices and Critical Gender Theory: Alternative Visions of Sex, Gender, and Gender Identity

Any attempt to reconcile transsexual voices and critical gender theory can most profitably be founded in an important common commitment held by both groups. Transsexuals and critical gender theorists alike challenge the notion deeply ingrained in Euro-American culture that there is an essential link between an individual's biological sex at birth and that individual's gender presentation throughout life. Therefore, both groups strongly oppose the view that individuals born as biological males must display masculine gender attributes and individuals born as biological females must display feminine gender attributes.

Given this common commitment, I want to explore visions of sex, gender, and gender identity which present alternatives to Euro-American dimorphism. In this section, I first examine the serious constraints that a sexually dimorphic culture imposes on an individual who may experience her gender identity as not coinciding with her biological sex. I then explore two alternative ways in which sex and gender can be conceptualized. The first vision I explore is one referred to as "sexual continuism" by Martine Rothblatt in her book, *The Apartheid of Sex.* The second vision I explore is one which views members of certain sex/gender minorities as members of a third sex/gender. This vision has a distinguished history in other cultures, including the two-spirit tradition (berdache) among Native American persons and the hijras tradition in India. Based on this vision, I propose the introduction of a third sex/gender category into Euro-American culture. In Part III, I contrast and compare Rothblatt's vision of sexual continuism with the vision of a third sex/gender, in order to evaluate which has the greater potential to bridge the gap between transsexual voices and critical gender theory.

A. The Constraints on Gender Identity Imposed by a Sexually Dimorphic Culture

Though uncertainties exist in so many areas concerning gender identity, this much we seem to know: some individuals from a very early age

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47. Rothblatt, supra note 24, at 22. See also Kessler & McKenna, supra note 22, at 163.
experience gender dysphoria, “an amorphous feeling of being different quite early in life.”\(^\text{48}\) Milton Diamond explains:

In their own minds there is no doubt they are of the opposite sex and should be reared accordingly. They become convinced so by everyday life events that they feel do not resonate well with their own image of who they are. They want to live life transformed so their anatomy fits their conviction and mental image of self.\(^\text{49}\)

Whatever its etiology, there is no doubting this sense of gender dysphoria experienced by transgendered people. Even Gilbert Herdt, a scholar who has forcefully shown the impact of culture on sexual orientation,\(^\text{50}\) admits that there is in all likelihood a biological component to gender identity:

Gender identity is not entirely a social construction, and sexual variations are not merely illusions of culture. The felt experiences of having a certain body, including the desires and strivings of the person socially identified with that body, combine to create a powerful ontology across the course of life. Surely, some elements of sex/gender development are internally motivated or hormonally time loaded in ways that can influence the outcome of such a life.\(^\text{51}\)

So, accepting the reality of a child’s sense of gender dysphoria, what is it for a biological male to “know” that she actually was meant to be a female? It is doubtful that one is born with some innate sense that “though I have a penis, I was meant to have a vagina.” Instead, a transgendered person’s dysphoria is self-interpreted in terms and concepts learned from the surrounding culture. In Euro-American culture, which is highly sexually dimorphic, the dysphoric individual will be inclined to self-interprett her experience in terms that are bipolar—male or female. If

\(^{48}\) Milton Diamond, Self-Testing: A Check on Sexual Identity and Other Levels of Sexuality, in GENDER BLENDING, supra note 2, at 103, 105.

\(^{49}\) Id. Diamond further explains:

Early in life, the transsexual becomes aware that society is reacting to her or him in a manner felt as inappropriate. In some subtle way transsexuals come to realize they would be more comfortable treated as are their opposite-sexed siblings or peers. The developing . . . [transsexual] realizes he or she is being treated not in accordance with internal feelings but rather in accordance with external anatomy. . . . Such individuals recount lives in which they had manifested or recognized a disposition toward cross-gender lifestyle events and behaviors. Their day-to-day social life . . . told them their internal signals were not synchronized with the external ones and their internal signals won out. They typically recount many incidents where sex-of-birth appropriate behaviors were felt to be or were actually impossible or difficult to manage . . . . And, quite often, these feelings have existed from preschool days. Id. at 104-05.

\(^{50}\) See generally GILBERT HERDT, SAME SEX, DIFFERENT CULTURES: GAYS AND LESBIANS ACROSS CULTURES (1997).

\(^{51}\) Gilbert Herdt, Mistaken Sex, in THIRD SEX, THIRD GENDER, supra note 2, at 419, 444-45 [hereinafter Herdt, Mistaken Sex].
the individual experiences discomfort with male identity, the only alternative is to conclude that she must be the opposite—female. This is reinforced by Western culture’s essentializing a necessary tie between, on the one hand, those somatic features which serve as the basis for ascribing sex, and on the other hand, the gendered ways in which we are taught to present ourselves in everyday life.52

Given this cultural setting, it is not surprising that individuals experiencing dysphoria conclude that it is not enough to present themselves in gendered ways culturally understood as belonging to the opposite sex. One is not truly a woman unless one is morphologically a woman. Thus, many transsexuals believe that they must “go all the way” and change their bodies by undergoing sex reassignment surgery. In a culturally dimorphic society, if you are not one sex (which is what a transsexual’s dysphoria tells him/her), you must be the other. Gender identity is experienced as immutable. Accordingly, one must change that which is mutable given modern technology—one’s biological morphology.53

Western culture’s dimorphic vision of sex and gender has proven destructive to transgendered people, in particular to transsexuals. As critical gender theory has suggested, that vision has made it extremely difficult for transsexual persons to conceptualize their own identities in any way other than as cross-gendered. If a transsexual biological male does not perceive him/herself to be a man, she/he must be a woman.54

Dimorphism is not, however, the only vision of sex and gender available. There are cultures which conceptualize three or more sex/genders. Moreover, among certain of these cultures, sex/gender is not necessarily equated with biology. Within such a cultural setting, the response to gender dysphoria might be very different. Though one experiences severe discomfort with the way in which one is gendered by soci-

52. See Kessler & McKenna, supra note 22, at 153-55 (describing how the ascription of sex is based largely on genitals in Western society).

53. The two groups that most seriously defy the Euro-American cultural assumption that biological sex and gender identity go hand in hand are intersexed persons and transsexuals. Intersexed people have an advantage over transsexuals in terms of their acceptance and understanding by society. In many cases of intersexed persons, the automatic assumption of male=masculine, female=feminine is short-circuited at birth, because the visible features on which the ascription of sexuality is based, genitals, defy common sense assumptions as to the nature of the world. See, e.g., Clifford Geertz, Common Sense as a Cultural System, in LOCAL KNOWLEDGE 73, 80-84 (1983) (Doctors and parents are stopped still in their tracks when faced with ambiguous sex organs, and are forced to confront the possibility that the automatic equation of sex=gender may not be true in all cases).

54. As the text makes clear, attempting to use language in a dimorphic culture to write about non-dimorphic cultural possibilities is, in a word, maddening. One obviously needs a pronoun that does not predetermined that sex/gender is dimorphic. The use of the neuter pronoun, “it,” is extremely dehumanizing, and accordingly, counterproductive to the enterprise in which I am involved—trying to normalize and gain respect for transgendered persons.
ety, if the social understandings of sex/gender are less closely tied to one's biological features, then one might have available ways to alleviate one's dysphoria without turning to genital surgery. The possibility of viewing transsexuals as a third sex/gender is considered in greater detail below.\textsuperscript{35}

B. Sexual Continuism

In searching for an alternative to sexual dimorphism, let's begin with Martine Rothblatt's vision of "sexual continuism." According to Rothblatt, dividing persons into dimorphic categories of "male" and "female" is as arbitrary a way to distinguish among people as dividing persons into racial categories.\textsuperscript{56} She describes this division of people into two sexes as the "apartheid of sex." Rothblatt sees the apartheid of sex as based on the dimorphic gender paradigm because

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Rothblatt proposes an alternative vision of sex which she calls "sexual continuism." This vision "posits that humanity is composed of a continuous blend of sexual identity, far beyond any simplistic male or female categorization."\textsuperscript{58} Sexual continuism "predicts that sexual identity, like other aspects of personality, arises from a confluence of factors not solely hormonal or environmental in origin."\textsuperscript{59}

Rothblatt bases sexual continuism on a review of research in sociology, psychology, and neurology. She asserts that what seems to be a natural biological distinction between male and female is not so clear. Rothblatt looks to the fact that approximately four percent of the population displays intersexed attributes, either genitally, gonadally, or chromosomally.\textsuperscript{60} Moreover, she looks to the fact that all individuals are hormonally a mix of what have been viewed traditionally as male hormones

\textsuperscript{55.} See infra Parts II.C, III.B.
\textsuperscript{56.} See ROThBLATT, supra note 24, at 19.
\textsuperscript{57.} Id. at 102.
\textsuperscript{58.} Id.
\textsuperscript{59.} Id.
(testosterone) and female hormones (estrogen). In addition, Rothblatt challenges evidence suggesting that there is any difference between men's brains and women's brains (either structurally or functionally). In terms of physical and mental performance, Rothblatt points out that there is a tremendous overlap between persons viewed as men and women. Finally, as technology begins to free human reproduction from the highly specific requirements of a male parent and a female parent, she claims that human reproduction can no longer serve as a justification for distinguishing males from females. "The new paradigm [of sexual continuism] claims that reproductive systems are not strictly personal, but are socio-technical and are accessible by all persons regardless of genitalia."\(^6\)

Given her vision of a continuum of sex, Rothblatt urges that biological sex should no longer have any tie to the social, economic, or legal spheres of life. Instead, she states that

[I]labeling people as male or female, upon birth, exalts biology over sociology. Instead, the new feminist principles inspire us to permit all people to self-identify their sexual status along a broad continuum of possibilities and to create such cultures of gender as human ingenuity may develop.\(^6\)

Thus, Rothblatt believes that a range of gender presentations should be available to all persons. She argues that there is in fact a "continuous blend of sexual identity, far beyond any simplistic male or female categorization."\(^6\) According to Rothblatt's vision, genitals become irrelevant as a mode of determining either sex or gender.

Rothblatt's critique of the dimorphic paradigm of sex is directly intended to support the transgendered movement.\(^6\) "Transgenderism makes manifest the continuum nature of sex types because even if a sex type

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\(^6\) See ROTHBLATT, supra note 24, at 8. She further points out that, as one ages, the testosterone and estrogen levels of men and women converge. See id.

\(^6\) Id. at 102.

\(^3\) See id. at 13.

\(^4\) Id.

\(^5\) Id. at 102.

\(^6\) Rothblatt describes herself as a "transperson." See id. at 159. Having been born male, and having married a woman, she states:

[A] few years ago, I decided to convert and become a kind of transgendered woman. Why? Because there was a lot more to my soul than the masculine persona I had become. There was a woman who needed to be expressed. . . .

. . . .

Today my spice of more than ten years and I have a wonderful unisexual lesbian marriage. In other words, she fell in love with my soul, not my sex. The transgender life-style has made our life more interesting and enabled our personalities to grow.

Id. at 159-60.
was real at birth, it can now be changed at will during one’s life.\textsuperscript{67} She believes that rather than being assigned to one of two sexes at birth, and in turn being tracked toward one set of expected gender behaviors, individuals should be allowed to freely find their place on the continuum of sex as they move through life.\textsuperscript{68}

C. The Third Sex/Third Gender

Unlike Rothblatt’s theory, which posits a unity of human sexuality along a single continuum, a different alternative to sexual dimorphism posits a multiplicity of sexuality—the notion of a third sex/gender.

(1) Examples from Other Cultures

Under the influence of Darwinian scholarship,\textsuperscript{69} during the past century social scientists have obsessively focused on the reproductive aspects of human sexuality. Therefore, cultural variations which suggest a third sex/gender have been downplayed in anthropological and other studies. Nonetheless, the existence of gender-nonconforming individuals is fairly universal among all cultures.\textsuperscript{70} Cultures currently exist, and have existed throughout history, that have embraced the vision of a third sex/gender.\textsuperscript{71} In order to illustrate this possibility, I will explore briefly three examples of cultures that negotiate a third sex/gender for certain in-

\begin{enumerate}
\item[\textsuperscript{67}] Id. at 16.
\item[\textsuperscript{68}] See id. at 18.
\item[\textsuperscript{69}] See generally Gilbert Herdt, Third Genders, Third Sexes, in A QUEER WORLD, supra note 42, at 100 [hereinafter Herdt, Third Genders].
\item[\textsuperscript{70}] See id. at 102. Herdt makes clear that, in modern times, there have been strong cultural and moral pressures for people to conform to a dimorphic vision of sex/gender. Accordingly, those who defy such a vision tend to remain hidden at the margins, often observed only from scholarly investigations into the gendered aspects of a particular society:

We are dealing with multiple cultural and historical worlds, in which persons of divergent sexual and gendered nature exist on the margins of society. They pass as normal to remain hidden from the official ideology and everyday commerce of social life. For this reason, they may, upon discovery, become icons in history and popular culture, sanctioning normal male/female dimorphism, a kind of betrayed matter out of place, which symbolizes boundary blurring, the anomalous, the unclean, the tainted, the morally inept or corrupt, the monsters of the cultural imagination of the Renaissance, and the vampires of Anne Rice novels.

Id. at 104.
\item[\textsuperscript{71}] Any in-depth discussion of cultures which conceptualize third sexes and third genders is far beyond the scope of this paper. The best overview of such cultures is presented in THIRD SEX, THIRD GENDER, supra note 2.
\end{enumerate}
dividuals: the Native American berdache, the Indian hijras, and the Sambian kwolu-aatmwol.\textsuperscript{72}

Before proceeding, however, I offer an observation about the usage of the very terms “sex” and “gender.” The distinction between sex and gender, distinguishing body from culture, is itself culturally bound and socially constructed. It is a distinction that can arise only in a culture that views the body (in particular, genitals) as the most significant basis for categorizing the sexualized aspects of human life.\textsuperscript{73} In other cultures where morphology is less important to the understanding and classifications of gendered life, the dimorphic distinction between sex and gender blurs. Accordingly, because I am examining cultures which challenge a dimorphic vision of human gendered life by introducing a third category, I will hereinafter often refer to “sex/gender.” Once one posits the existence of a third sex/gender category, the importance of biological attributes (e.g., genitals) to fundamental categorization of individuals wanes in significance.\textsuperscript{74}

\textsuperscript{72} Gilbert Herdt has suggested that, given our cultural understandings, distinctions can be drawn between societies that conceptualize a third gender from those that conceptualize a third sex. Third genders are conceptualized largely on the basis of cultural characteristics, while third sexes are conceptualized on the basis of some more material feature about a person’s body (features often associated with intersexed persons, i.e., a small penis or a large clitoris). See Herdt, Third Genders, supra note 69, at 100. Moreover, Herdt raises important questions about whether the instances in which we find societies conceptualizing third sexes or third genders are “the product of ontology, of a sense of being different that identifies with the category,” or a product of “social and sexual pressures that produce normative dimorphic hierarchies.” Id. at 106-07.

\textsuperscript{73} For an application of this insight to law, see Katherine M. Franke, The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex From Gender, 144 U. PA. L. REV. 1 (1995).

\textsuperscript{74} Will Roscoe notes:

Gender categories often draw on perceptions of anatomical and physiological differences between bodies, but these perceptions are always mediated by cultural categories and meanings. Nor can we assume the relative importance of these perceptions in the overall definition of personhood in a given social context, or that these differences will be interpreted as dichotomous and fixed, or that they will be viewed as behavioral or social determinants (as opposed to, for example, a belief that behaviour might determine anatomy). . . .

. . . [T]he presence of multiple genders does not require belief in the existence of three or more physical sexes but, minimally, a view of physical differences as unfixed, or insufficient on their own to establish gender, or simply less important than individual and social factors, such as occupational preference, behavior and temperament, religious experiences, and so forth.

Will Roscoe, Gender Diversity in Native North America: Notes Toward a Unified Analysis, in QUEER WORLD, supra note 42, at 68.
a. The Native American Berdache

Perhaps the best-known example of a third sex/gender category is the Native American “two-spirit” people, formerly known as “berdache.”^75 Male berdaches have been documented in nearly 150 Native North American societies. In approximately half of these groups, a similar status has been noted for females who undertook a man’s lifestyle. Berdaches are characterized by gender nonconformity in various aspects of their lives. Will Roscoe has suggested that the most appropriate way to understand the berdache is as part of a third sex/gender category. Three key features appear to have characterized this unique sex/gender status: productive specialization (crafts and domestic work for male berdaches; warfare, hunting, and leadership roles in the case of female berdaches); supernatural sanction (in the form of an authorization and/or bestowal of powers); and gender variation.^76

Instead of simply viewing the berdaches as an example of dimorphic gender-crossing, anthropologists and historians have recently “begun to argue that berdaches in fact occupied a third gender role, or, in the case of tribes with both male and female berdaches, and distinct terms for each, third and fourth genders.”^77 Roscoe explains:

On the one hand, it easily can be shown that a dual gender model fails to account for many of the behaviors and attributes reported for berdaches—for example, berdaches who did not cross-dress or attempt to mimic the behavior of the “opposite” and those who engaged in a com-

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^75. See Terry N. Tafoya, Native Two-Spirit People, in TEXTBOOK OF HOMOSEXUALITY AND MENTAL HEALTH 603 (Robert P. Cabaj & Terry S. Stein eds., 1996):

Historically, the most common term used to describe the two-spirit person was “Berdache.” In a 1994 official statement to the American Anthropological Association, a group of Native and non-Native anthropologists and other scholars formally asked authors of introductory textbooks to update the terminology “Berdache” to “two-spirit” and to recommend that when the archaic term must be used for historical purposes, it should be written as “Berdache” [sic] . . . .

In many ways “Berdache” is a misleading term. It is originally derived from a mid-Eastern term for “male sex slave,” or catamite, a category brought back during the time of the Crusades by some Europeans . . . . When French fur traders, missionaries, and explorers encountered Native people who were “different,” they often used the word “Berdache” to refer to them. Id. at 605-06 ([sic] in original).

^76. See Roscoe, supra note 74, at 65.

^77. As Pat Califia has pointed out, influenced by a dimorphic vision of sex/gender, certain historians have attempted to view the berdaches as examples of homosexuals in non-Western culture. See CALIFIA, supra note 3, at 123-46 (discussing work of, among others, Jonathan Katz in GAY AMERICAN HISTORY (1976)).

^78. See Roscoe, supra note 74, at 65. In the case of gender variation, while cross-dressing was the most common and visible marker, it has proven a more variable and less reliable indicator of berdache status than previously assumed. See id.

^79. Id. at 66.
combination of female, male, and berdache-specific pursuits. On the other hand, the consistent use of distinct terms to refer to berdaches, a practice that prevented their conceptual assimilation to an “opposite” sex, is positive evidence that berdache status was viewed as a separate category.80

b. The Indian Hijras

Another example of a third sex/gender category are the hijras of India. Hijras are “a religious community of men who dress and act like women and whose culture centers on the worship of Bahuchara Mara,” one of many goddesses worshipped throughout India.81 As part of this worship, hijras undergo ritual surgery involving the removal of their genitals. This surgery defines the hijras as neither men nor women, but rather promotes the hijras to a sacred place in Indian culture.82 They are believed to have supernatural powers, which entitle them to perform special rituals after the birth of a male child and during weddings. In both contexts, these ritual performances are connected to fertility.83

While Hindu culture in general ascribes to strict gender roles, believing men and women to have different sexual natures and different roles to perform in society, that culture also believes that sex/gender is mutable and alterable. Accordingly, the “conceptualization of Hijras as neither man nor woman has nothing to do with male homosexuality. Rather it is based on the model of the hermaphrodite, a biologically intersexed person.”84 In fact, the understanding of the hijras as an alternative, third sex is firmly based in age-old Indian culture. “The interchange of male and female qualities, transformations of sex and gender and alterna-

80. Id. at 66-67.
81. See Serena Nanda, The Hijras of India, in A QUEER WORLD, supra note 42, at 82 [hereinafter Nanda, The Hijras of India]. See also Serena Nanda, Hijras: An Alternative Sex and Gender Role in India, in THIRD SEX, THIRD GENDER, supra note 2, at 373 [hereinafter Nanda, Hijras: An Alternative Sex].
82. See Nanda, The Hijras of India, supra note 81, at 82.
83. See id.
84. Id. at 83. Nanda further explains:

The popular understanding of the hijra as an alternative sex and gender role is based on the model of the hermaphrodite, a person biologically intersexed. . . . The word hijra is a masculine noun, most widely translated into English as either “eunuch” or “hermaphrodite (intersexed).” Both these glosses emphasize sexual impotence, which is understood in India to mean a physical defect impairing the male sexual function, both in intercourse (in the inserter role) and in reproductive ability. . . . It is widely believed in India that a man who has continued sexual relations in the receiver role will lose sexual vitality in his genitals, and become impotent. It is sexual impotence (with women), then, and not sexual relations with men that defines the potential hijra. Nanda, Hijras: An Alternative Sex, supra note 81, at 380 (emphasis in original).
tive sex and gender roles, both among deities and humans, are meaningful and positive themes in Hindu mythology, ritual and art."{85}

c. The Sambian Kwolu-aatmwol

A final example of a culture’s conceptualizing a third sex/gender is found in the Sambian society in New Guinea, which identifies certain individuals as kwolu-aatmwol. The term kwolu-aatmwol best translates as “a female thing changing into a male thing.”{86} These are persons who would be diagnosed by Western medicine as having an intersexed condition known as “five alpha reductase hermaphrodism.”{87} They are born with ambiguous female-appearing genitals at birth. At puberty, the individual begins developing into a “normal” male, with the growth of body hair and male musculature. Such individuals are assigned to this third sex/gender category, kwolu-aatmwol, often from the time of birth.{88} Sambian culture regards such an individual as “[a] sad and mysterious quirk of nature,” though some have gone on to distinguish themselves as a shaman or war leader.{89}

In Sambian culture, “[b]iological maleness is distinct from the mere possession of male genitalia.”{90} One achieves maleness by undergoing a series of puberty initiations over a period of years. Gilbert Herdt posits that kwolu-aatmwol occupy a third sex/gender position in Sambian culture because they are not allowed to undergo the final third stage of such initiation, an otherwise universal event for all other males. Moreover, they appear to be socialized to be less aggressive and assertive and more nurturing and deferential than other males.{91} Herdt notes that the “presence of a third-sex category, with sex reassignment at birth and some differences in growing up, serves to mediate gender dimorphism, providing a different, perhaps anomalous or residual if not fuzzy set of responses to their bodies and, within themselves, to their own sense of their identities.”{92}

From this brief overview, one can see that the two sex/gender system of Western culture that appears to have arisen in the eighteenth and
nineteenth centuries is by no means inevitable. Instances in other cultures of multiple sex/genders have been systematically distorted or ignored by Western anthropologists and historians studying these societies.

(2) A Proposed Third Sex/Gender Category for Euro-American Culture—"Other"

Drawing from the examples from Native American, Indian, and Sambian cultures, I propose that we begin to conceptualize a third sex/gender category for Euro-American culture, which I will tentatively term "Other." In doing so, I take my cue from several sources. First, Marjorie Garber, in her book Vested Interests, argues that cross-dressers have always been a necessary part of any gendered culture, serving to reinforce sex/gender categories by marking the outer limits and providing a foil against which social ideas of gender can be propagated. She states:

[O]ne of the most consistent and effective functions of the transvestite in culture is to indicate the place of what I call "category crisis," disrupting and calling attention to cultural, social, or aesthetic dissonances . . . .

By "category crisis" I mean a failure of definitional distinction, a borderline that becomes permeable, that permits of border crossings from one (apparently distinct) category to another.

Similarly, the category "Other" is also meant to provoke a category crisis. It is not meant to describe any "natural" type, and thus does not refer to any specific biological, psychological, or social attributes of an individual. Rather, it is a classification, freely assumed by an individual, which brings to the fore the ambiguities inherent in the dimorphic division of humans into the seemingly natural categories of male and female. The restroom labeled "Other" which I discuss below is the institutional component meant to assist the conceptual sex/gender category, "Other," in challenging sexual dimorphism.

I also take my cue in proposing a new sex/gender category from the works of Kate Bornstein and Anne Bolin. In Gender Outlaw, Bornstein

93. See generally LAQUEUR, supra note 24. Laqueur argues that, prior to the Enlightenment, people considered themselves as belonging to only one sex. Females were perceived as being a lesser form of males. Female genitals were scientifically viewed as male genitals that were simply reversed and on the inside of the body.

94. See Herdt, Third Genders, supra note 69, at 102.


96. Id. at 16.

97. BORNSTEIN, supra note 3.
points out that the strict gender codes of our dimorphic culture not only oppress transgendered people, but gay and lesbian people as well. She explains:

Assuming that gay men and lesbians are more consciously excluded by the culture for violations of gender codes (which are visible in the daily life of the culture) than for actual sexual practices (which usually happen behind closed doors and in private spaces), then lesbians and gay men actually share the same stigma with "transgendered" people: the stigma of crimes against gender.

So let's reclaim the word "transgendered" so as to be more inclusive. Let's let it mean "transgressively gendered." Then, we have a group of people who break the rules, codes, and shackles of gender.

Anne Bolin similarly encourages the use of the model of a third sex/gender as a way of broadening the political movement of those who challenge dimorphic visions of sex:

By being Other and seeking roots with Otherness, transgendered people and gay men and women can transform their status momentarily or more deeply. By using the berdache as a model, the transgender community and homosexual community become active participants in re-shaping their culture and in finding affiliation where division existed.

Let me make clear what I am not proposing by the vision of a new sex/gender category, "Other." I am not suggesting that we view all transsexual persons, or transgendered persons, or any other group of persons, as the unique membership of a third sex/gender. The last thing I wish to advocate is a simplistic replacement of our society's rigid dimorphic vision of sex/gender with an equally rigid trimorphic vision.

Rather, the category "Other" is broadly and inclusively conceived, as potentially excluding no one. So who exactly is a member of the sex/gender category, "Other"? The determination as to whether one is a member of the category has nothing to do with biology, desire, or gender norms.

98. Id. at 134-35. Recent legal scholarship strongly supports Bornstein's assertion that discrimination against lesbians and gay men relates far less to their sexual practices and more to their defiance of society's gender norms. See Mary Anne C. Case, Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence, 105 Yale L.J. 1 (1995); Katherine M. Franke, What's Wrong with Sexual Harassment, 49 Stan. L. Rev. 691 (1997). See also Doe v. City of Belleville, 119 F.3d 563, 580 (7th Cir. 1997) (holding that same-sex sexual harassment is actionable under Title VII and that "Title VII does not permit an employee to be treated adversely because his or her appearance or conduct does not conform to stereotypical gender roles"), petition for cert. filed, 66 U.S.L.W. 3308 (U.S. Oct. 15, 1997)(No. 97-669).


100. Gilbert Herdt observes, "[T]he code of thirdness should not be taken literally to mean that in all times and places, there are only three categories possible for human life. We would want to entertain the possibility of multiple categories in human lives." Herdt, Third Genders, supra note 69, at 105.
presentation. It is a matter of personal choice. It is an identity category which an individual can assume to challenge the destructive history caused by our culture's adoption of a dimorphic sex/gender division. Identifying oneself as "Other" is a conscious choice by an individual to oppose the male/female, masculine/feminine dichotomies, and the oppressions that result from those dichotomies.

Accordingly, irrespective of one's genitals, chromosomes, sexual orientation, gender presentation, or gender identity, any individual may opt to self-identify as "Other." By so doing, that individual makes a statement of solidarity with other persons who object to the insidious nature of Euro-American sexual dimorphism. "Other," rather than recognizing a new "natural" third sex/gender category, serves as a queer sex, gender-blending sex, transgendered-sex category. To borrow from Anne Bolin, the category "Other" is part of the process of creating not just a third gender but the possibility of numerous genders and multiple social identities. As such, [Other] challenges the dominant American gender paradigm with its emphasis on reproduction and the biological sexual body as the sine qua non of gender identity and role.101

III. Evaluation of the Two Alternative Visions

Which of these alternative visions of sex, gender, and gender identity—sexual continuism or a third sex/gender—offers the greatest promise of providing common conceptual ground on which critical gender theorists and transsexuals can ally in the struggle for transsexual rights? In this section, I will evaluate these alternative visions along two parameters.102 First, is the alternative vision of sex/gender attractive to both

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101. Bolin, Transcending and Transgenderings, supra note 2, at 477.
102. Dallas Denny has suggested a more complex, multi-factored approach to evaluating alternative visions of sex and gender as they apply to transgendered and transsexual persons:

Some Criteria by Which to Evaluate Various Models of Transgender and Transexual Behavior

- How has the model impacted the way transgendered and transexual persons see themselves and the way they are viewed by others?
- Does the model treat the transgendered and transexual individual with self-respect and dignity?
- Does the model maximize the amount of choice of the transgendered and transexual individual (allow the individual to set his or her own pace, to participate in decisions to change/not change the body, and to decide upon particular life goals)?
- Does the model require the individual to surrender autonomy?
- Does the model build a sense of transgendered and transexual persons as healthy and productive, or does it pre-suppose abnormality and pathology?
- Does the model allow a healthy range of personal styles, as opposed to promoting gender stereotypes?
transsexuals and to critical gender theorists? Second, can the vision translate into practical social policy?

In testing each vision for its practicability, I use the heuristic device of the public restroom. In so doing, I do not intend in any way to trivialize issues of transsexual rights. The choice of public restrooms is in fact the source of considerable anguish for transsexuals (especially in the workplace). As Brown and Rounsley point out:

Both practicality and logic dictate that someone dressed as a woman does not belong in the men's room—just as someone dressed as a man does not belong in the ladies' room. And yet, which bathroom the transsexual employee should use often becomes an area of concern in many companies.

Moreover, public restrooms are a social institution in our society which blatantly reinforce a dimorphic vision of sex/gender. Accordingly, the treatment given by each alternative vision to this omnipresent social institution indicates the power of that vision to precipitate social change which potentially can benefit all sexual minorities.

A. Evaluating Sexual Continuism—the Unisex Bathroom

Though Rothblatt's theory of sexual continuism should prove quite attractive to critical gender theorists, it is less clear that transsexuals would find it a compelling alternative to sexual dimorphism. Contemporary critical gender theory has moved beyond the early feminist critique

- Does the model provide a variety of outcome choices, including sex reassignment, genital surgery, hormonal therapy, androgyny, transgenderism, and remaining in the original gender role?
- Does the model provide procedural safeguards for medical procedures and treatment?
- Does the model provide continuity from early “coming-out” stages through coping with circumstances of the new life?
- Does the model provide the individual with opportunities to explore alternative gender roles before taking irrevocable steps? Does it allow “fall-back” positions when a step proves undesirable?
- Does the model provide for a hierarchy of treatment, with less aversive and intrusive methods considered before more aversive and intrusive methods are tried?
- Does the model provide for peer support?
- What are the relative costs associated with the model?
- What have been the outcomes of past applications of the model?

Dallas Denny, *Transgender: Some Historical, Cross-Cultural, and Contemporary Models and Methods of Coping and Treatment*, in *GENDER BLENDING*, supra note 2, at 34.

As I suggest below, to the extent that the model of a third sex/gender allows a transgendered person the option of “passing” as a person traditionally gendered as male or female rather than “coming out” as transgendered, this model seems more respectful of individual choice than does Rothblatt's model.

103. BROWN & ROUNSLEY, supra note 1, at 160.
of the construction of gender to a realization that the dimorphic paradigm of sex itself is socially constructed. Rothblatt’s critique of sex mirrors critical gender theory’s understanding that gender and sex are socially created and, ultimately, are exploited in our society to the detriment of women and sexual minorities.

Rothblatt’s theory, however, is of doubtful appeal to transsexuals. Many transsexuals have no desire to blur the categories of male and female. After undergoing sex reassignment surgery, many MTF transsexuals consider themselves (and desire others to consider them) as both a gendered female and a biologically-sexed female. Of course, many transsexuals can accept that other transsexuals might choose to consider themselves to be gendered as other than male or female. However, it is critically important to many MTF transsexuals that they assume a traditional sex identity as female. Although Rothblatt’s theory is clearly designed to take account of the transsexual’s situation, it in fact could prove very threatening to many transsexuals by denying them femaleness, the very category that they have struggled so long to attain.

Moreover, Rothblatt’s vision does not easily translate into practical social policy. In advancing her theory of sexual continuism, Rothblatt does address directly the issue of the public restroom, an issue she refers to as “The Bathroom Bugaboo.” She views the segregation of bathrooms by sex as analogous to the “[u]biquitous ‘whites only’ and ‘coloreds’ signs hung in front of separate restroom facilities through much of the South” during the 1950s and 1960s.

Rothblatt advocates that we replace sex-segregated restrooms with unisex public restrooms. In addressing issues of privacy, she advocates placing toilets and urinals within enclosed stalls. Alternatively, she urges that we eliminate urinals altogether, which favor persons with penises, and install only sit-down toilets in public lavatories. In response to concerns about rape, she suggests that bathroom security should be increased by providing loop cameras to discourage restroom crime. She concludes:

The bathroom bugaboo is a legal problem because, as with race, restroom segregation reinforces social discrimination. It took laws to

104. See sources cited supra note 24.
105. Anne Bolin quotes one transsexual as suggesting that post-operative transsexuals create a kind of new closet for themselves after surgery:

Transsexual people must learn to come out. The closet for them is as real as it is for gay men and lesbians. But transsexualism has two closets. . . . That’s where people go after their transitions to deny their pasts and their transsexualism. It makes them vulnerable to outing, just as it does the gay and lesbian community.

106. ROTHBLATT, supra note 24, at 91.
107. Id. at 92.
108. See id.
eliminate "whites only" lavatories. It took laws to mandate handicapped toilets. And it is taking laws to redress inadequate bathroom facilities for women. The best way to redress this harm, and to help cleanse society of sexual apartheid, is to pass laws that mandate secure, reasonably clean, unisex restrooms for all.109

Rothblatt's vision of unisex bathrooms is probably too threatening to too many people to have a realistic possibility of implementation. Unisex restrooms do not respect the choices of those who self-identify as male or female and who want to have their privacy respected along biologically defined lines. Similarly, these restrooms do not respect the choices of MTF transsexuals who want to use the female restroom as an important component of the gender identity they have assumed for themselves.

In her work, The Man in The Red Velvet Dress, J.J. Allen criticizes Rothblatt's theory:

[The majority of the population is also heterosexual, and what is heterosexuality but a sexual attraction toward the opposite sex? Male and female are inescapable biological and sexual referents. To expect the mainstream to radically reinterpret itself for the sake of transgenderist ideology is the sort of conceit typical of a member of any minority.110

Even if one questions Allen's assertion that male and female are inescapable categories, the practicability of getting mainstream heterosexuals to give up their self-identity as male or female is unrealistic.

Rothblatt's vision purports to offer an alternative to a dimorphic vision of sex/gender. But does it really? Although she adopts the conceptual structure of a continuum to describe sex, her theory reinforces a dimorphic view of sex by placing the categories "male" and "female" at the endpoints of the continuum. Under such a view, individuals are inevitably defined as more or less male, or more or less female. The determining concepts remain bipolar.

Rothblatt is correct to attack the notion that there is a necessary tie between sex and gender. Individuals should be encouraged to experiment and be creative when it comes to gender presentation, irrespective of biological sex.111 But in attempting to obliterate the categories of male and female in favor of a view of biological continuity, Rothblatt may have gone too far.

109. Id. at 95.
110. ALLEN, supra note 3, at 133.
111. See id. at 133-34.

[T]here's an evolutionary and sexual reality on top of which we have superimposed a set of dubious gender constructs. I assert that it is masculinity and femininity (gender), rather than male and female (sex), that form a continuum and therefore need redefinition.

Id.
First, the vast majority of individuals (96% on Rothblatt’s own terms) are born either male or female, implying a coordinance among external genitals, internal reproductive organs, and chromosomes. This is not to deny the existence of intersexed individuals. Nor is it to deny the work of critical theorists such as Judith Butler\(^{112}\) and Thomas Laqueur\(^{113}\) who forcefully argue that sex itself is a product of social construction. Nonetheless, in terms of classification, the categories of male and female apply comfortably to an overwhelming majority of people. Moreover, as Rothblatt herself seems to recognize, it may make perfect sense to develop medical specialties along the lines of biological sex, given medical problems and life changes that accompany male and female biologies.\(^{114}\)

Second, despite advances in technology, human reproduction still requires the presence of a male sperm and a female egg. (Of course, cloning technology could change that in fundamental ways.) Granted, intercourse between a man and a woman is no longer necessary for procreation.\(^{115}\) Nonetheless, in the context of human reproduction the bipolar categories of male and female are difficult to overcome.

Third, the nature of human sexual desire highlights the most problematic defect inherent in Rothblatt’s proposal to abandon the sex categories male and female. Rothblatt wants to believe that individuals are attracted to sexual types organized along active/passive parameters. It seems more likely, however, that human sexuality is organized along genital/bodily lines. In general, a vast majority of people seem to be attracted to gendered bodies, including certain genitals. Thus, irrespective of questions of sexual orientation, people seem to be attracted to bodies with penises (and public indicators of penises, such as beards and deep voices), or vaginas (and public indicators of vaginas, such as breasts and certain facial characteristics). Of course, some individuals are drawn to both. But it is doubtful that male and female genitals are irrelevant to human sexual attraction and desire.

Finally, Rothblatt’s vision of a sexual continuum defies much empirical research in cultural anthropology. Will Roscoe has noted:

> It may, indeed, be arguable that all societies have at least two genders, and . . . that these two genders are linked to perceptions of physiological differences. What constitutes anatomical sex, however, which or-

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112. See Butler, supra note 24.
113. See Laqueur, supra note 24.
114. See Rothblatt, supra note 24, at 13.
115. Procreation can and has been an important historical justification for oppression against sexual minorities. Lesbians and gay men historically have been condemned for engaging in non-procreative sex. See, e.g., Jonathan Ned Katz, Coming to Terms: Conceptualizing Men’s Erotic and Affectional Relations with Men in the United States, 1820-1892, in Queer World, supra note 42, at 216.
gans (or fluids or physiological processes) are considered the signs of maleness and femaleness, has been shown by scholars in several fields to be as much a social construction as what has been termed "gender."

The bottom line seems to be that the sex/gender categories “male” and “female” are here to stay. The weakness of Rothblatt’s theory is that it seeks to eliminate these categories by collapsing them into a unitary vision of sex/gender along a continuum. As suggested below, the great advantage of the alternative vision of a third sex/gender is that it leaves intact the highly entrenched social categories of male and female. Instead, the vision of a third sex/gender, “Other,” accomplishes its subversive goals through supplementation, not reduction, of sex/gender categories.

B. Evaluating the Vision of a Third Sex/Gender—The Restroom Labelled “Other”

Unlike Rothblatt’s vision of a sexual continuum, the introduction of a third category carries with it certain cultural advantages. As the sociologist George Simmel points out:

The dyad represents both the first synthesis and unification, and the first separation and antithesis. The appearance of the third party indicates transition, conciliation, and the abandonment of absolute contrast.

The introduction of a third category forces individuals to rethink their prior ways of classification and to engage in a cultural dialogue over the reasons that Western society created a dyad in the first place. Rothblatt’s theory of sexual continuism fails as a useful social critique of dimorphism because it relies heavily upon the dyadic endpoints of male and female, suggesting only that these marginal points are at best vague and uncertain. In contrast, the introduction of the triad is not about margins; it is about core difference. The new category “Other,” when conceptualized as a third category, cannot be conceived as merely an offshoot of one of the existing categories.

I propose that one of the most productive ways to implement the use of a third sex/gender category to challenge Western sexual dimorphism is through the adoption of a third public restroom labeled “Other.” Recent architectural theory has emphasized the interrelationship between how a society constructs and arranges its physical spaces and how a society understands sex and gender. Gilbert Herdt has suggested that the creation

116. Roscoe, supra note 74, at 69.
117. THE SOCIOLOGY OF GEORGE SIMMEL 145 (Kurt Wolff ed. & trans., 1951), quoted in Herdt, Third Genders, supra note 69, at 105.
118. See, e.g., AARON BETSKY, BUILDING SEX: MEN, WOMEN, ARCHITECTURE AND THE CONSTRUCTION OF SEXUALITY (1995); THE SEX OF ARCHITECTURE (Diana Agrest et al. eds., 1996); DAPHNE SPAIN, GENDERED SPACES (1992); STUD: ARCHITECTURES OF MASCULINITY
of a new physical space can have an important impact on an emerging
group's development of a sense of itself, and ultimately, an impact on the
broader society:

One of the findings of my own comparative work on culture, sexuality
and historical change has been to demonstrate that the intentional actor
in search of a new identity requires a separate social space; it is within
this liminal space that culture is created and transformed. 119

Accordingly, there is a need to create a physical site in which to im-
plement and test the vision of a third sex/gender category, "Other." The
virtually universal presence of the public restroom makes it an ideal "so-
cial space[] and cultural place[] for thirdness [to be] structured across the
course of life."120 Only through the existence of such spaces can indi-
viduals in our culture begin to experiment with new categories of
sex/gender, and perhaps encourage broader social change directed to-
wards universal acceptance of all sexual minorities.

How does the vision of a new sex/gender category, "Other," and the
restroom labeled "Other," stand up to scrutiny under the parameters of,
first, acceptability to critical gender theorists and to transsexuals and,
second, practicability? Critical gender theorists, given their aim to cause
a Garber-like121 category crisis concerning the dimorphic construction of
sex/gender, should find the vision of a third sex/gender category ex-
tremely attractive. The restroom labeled "Other" can serve as a mecha-
nism to assist in transforming our society from one which views all
sex/gender questions dimorphically to one which is more respectful of a
full range of sex/gender identities. The very existence of a restroom la-
beled "Other" forces all persons, especially those who choose to use the
restrooms labeled "Men" or "Women," to question their default assump-
tions about sex and gender. The category "Other" forces all to question
not only who should be entering the new door, but also to wonder who
and what belongs inside the doors labeled "Men" and "Women," an issue
heretofore always taken for granted. In particular, the existence of a
third door raises public awareness of the fluidity of the notions of male
and female. The door labeled "Other" raises central questions concern-
ing the boundaries of our existing concepts of sex and gender. Do
"Men," "Women," and "Other" refer to an individual's internal or ex-
ternal biology, gender presentation, orientation, or self-identity?122

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120. Id.
121. See supra notes 95-96 and accompanying text.
122. Anne Bolin notes that "[p]ublic recognition and legitimacy of alternatives encourages
multiple treatment options and the opportunity for the continued decoupling of gender and sex." Bolin, Transcending and Transgenderings, supra note 2, at 465.
The idea of a third sex/gender category that must consciously be assumed by an individual should prove attractive to transsexuals. Unlike Rothblatt's vision, which by fiat places transsexuals somewhere along the sexual continuum away from the endpoints of male or female, the vision of a third sex/gender gives a transsexual the choice of whether or not to identify as "Other." On the one hand, the transsexual (either pre-operative or post-operative) may choose to "come out" as transsexual, view herself as third-gendered, and accordingly, use the restroom labeled "Other." On the other hand, if it is important to the transsexual's sense of personal identity to assume the traditional sex/gender category of female, she may choose to self-identify as female (for the MTF transsexual) and use the restroom labeled "Women." In other words, in contrast to Rothblatt's vision, the vision of a third sex/gender is highly respectful of an individual's choice of self-definition.

Moreover, to the extent that critical gender theory has accurately recognized the impact of the medical profession on the self identity of the transsexual, the category "Other" may enable some transsexuals to question their own desire to undergo sex reassignment surgery. Instead, once it is understood that gender identity and presentation, on the one hand, and biological morphology, on the other, are not inextricably linked, there may be more transsexuals who choose to live as transgendered persons without undergoing surgery.

Is the vision of this new sex/gender category practicable? At a minimum, it seems far more likely to be acceptable to the general public than a single unisex bathroom. On the one hand, recognition of a third sex/gender category would allow those comfortable with the categories "Men" or "Women" to continue to self-identify according to those categories, and to use bathrooms so labeled. On the other hand, anyone comfortable with the gender-bending nature of using a new bathroom labeled "Other" would be free to do so. Maintaining the existing two doors shows respect to those who, for whatever reason, find it important to maintain their sex/gender identity along traditional lines. At the same time, the door labeled "Other" is a location of choice for those wishing to challenge those traditional lines.

Kate Bornstein has suggested that all persons are potentially transgendered in that all have the ability to transgress our culture's long-standing gender norms. Accordingly, the restroom labeled "Other" is available to all persons. An individual's decision to use that restroom for the first time is an important step toward dismantling our culture's rigid gender codes.

How might the idea be implemented? The obvious places to consider creating third restrooms are lesbian and gay bars, and other establishments that cater to lesbian, gay, transsexual, and other transgendered persons.
Another way in which a third restroom is beginning to appear in public spaces is as a result of the Americans with Disabilities Act of 1990 ("ADA"). There is a deep irony in this fact. On the one hand, the ADA explicitly excludes transsexualism from its ambit. On the other hand, the ADA Accessibility Guidelines for Buildings and Facilities, which set forth the statute’s architectural requirements, not only allow the use of a third “single-user” restroom in building alterations, but affirmatively encourage the addition of a third restroom in new construction. The upshot of these guidelines is that a statute explicitly not applicable to transsexuals in fact proves to be of particular utility to transgendered people.

**Conclusion**

The etiology and nature of gender identity as a psychological concept remains incredibly elusive. It may be a long time before science determines the relative influences of nature and of nurture on gender identity. In the meantime, our society needs to take the personal stories of transgendered people in general, and of transsexuals in particular, much more seriously. In this paper, I have suggested that one way of doing so is to create a new flexible category of sex/gender, “Other,” that respects the needs of all “transgendered” persons, irrespective of how they seek to transgress gender.

124. Section 12211(b) of the ADA states:
   Under this Act, the term “disability” shall not include—
   (1) transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders . . . .
127. In its “Recommendations” concerning new construction, the ADA Guidelines state:
   1. In new construction, accessible single-user restrooms may be desirable in some situations because they can accommodate a wide variety of building users. However, they cannot be used in lieu of making the multi-stall toilet rooms accessible as required.

*Id.*

128. See, e.g., Stephen Whittle, *Gender Fucking or Fucking Gender?*, in BLENDING GENDERS, supra note 2, at 196, 209-10.