

Chapter 27

Choice of Gender Identity in International Human Rights Law

Aaron Xavier Fellmeth*

Michael Reisman's work has long qualified the traditional deference to state sovereignty as a pragmatic choice valued because it ultimately serves the goal of protecting human life and dignity.¹ In placing state sovereignty in subservience to more fundamental values while recognizing the importance of a stable world public order, Reisman calls for realistically balancing the needs of states—as mediators between groups of individuals who claim differing cultural beliefs, ideologies, and allegiances—and the universal and equal rights of all individuals regardless of these differences.² Pushing international law beyond the limits of realistic acceptance by states, which do the heavy lifting in international law enforcement, risks undermining the law's legitimacy and threatening its authoritative status. The enduring tension, some would say weakness, in international human rights law arises from its role as a restraint on the very states charged with enforcing it.

Yet some international human rights claims challenge state power more than others. When an asserted right challenges the state's official ideology or a widespread cultural belief, the state may be expected to resist recognizing the right with special vigor. Today, as historically, there are few subjects more burdened with ideological and cultural import than sexuality and gender. For whatever reason—religious, biological, or social—societies and their governments tend to resist relinquishing control over sex- and gender-related public policies, no matter how personal or private the individual's interest in autonomy may seem.

Transgendered persons must struggle with just such entrenched social norms in claiming human rights to freedom from discrimination and official recognition of their claimed gender. Their struggle in this regard resembles that of homosexuals and bisexuals claiming rights to nondiscrimination, privacy, and freedom of intimate association and family life. The similarities between the challenges these groups face

* The author thanks Beth DiFelice for her research assistance.

1 See, e.g., W. Michael Reisman, *Why Regime Change Is (Almost Always) a Bad Idea*, 98 AM. J. INT'L L. 516, 517 (2004).

2 Cf. W. Michael Reisman, *Coercion and Self-Determination: Construing Article 2(4)*, 78 AM. J. INT'L L. 642 (1984).

have frequently caused gay rights advocates to align themselves with transgender rights advocates. Many international gay rights nongovernmental organizations now include transgender rights among their portfolio of causes.³

Despite the obstacles, advocates of transgendered persons have on the whole made significant progress in advancing their claims in some regions. In some cases, their success has been sufficiently notable to overshadow the successes of homosexuals in making comparable claims.⁴ Such success may seem surprising in light of the very small number of transgendered persons worldwide⁵ and discomfort with the concept of transgenderism among a large percentage of the public in most states.⁶ This essay

3 The International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGTA) is perhaps the most prominent example. At its 2004 regional conference in Santiago de Chile, one of then-ILGTA's main themes was the inclusion of gender identity issues in the movement. Another example is the Human Rights Campaign, whose mission is "to achieve lesbian, gay, bisexual and transgender equality." Human Rights Campaign, About Us, http://www.hrc.org/about_us/index.htm (last visited June 4, 2009).

4 On advances in recognition of international human rights for sexual minorities, see generally Aaron Xavier Fellmeth, *State Regulation of Sexuality in International Human Rights Law and Theory*, 50 WM. & MARY L. REV. 797 (2008).

5 While the number of transgender persons has not been reliably estimated, the population percentage of transsexuals is consistently estimated at well under 1% in the United States and Europe. See, e.g., AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 535 (4th ed. 1994); P.L. Eklund, L.J.G. Gooren & P.D. Bezemer, *Prevalence of Transsexualism in the Netherlands*, 152 BRIT. J. PSYCHIATRY 38 (1988).

6 See, e.g., Darryl B. Hill & Brian L.B. Willoughby, *The Development and Validation of the Genderism and Transphobia Scale*, 53 SEX ROLES 531 (2005) (finding extremely intolerant attitudes toward transsexuals among subjects in Montréal, Québec); Mikael Landén & Sune Innala, *Attitudes Toward Transsexualism in a Swedish National Survey*, 29 ARCHIVES OF SEXUAL BEHAVIOR 375, 379-80 (2000) (reporting that some 40% of Swedes object to befriending a transsexual and would not allow transsexuals to work with children); Harold Leitenberg & Lesley Slavin, *Comparison of Attitudes Toward Transsexuality and Homosexuality*, 12 ARCHIVES OF SEXUAL BEHAVIOR 337, 341 (1983) (reporting that over 20% of college students in a liberal U.S. state found transsexuality "always wrong"); Anthea De Lima, *Many Do Not Sympathise with "Mak Nyahs"*, NEW STRAITS TIMES (Kuala Lumpur), Aug. 5, 2002 (reporting that 48% of students surveyed viewed transsexuals as "part of society's social ills."); Donald Asprey, *Transsexuals Are Family Outcasts, But Find Support Elsewhere*, S. CHINA MORNING POST, June 20, 2006, at 1 (reporting that more than half of Hong Kong residents surveyed considered sex change operations morally wrong and 49% referred to transsexuals a "human beasts"); Mubarak Dahir, *Transgender Breakthrough*, THE ADVOCATE, Oct. 15, 2002, at 38 (reporting that 31% of U.S. residents surveyed felt "unfavorable" toward transgendered persons and 33% considered being transgendered "morally wrong"); *Most of Young Czechs Intolerant of Romanies, Prisoners—Poll*, BBC MONITORING EUROPE, Dec. 17, 2007 (finding 50% of polled Czech students aged 12-20 have negative attitudes toward transsexuals, versus some 33% toward homosexuals); *Press Scanner: Poll Gives Curious Results*, TURKISH DAILY N., 2002 WLNR 7478374 (June 4) (reporting that 61% of Turks polled stated that they "would not tolerate" living in the same apartment building with a transvestite).

will summarize the state of international human rights law relating to transgendered persons to demonstrate the obstacles to further recognition of transgender rights and the movement's seemingly paradoxical success so far. It will then suggest some reasons for and potential problems with tying transgender rights to similar rights for homosexuals but will argue that human rights claims by the two groups have much in common despite the apparent discrepancies.

I. Advances in the Recognition of Transgender Rights

The recognition of human rights for homosexuals and bisexuals is a relatively recent, and still a limited, phenomenon.⁷ Europe and the British Commonwealth states—especially Canada and South Africa—have led the way toward the acceptance of gay rights as human rights.⁸ In these states, transgender rights have evolved more or less in parallel with gay rights, and in most cases the evolution has been rapid and recent. Before 1989, not a single member of the European Community (EC) had adopted a law specifically protecting transsexuals from discrimination,⁹ but a few European states had already legally codified a right of transsexuals to official recognition of sex reassignment surgery and to marry a person of their birth sex.¹⁰ This practice was far from universal, and procedures in many member states for recognition were cumbersome and slow, if not altogether absent.¹¹

The first major change in policy came in 1989, when the EC Parliament¹² and the Council of Europe (CoE) Parliamentary Assembly¹³ called for comprehensive recognition of gender and sex changes and the enactment in member states of legislation to prevent discrimination against transgendered persons. The CoE Assembly adopted the position that “human dignity and personal rights must include the right to live according to one’s [conception of one’s own] sexual identity” and called on CoE member states to “enact provisions on transsexuals’ rights to change sex” through surgical

7 See generally Fellmeth, *supra* note 4, at 814-72.

8 See *id.*

9 Resolution on Discrimination Against Transsexuals, EUR. PARL. DOC. A 3-16/89 [hereinafter EC Parliament Res. C256/33], Explanatory Statement (Doc_EN\RR\73316.TO), at 14.

10 E.g., Greg Taylor, *The New Gay and Lesbian Partnerships Law in Germany*, 41 ALTA. L. REV. 573, 582 (2003).

11 In Ireland, for example, there were no procedures for governmental recognition of a sex reassignment. See EC Parliament Res. C256/33, *supra* note 9, Explanatory Statement, at 10-12.

12 *Id.* ¶¶ 2, 9.

13 Eur. Consult. Ass., Recommendation 1117 on the Condition of Transsexuals, 21st Sess., Doc. No. 6100 (1989), available at <http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta89/EREC1117.htm>.

and other medical intervention to be covered by private or public health insurance.¹⁴ It further called for a European convention for the protection of transsexuals.¹⁵

The EC Parliament resolution focused on specific topics of concern to transgendered persons. It called on the Commission and Council to clarify that EC directives relating to workplace equality, as currently drafted, already outlaw discrimination against transsexuals, and it called on the EC Council and member states to recognize persecution on grounds of transsexuality as a basis for granting asylum.¹⁶ Furthermore, the Parliament called on the Council of Europe to draft and adopt a convention for the “protection of transsexuals,” presumably meaning protection from both public and private discrimination, and it urged the Commission to create an office for reporting cases of discrimination based on transsexuality.¹⁷

As the parliamentary bodies of the Council of Europe and the European Community pushed for recognition of human rights for transgendered persons, the judicial organs overcame their initial reluctance to enforce nondiscrimination rights. In its 1996 decision in *P. v. S. & Cornwall County Council*, the European Court of Justice (ECJ) held that an employer’s dismissal of an employee based on gender reassignment surgery violated Directive 76/207, which prohibits discrimination based on “sex.”¹⁸ Several years later, in *K.B. v. NHS Pensions Service Agency*, the applicant, a woman living with a female-to-male transsexual, had been denied the right to marry her partner under U.K. municipal law and, because she was unmarried, further denied the right to designate her partner as the beneficiary of her pension.¹⁹ To the claim of sex discrimination, the court responded that Article 141 (previously Article 119) of the Treaty of Rome and the Council’s Equal Pay Directive²⁰ prohibited an EC member from obstructing the applicant’s ability to marry a transsexual partner and thereby depriving the applicant’s partner of the benefit of the applicant’s pension.

Two years later, in *Richards v. Secretary of State for Work and Pensions*, the ECJ considered the claim of a male-to-female transsexual who had been denied the right to the more favorable retirement age afforded to women in the U.K. for pension pur-

14 *Id.* ¶¶ 1-2, 4.

15 *Id.* ¶ 3. The call, however, has not yet been answered.

16 EC Parliament Res. C256/33, *supra* note 9, ¶¶ 8, 10.

17 *Id.* ¶¶ 3, 13. The office was not ultimately created, but the Directorate-General of Employment, Social Affairs, and Equal Opportunity does include a Directorate for equality between men and women and for action against discrimination, while the Directorate-General for Freedom, Justice, and Security counts among its mandates the protection of EC citizens from discrimination generally.

18 Case C-13/94, *P. v. S. & Cornwall County Council*, 1996 E.C.R. I-2143 ¶¶ 19-23; *see Chessington World of Adventures v. Reed*, [1998] I.C.R. 97 (Eng.); Sex Discrimination (Gender Reassignment) Regulations 1999 (U.K.).

19 Case C-117/01, *KB v. Nat’l Health Serv. Pensions Agency*, 2004 E.C.R. I-541, 1 C.M.L.R. 28 (2004).

20 Council Directive 75/117, Equal Pay Directive, 1975 O.J. (L 45) 19 (EU).

poses.²¹ In a tersely worded judgment, the Court referred back to the *K.B.* case for the proposition that

national legislation which precludes a transsexual, in the absence of recognition of his new gender, from fulfilling a requirement which must be met in order to be entitled to a right protected by Community law must be regarded as being, in principle, incompatible with the requirements of Community law.²²

The Court explained that the right protected by EC law was *not* the right to equal retirement age based on sex, on the basis of which the relevant EC directive had specifically reserved the right to discriminate.²³ Rather, the right was that of the post-operative transsexual to official recognition of her new gender identity.

Meanwhile, after denying that, for Article 8 purposes, transsexuals could have a “family life” with unrelated persons of the same sex for some time,²⁴ the European Commission of Human Rights ultimately extended the privacy and nondiscrimination rules of Articles 8 and 14 of the European Convention on Human Rights (ECHR)²⁵ to transsexuals in a string of important cases handed down between the late 1980s and the early 1990s.²⁶ The European Court of Human Rights (Strasbourg Court), too, was initially reluctant to recognize nondiscrimination rights for transsexuals and afforded states parties to the ECHR a wide margin of discretion to discriminate. After initially rejecting several claims by transsexuals seeking to compel states parties to note their post-operative sex on their birth certificates,²⁷ the Court has now come to acknowledge significant duties on the part of states parties to afford equal rights to transgendered persons.

The first move toward recognition was the Strasbourg Court’s decision in the 1992 case *B. v. France*. There, the Court found that France had violated a male-to-female transsexual’s right to privacy by declining to change her first name to a female one

21 Case C-423/04, *Richards v. Sec’y of State for Work and Pensions*, 2006 E.C.R. 3585, 2 C.M.L.R. 49 (2006).

22 *Id.* ¶ 31.

23 The directive mandated equal treatment of men and women in the field of social security, but allowed derogation in the retirement age of women and men. Council Directive 79/7, 1979 O.J. (L 6) 24, art. 7(1)(a) (EC).

24 *E.g.*, *X & Y v. United Kingdom*, App. No. 9369/81, 32 Eur. Comm’n H.R. Dec. & Rep. 220; *Kerkoven v. The Netherlands*, App. No. 15666/89.

25 European Convention on Human Rights arts. 8, 14, 213 U.N.T.S. 222, *entered into force* Sept. 3, 1953 [hereinafter ECHR].

26 *See, e.g.*, *Rees v. United Kingdom*, App. No. 9532/81, 9 Eur. H.R. Rep. 56, 622 (1987); *B. v. France*, App. No. 13343/87, 16 Eur. H.R. Rep. 1 (1992); *Sheffield & Horsham v. United Kingdom*, App. No. 31-32/1997/815-816/1018-1019, 27 Eur. H.R. Rep. 163 (1998).

27 *Rees v. United Kingdom*, App. No. 9532/81, 9 Eur. H.R. Rep. 56, ¶¶ 37, 44 (1987); *Cossey v. United Kingdom*, App. No. 10843/84, 13 Eur. H.R. Rep. 622, 626, ¶ 18 (1990); *Sheffield & Horsham v. United Kingdom*, App. No. 31-32/1997/815-816/1018-1019, 27 Eur. H.R. Rep. 163 (1998).

and to amend her birth certificate to reflect her new gender even though the birth certificate was designed to be updated throughout the life of the individual. The Court distinguished between those states that use birth certificates as a fixed record of an event (the birth of a child of a specific sex) and those that treat birth certificates as identification documents to be updated and used throughout an individual's life. In two previous cases, *Rees v. United Kingdom* and *Cossey v. United Kingdom*, the birth certificate was never intended to be updated, and the Court accordingly declined to find a human rights obligation on the part of states to amend the certificate to reflect the new sex. But this was not the case in France. Given the certificate's status as living documentation, the Court held that there was no reasonable justification for refusing to recognize the surgical gender change that France had allowed the applicant to undergo in the first place.²⁸

As Judge Pettiti noted in dissent, the Court had not explicitly overruled *Rees* and *Cossey*.²⁹ Consistent with this observation, the Court in subsequent years repeatedly refused to extend the rule to require the amendment of birth certificates where the certificate was not intended to be updated throughout the person's lifetime; the Court, in other words, declined to extend to member states a positive obligation to update historical records to reflect the applicant's new gender, even by merely adding a note indicating the gender change on the documents.³⁰ In these cases, however, the majority faced an increasing number of dissenters (3 in 1986, 8 in 1990, and 9 in 1998), possibly indicating a gradual shift toward a less qualified recognition of a right of transgendered persons to state recognition of their new genders. The Court was mostly trailing the advanced positions of Council of Europe member states. By 1998, twenty-three of the then thirty-seven CoE member states generally recognized the new gender of transsexuals who had undergone sex reassignment surgery (some had done so as early as the 1970s³¹ and only four—Albania, Andorra, the Republic of Ireland, and the United Kingdom—expressly prohibited updating of their birth certificates with the new gender).³²

The watershed for transgender equal rights recognition in Europe came in 2002 in *Goodwin v. United Kingdom* and *I. v. United Kingdom*.³³ Like the *Richards* case before

28 *B. v. France*, 16 Eur. H.R. Rep. at 30 ¶ 52 (1992).

29 *Id.* at 38 (Pettiti, J., dissenting).

30 *Rees v. United Kingdom*, App. No. 9532/81, 9 Eur. H.R. Rep. 56, ¶¶ 37, 44 (1987); *Cossey v. United Kingdom*, App. No. 10843/84, 13 Eur. H.R. Rep. 622, ¶ 18 (1990); *Sheffield & Horsham v. United Kingdom*, App. No. 31-32/1997/815-816/1018-1019, 27 Eur. H.R. Rep. 163 (1998).

31 *E.g.*, *Transsexuelle I*, BVerfGE 49, 286 (1978), <http://www.oefre.unibe.ch/law/dfr/bvo49286.html> (Germany). *See also* *Cossey v. United Kingdom*, App. No. 10843/84, 13 Eur. H.R. Rep. 622, ¶ 3 (Palm, J., dissenting).

32 *Sheffield & Horsham*, 27 Eur. H.R. Rep. at 201 & n.95 (Bernhardt, J., partly dissenting). These include Belgium, Germany, Italy, the Netherlands, Sweden, and Turkey. *See X., Y. & Z. v. United Kingdom*, 1997-II Eur. Ct. H.R. 620, 654, ¶ 67 (1995).

33 *Goodwin v. United Kingdom*, App. No. 28957/95 (2002) (Eur. Ct. H.R.); *I. v. United Kingdom*, App. No. 25680/94 (2002) (Eur. Ct. H.R.).

the ECJ, *Goodwin* and *I.* arose because of sex discrimination in the UK's national insurance plan, which allowed women to retire earlier than men. The cases presented analogous facts: after the applicants had undergone gender reassignment surgery, the UK Department of Social Security continued to treat them as members of their birth sex. It also required them to enter into a special national-insurance-payment arrangement to prevent their employers from discovering their original sex.³⁴ In considering a complaint brought under Articles 8 and 14 of the ECHR, the Strasbourg Court held that, where a state countenances or assists in gender reassignment surgery, it fails to respect a transgendered person's private life if it refuses to recognize the resulting new gender officially.³⁵ By requiring states that permit gender reassignment surgery to amend the birth certificate of transgendered persons, the Court established a new rule of consistent treatment: henceforth, no member state could recognize a gender reassignment surgery for some purposes but not others. The clear implication of the Court's reasoning was that states permitting gender reassignment surgery must allow the transsexual to assume all of the rights and duties of his or her new gender. The *Goodwin* Court wrote in part:

The Court is struck by the fact that ... the gender reassignment which is lawfully provided is not met with full recognition in law ... Where a State has authorised the treatment and surgery alleviating the condition of a transsexual ..., it appears illogical to refuse to recognise the legal implications of the result to which the treatment leads ...

In the twenty-first century the right of transsexuals to personal development and to physical and moral security in the full sense enjoyed by others in society cannot be regarded as a matter of controversy. ... In short, the unsatisfactory situation in which post-operative transsexuals live in an intermediate zone as not quite one gender or the other is no longer sustainable.³⁶

In 2004, the United Kingdom became one of the last CoE member states to implement the Court's decision by allowing transsexuals to amend their birth certificates without conditioning this right on surgical intervention.³⁷ The *Goodwin* decision further specified that recognition of the new gender encompassed the right to marry a person of the transsexual's birth sex—a right that the Strasbourg Court has not yet recognized, seven years later, as applicable to homosexuals. Several other European

34 Because of the disparate retirement ages for males and females, the fact that the applicants continued to pay insurance contributions after their sixtieth birthdays would have tipped off their employers that the UK government treated them as males rather than as females.

35 *Goodwin v. United Kingdom*, App. No. 28957/95, ¶¶ 78, 93 (2002) (Eur. Ct. H.R.).

36 *Id.* ¶¶ 78, 90. In May 2006, the Court affirmed in *Grant v. United Kingdom*, App. No. 32570/03, 44 Eur. H.R. Rep. 1, ¶¶ 51, 56 (2007), that transsexuals suffering continued Article 14 discrimination based on vestigial legislation or state nonrecognition practices had a right to compensation until the effects of discrimination were rectified.

37 Gender Recognition Act 2004, ch. 7 (Eng.).

states now authorize the amendment of public documents notwithstanding the absence of intent to undergo gender reassignment surgery.

Following *Goodwin*, two other important cases—*Van Kück v. Germany*³⁸ and *Schlumpf c. Suisse*³⁹—have created new and significant rights for transgendered persons in Europe. In *Van Kück*, the applicant was a male-to-female transsexual employee of the Berlin government who sought partial reimbursement from her private health insurance company of the expenses of hormone treatments and gender reassignment surgery. The applicant was entitled to reimbursement of “necessary” medical expenses, and her claims were denied on the ground that the surgery was considered unnecessary in view of the possibility of the applicant’s gender identity disorder being resolved by extensive psychotherapy. On appeal, the German court also accepted the argument that treatments were non-reimbursable because the applicant, by self-administering female hormones without medical supervision, had “herself deliberately caused the disease [*sic*]” in violation of the insurance conditions.⁴⁰ The applicant argued, *inter alia*, that she had been denied her right to a fair hearing guaranteed by Article 6(1) of the ECHR, because the German courts had arbitrarily required that gender reassignment surgery be the only possible treatment for her disorder. She also argued that the court had concluded without evidence that her use of hormone treatments had “caused” her gender disorder. The decision, she claimed, violated her rights to privacy and self-determination under Article 8 of the ECHR.

Over a strong dissent, the majority accepted both arguments. The Court began its analysis with the uncontroversial observation that “gender identity is one of the most intimate matters of private life,” and it quickly concluded that a person asserting a gender identity different from his or her biological sex had a right not to be required to prove the medical “necessity” of treatment.⁴¹ The Strasbourg Court rebuked the German court for assuming that it had sufficient medical expertise and information to decide how transsexuality is caused. It concluded that a judicial decision of this kind could not have met the Article 6 requirements for a fair hearing.

The Article 8 analysis did not differ substantially from the Article 6 analysis. The Court again focused on the arbitrary denial of reimbursement based on insufficient evidence and speculation. The main analytic difference was that the operative result, so to speak, was not the denial of a fair hearing but the effect of the national court decisions on the applicant’s “right to respect for her sexual self-determination as one of the aspects of her right to respect for her private life.”⁴² The Strasbourg Court concluded that “no fair balance” had been struck between the interests of the private health insurance company and those of the applicant,⁴³ although the Court offered

38 *Van Kück v. Germany*, App. No. 35968/97, 37 Eur. H.R. Rep. 51 (2003).

39 *Affaire Schlumpf c. Suisse*, App. No. 29002/06 (2009) (Eur. Ct. H.R.).

40 *Id.* ¶¶ 23, 27.

41 *Id.* ¶¶ 56-57.

42 *Id.* ¶ 78.

43 *Id.* ¶ 84.

little guidance on the proper way to balance the interests of the parties under Article 8—except perhaps by offering a fair trial under Article 6.

Schlumpf involved very similar facts. The Swiss Federal Insurance Tribunal mandated a two-year waiting period before gender reassignment surgery would be authorized as a necessary medical procedure. Again, the applicant alleged violations of Articles 6(1) and 8 and prevailed on the same grounds as set forth in *Van Kück*. The Strasbourg Court similarly chided the Swiss court for adopting a legal requirement with no reference to the medical facts of each case and substituting its own judgment for that of medical professionals. It elaborated on the Article 8 grounds by pointing out that Switzerland is not entitled to influence an individual's decision to seek gender reassignment surgery but must instead balance the interests of the individual with the other "interests at play."⁴⁴ In response to Switzerland's argument that one such interest is the state's role in ensuring that individuals do not engage in gender reassignment surgery precipitately, the Court reminded the government that individuals may not be presumed to submit without reflection to the painful and drawn out surgical, and other medical, procedures involved in gender reassignment.⁴⁵

The decisions in *Van Kück* and *Schlumpf* illustrate a European trend away from trivializing questions of gender identity. In particular, the Strasbourg Court's judgments indicate judicial intolerance for a dismissive approach to the applicant's claims and point out what should have been evident upon the merest reflection—a person is unlikely to seek the extreme option of gender reassignment surgery unless that person has arrived at a considered determination that the procedure is necessary. That said, the Article 6(1) question was not technically whether the applicant had a human right to state-paid gender reassignment surgery, but rather whether the insurer is justified in ignoring evidence or simply inventing facts to support its denial of an insurance claim for reimbursement of such surgery. In short, what the state may not do after *Van Kück* is to assume, absent sufficient evidence, that gender dysphoria reflects no more than a whim. It remains possible that the reimbursement could have been denied had credible testimony supported the insurer's argument that non-surgical options would have availed the applicant's purposes equally well.

This, however, is the point at which an Article 8 analysis complicates the issue. The Strasbourg Court's emphasis on the gravity of irreversible surgery and the fact that "the most intimate private life matters" were implicated⁴⁶ seems to imply that gender reassignment surgery, when requested by the insured person, should always be considered medically "necessary." Such a right would be a very specific and advanced one indeed, but it may be what the Court intended. It is interesting that the European jurisprudence has avoided deciding transsexual claims on Article 14 nondiscrimination grounds, although these were raised by both applicants in the foregoing cases. Minority group-discrimination analysis seems a more suitable human rights framework for transsexual claims, because it is more intuitive to draw a dichotomy

44 *Id.* ¶¶ 102, 111-12.

45 *Id.* ¶ 110.

46 *Van Kück*, 37 Eur. H.R. Rep. at 51 ¶ 82.

between transgendered persons and non-transgendered persons as classes⁴⁷ than it would be to assert a universal right to decide one's own gender.⁴⁸ But this intuition may be a cultural bias that is not based on any considered policy. The Strasbourg Court's decision to eschew analysis under Article 14 indicates its intent to give individuals a preeminent role in deciding questions relating to their own gender identity as a matter of autonomy and privacy.

Outside of Europe, only a few states have recognized a right of transsexuals to have their identification documents, including birth certificates, updated with a new name and sex after gender reassignment surgery. These include Canada, Israel, Japan, Malaysia (since 2006, but for non-Muslims only), New Zealand, North Korea, the Philippines, Singapore, South Africa, South Korea, and parts of Australia, the United States, and the People's Republic of China.⁴⁹ Very few states prohibit discrimination based on transsexual status⁵⁰ or allow post-operative transsexuals to marry persons of their

47 The exception is intersex persons.

48 How the distinction is drawn may, of course, be subject to debate, but this question is easily encompassed in discrimination analysis. Whether pre-operative transsexuals should belong to the same class as post-operative transsexuals, for example, can be resolved with reference to the social discrimination that both equally suffer.

49 See Law Concerning Special Cases in Handling Gender for People with Gender Identity Disorder (GID), Law No. 111 of 2003, reprinted in Laura H. Norton, Note, *Neutering the Transgendered: Human Rights and Japan's Law No. 111*, 7 GEO. J. GENDER & L. 187, apps. A & B (2006) (Japan); Robyn Emerton, *Neither Here nor There: The Current Status of Transsexual and Other Transgender Persons Under Hong Kong Law*, 34 HONG KONG L.J. 245, 246-47 (2004); *Non-Muslims Benefit from Landmark Ruling*, NEW STRAITS TIMES, June 19, 2006, 2006 WLNR 10547693 (Malaysia); Park Yoon-Bae, *Legal Framework for Transsexuals*, KOREA TIMES, June 29, 2006, at 2006 WLNR 11294607 (North Korea); Human Rights Watch, Press Release, *South Korea: Rights Bill Excludes Many*, Nov. 5, 2007, at <http://hrw.org>; see also Emerton, *supra* note 49, at 269-70 (discussing Australian cases in which post-operative transsexuals were treated as having their new gender).

Although it does not make the information easily available, the U.S. federal government does recognize gender changes for purposes of passports and other documents and, as of 2009, at least fifteen states permit the amendment of official documents, see Robert E. Rains, *Legal Recognition of Gender Change for Transsexual Persons in the United Kingdom: The Human Rights Act 1998 and "Compatibility" with European Human Rights Law*, 33 GA. J. INT'L & COMP. L. 333, 404 (2005), and thirteen plus the District of Columbia ban private sector discrimination based on gender identity, see Neil Dishman, *The Expanding Rights of Transsexuals in the Workplace*, 21 THE LABOR LAWYER (ABA) 121 (2005); Katie Koch & Richard Bales, *Transgender Employment Discrimination*, 17 UCLA WOMEN'S L.J. 243 (2008); Keith Ecker, *Out in the Office*, INSIDE COUNS., May 2008, at 47.

The Special Administrative Region of Hong Kong permits post-operative transsexuals to update their identity cards, passports, and education certificates, and to register their change of names, but it does not permit amendment of birth certificates, which are treated as a historical record. Emerton, *supra*, at 252-53, 256-57. It appears unlikely that they can marry persons of the same sex as their own birth sex. See *id.* at 263-64.

50 These include South Africa, most of Australia, and São Paulo, Brazil. In the United States, most, but not all, jurisdictions consider discrimination based on gender identity to be

own birth sex. These include Canada, New Zealand, Taiwan, the People's Republic of China, Singapore, South Korea, some regions of Australia, and a few U.S. states.⁵¹

Despite some successes, transgendered persons face discrimination on a global level to a degree at least equivalent to that suffered by homosexuals and bisexuals. State-sponsored and state-tolerated discrimination against transsexuals remains the rule rather than the exception.⁵² In some countries, transsexuals are denied basic rights by being treated as homosexuals (with its attendant legal disadvantages) rather than belonging to a new gender even after reassignment surgery.⁵³ Even in Japan, which in 2003 enacted a law permitting the amendment of civil status documents by post-operative transsexuals, an exception was made for any transsexual who had reproduced, due to concerns that a sex change operation might "shock" the transsexual's children.⁵⁴ While the concern for the welfare of the children is of course

sex discrimination prohibited by federal (Title VII of the 1964 Civil Rights Act) or state law. *See, e.g.*, *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000); *Smith v. City of Salem, Ohio*, 378 F.3d 566 (6th Cir. 2004); *Schroer v. Billington*, 424 F. Supp. 2d 203 (D.D.C. 2006); *Blozis v. Mike Raisor Ford, Inc.*, 896 F. Supp. 805 (N.D. Ind. 1995); *Maffei v. Kola-ton Indus., Inc.*, 164 Misc.2d 547, 626 N.Y.S.2d 391 (N.Y. Sup. Ct. 1995); *Quinn v. Nassau County Police Dep't*, 53 F. Supp. 2d 347 (E.D.N.Y. 1999); *Rentos v. Oco-Office Sys.*, 1996 WL 737215, 72 Fair Empl. Prac. Cas. (BNA) 1717 (S.D.N.Y., Dec 24, 1996). *But see* *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1084-85 (7th Cir. 1984), *cert. denied*, 471 U.S. 1017 (1985) (discrimination based on transsexuality held not to constitute sex discrimination).

- 51 *See* Emerton, *supra* note 49, at 266; *In re Kevin*, (2001) 28 Fam. L.R. 158 (Austl.); Attorney-General v. Otahuhu Family Ct., [1995] 1 N.Z.L.R. 603 (H.C.). Reports that Singapore allowed transsexuals to marry persons of their birth sex have been superseded by judicial rejection of such marriages. *See* Meredith Weiss, *Who Sets Social Policy in Metropolis? Economic Positioning and Social Reform in Singapore*, 27 NEW POLI. SCI. 267, 279 & n.82 (2005). Among the handful of U.S. cases approving post-operative transsexual marriage, *see, for example*, *M.T. v. J.T.*, 355 A.2d 204 (Super. Ct. N.J. App. Div.), *cert. denied*, 364 A.2d 1076 (N.J. 1976). Most states, however, refuse to recognize such marriages. *See, e.g.*, *Kantaras v. Kantaras*, 884 So.2d 155 (Fla. App. 2004); *In re Marriage of Simmons*, 825 N.E.2d 303 (Ill. Ct. App. 2005); *In re Estate of Gardiner*, 42 P.3d 120 (Kan. 2002); *In re A Marriage License for Nash*, Nos.2002-T-0149, 2002-T-0179, 2003 WL 23097095 (Ohio Ct. App. Dec. 31, 2003); *Littleton v. Prange*, 9 S.W.3d 223 (Tex. App. 1999).
- 52 *See, e.g.*, Human Rights Watch, News Release: Guyana: Stop Dress Code Arrests, Mar. 5, 2009; Human Rights Watch, News Release: Turkey: Court Shows Bias, Dissolves Lambda Istanbul, June 1, 2008; Human Rights Watch, News Release: Kuwait: Halt Dress-Code Crackdown, Mar. 30, 2008; Human Rights Watch, News Release: Guatemala: Transgender People Face Deadly Attacks, Feb. 20, 2006; Mauro Cabral & Paulo Viturro, Mauro Cabral & Paulo Viturro, *(Trans)Sexual Citizenship in Contemporary Argentina*, in *TRANSGENDER RIGHTS* 262, 267 (Paisley Currah, Richard M. Juang & Shannon Price Minter eds., 2006); Trevor Chappell, *Sad Face of Gay Lives*, *THE ADVERTISER* (MELBOURNE), June 21, 2000, at 30 ("Transgender people [in Australia] were twice as likely to have been bashed (21 per cent), compared to homosexual men (11 per cent) and homosexual women (6 per cent).").
- 53 *E.g.*, Hiroko Tabuchi, *Japan's Transsexuals Emerge from the Dark*, *L.A. TIMES*, June 11, 2006, at A34.
- 54 *See* Norton, *supra* note 49, at 202 & app. B.

salutary, the Japanese policy illustrates the stigma that even liberal states continue to attach to transgenderism.

II. Special Challenges of Gender Identity Claims in International Human Rights Law

The CoE Assembly's and EC Parliament's calls for equal rights for transgendered persons preceded by several years similar calls for the recognition of a right to same-sex marriage or its equivalent for homosexuals. Within lesbian, gay, and bisexual advocacy organizations, however, the concept of transgender rights advocacy being grouped with homosexual rights advocacy has not been uniformly accepted.⁵⁵ Some gay rights advocates see little common ground between their claims and those of transsexuals,⁵⁶ but others see parallels.⁵⁷ The human rights claims of homosexuals and bisexuals effectively boil down to the assertion that the state rarely, if ever, has a legitimate interest in discriminating against individuals based on their sexual orientation (that is, the sex of one's chosen partner) that is sufficient to overcome those individuals' well recognized rights to privacy, association, and family life. The force of this argument derives in part from the observation that sexual orientation is a fundamental aspect of personal identity. Freedom of intimate association is essential to every person's autonomy. It is a precondition to the fulfillment of each person's potential as a self-actualized human being.

On the other hand, claims by homosexuals and bisexuals to equal rights, narrowly construed, do not imply that the state has the further obligation to treat persons claiming gender dysphoria as having a sex or gender different from their biological sex. Transgendered persons, unlike bisexuals and homosexuals, seek positive action by the state: not only acquiescence in disregarding their biological sex but affirmative conduct in the form of recognizing their self-perceived gender as their true sex or gender.⁵⁸ In other words, they seek state acquiescence and assistance in their repudiation of a central gender convention of society.

Notwithstanding this difference, the common ground between human rights claims made by homosexuals and transgendered persons is profound. If freedom of sexual orientation is critical to personal self-actualization, then freedom of sexual identity benefits from the *a fortiori* argument. One's self-conception as a man or woman would appear to implicate one's fundamental identity even more than one's

55 See Shannon Price Minter, *Do Transsexuals Dream of Gay Rights?*, in TRANSGENDER RIGHTS, *supra* note 52, at 141, 142, 146.

56 *E.g.*, Bruce Bawer, *Confusion Reigns*, THE ADVOCATE, Oct. 18, 1994, 140-41.

57 *E.g.*, Matt Coles, *Making the Case for Transgender Inclusion*, SOUTHERN VOICE, Apr. 26, 2001.

58 This cannot be reduced entirely to claims that the state should ignore biology and defer to the psychological self-perception of transsexuals on the matter of sex, because many transsexuals either have some biological characteristics typical of the other sex or seek (or have obtained) surgical assistance in emulating the biological characteristics of the other sex.

sexual attraction to a man or woman.⁵⁹ Both homosexual and transgendered claims comport with the premise of international human rights law that distinctions based on sex or gender presumptively require a strong justification. If a person's sex does not generally matter for regulatory purposes, then neither should a person's gender identity or the sex of a person's intimate partner. In the few kinds of modern legal regulation in which gender is thought to matter, only reproductive and parental rights issues demand serious consideration, because they implicate the rights of third parties, i.e., children.⁶⁰

These observations have consequences for legal theories of transgender rights. Discrimination based on transgenderism and sexual orientation ultimately reflects the codification of social expectations about gender roles, enforced with the state's civil, administrative, and criminal powers of coercion, as well as its powers of resource allocation, legitimation, and moral suasion. International human rights instruments—from the Universal Declaration to the Convention on the Elimination of All Forms of Discrimination Against Women and nearly every major treaty in between—testify to the formal acceptance among civilized states that only the most cogent justification may sustain a distinction based on sex or gender. Yet both official and social sex and gender discrimination remain exceedingly common, as the U.K.'s gender-differentiated retirement age in *Richards* illustrates. Persistent gender identity discrimination, in other words, is symptomatic of the fact that the legal and social relevance of sex and gender have not caught up to contemporary international human rights law in any but the most enlightened liberal democracies.

III. The Yogyakarta Principles

That said, the failure to recognize and adopt an attitude of sensitivity to the ways in which transgender rights claims threaten the ideological fabric that underlies state and social sexism may have the effect of reducing the chance of successful recognition of the most basic transgender rights. The most ambitious effort to persuade states to recognize transgender rights thus far is the adoption of the Yogyakarta Principles, published by a small group of concerned citizens and international lawyers in 2007.⁶¹ The Principles reject, at the most fundamental level, gender identity as a legitimate basis for state discrimination. Beyond the usual recitations of the rights to

59 Similar reasoning has led some commentators to conclude that transgenderism is a more inclusive category than sexual orientation. See KATE BORNSTEIN, *GENDER OUTLAW* 135 (1995); Phyllis Randolph Frye, *Facing Discrimination, Organizing for Freedom: The Transgender Community*, in *CREATING CHANGE* 451 (John D'Emilio et al. eds., 2000).

60 There appears to be no empirical evidence that having transsexual parents has any negative effect on child sexual development, see RICHARD GREEN, *SEXUAL IDENTITY CONFLICT IN CHILDREN AND ADULTS* 696-97 (1974), which leaves scant justification for state discrimination against transsexuals even in this sensitive area.

61 Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (2007), http://www.yogyakartaprinciples.org/principles_en.pdf.

nondiscrimination and recognition of gender reassignment surgery, the Principles declare that no one should be “forced to undergo medical procedures, including sex reassignment surgery, sterilisation, or hormonal therapy, as a requirement for legal recognition of their gender identity.”⁶² The Principles claim, in effect, that a person has a human right to dictate his or her own gender by fiat and that the state is obligated to recognize and enforce each person’s decision in this regard.

But the Principles do not stop at advocating state acceptance of gender identity choice. They also demand that states “[u]ndertake targeted programmes to provide social support for all persons experiencing gender transitioning or reassignment.”⁶³ Moreover, the Principles would obligate states to “[p]rovide adequate access to ... hormonal or other therapy as well as to gender-reassignment treatments where desired.”⁶⁴ Such treatments presumably include gender reassignment surgery, which typically costs at least \$15,000 and perhaps as much as \$100,000 or more.⁶⁵

There are two significant objections to the Yogyakarta demands relating to transgender rights that do not apply with equal force to human rights claims by homosexuals. The less consequential is that, although sex and gender may be legally irrelevant from a human rights perspective, sex remains biologically relevant in at least some respects. From the state’s perspective, for example, sex is a useful identifying factor, like height or hair and eye color.⁶⁶ The technological mutability of these characteristics may diminish their utility as identifying criteria, but it does not render them useless. Sex, as a core biological human characteristic, remains one of the most useful for identification purposes. A state may not reasonably be asked to defer without qualification to individual choice of gender identity, especially given gender’s psychological mutability relative to biological immutability. Retained knowledge of a transgendered person’s birth sex may also be important for that person’s own health and safety in cases of medical treatments that differ according to the patient’s sex. Of course, the consequences that follow from these observations should not be especially troubling to transgendered persons and their advocates. The biological relevance of sex in no way undermines their claims to nondiscrimination and recognition of their new gender, so long as they do not claim a very aggressive human right to the deletion of their biological sex information from all state records.

The main obstacle to the immediate and widespread acceptance of the Yogyakarta Principles is their apparent indifference to political reality. Were the Principles limited to treating gender as properly self-determined, they would merely reflect the unavoidable subjectivity of the concept of gender. But by referring to “legal recognition,” the Principles reveal a more ambitious agenda. States very rarely afford legal recognition of any kind to gender, but they commonly base legal consequences on

62 *Id.* at 11-12.

63 *Id.* at 12.

64 *Id.* at 16.

65 See Laura-Claire Corson, *Country’s Most Popular Gender-Reassignment Surgeon Has Been Through It*, NW1.COM, Mar. 4, 2007, available at <http://nwi.com/articles/2007/03/04/features/lifestyles/docb14a70da1488819f862572910002fdc7.txt> (last visited June 30, 2009).

66 Cf. Cabral & Viturro, *supra* note 52, at 262, 263.

sex. Sex, unlike gender, is objective and biologically determined. A state that accepted the unrestricted obligation of legal recognition of an individual's self-proclaimed sex might consider it to be committing itself to rendering nearly all sex-based distinctions in public policy doctrinally nugatory.

This is not to paint this implication as inconsistent with international human rights theory. On the contrary, as already noted, transgender rights claims highlight the ubiquity of unjustifiable state discrimination based on sex. But in the near future the reality of global sex discrimination also dooms many of the gender identity principles proposed at Yogyakarta to aspirational status. Full gender self-determination without the precondition of surgical intervention will require a significant shift in values in most of the world. For economic and political reasons alike, seeking to impose a universal positive obligation to supply social and medical services for transsexual transition suffers from utopianism. Notwithstanding the CoE Assembly's friendly position on the issue and official policies in a handful of states to provide gender reassignment surgery at public expense,⁶⁷ even in those states whose publics are most accepting of transgenderism, only very small minorities consider that the state should bear the considerable expense of gender reassignment surgery.⁶⁸ In the hierarchy of human rights principles that require state expenditures of resources, such claims must inevitably rank behind ensuring the rights to subsistence, free speech, privacy, due process of law, and other fundamental values. Not every human right can or should be accompanied by an obligation imposed on the state to create the conditions for the realization of the maximum benefit of the right for every person. Despite the commendable intentions of and reasoning underlying the Yogyakarta Principles, such extreme proposals risk undermining by association the more politically realistic claims accompanying them.

Advocates of nondiscrimination based on sexual orientation do not face the same challenges. Their claims require relatively little positive state action beyond providing standard protection from private persecution and extending the recognition of the same rights now taken for granted by heterosexuals to homosexuals and bisexuals. Given that claims to equality of military service opportunities, marriage, child rearing rights, and other basic rights have not yet achieved widespread recognition for homosexuals,⁶⁹ the recognition of a universal right to state-sponsored gender reassignment seems remote, regardless of how desirable it may be.

67 See, e.g., Juan Carlos Rodriguez, *Transgender? You May Want to Move to Cuba or Brazil*, THE ADVOCATE, July 31, 2008, at <http://www.advocate.com> (reporting that Cuba and Brazil have undertaken to provide publicly funded gender reassignment surgery "to qualified citizens").

68 See, e.g., Landén & Innala, *supra* note 6, at 379 (noting that only 15% of Swedes believe public funds should cover the expense of a sex change).

69 See Fellmeth, *supra* note 4, pt. I.

IV. Transgender Rights and Mainstream Gender Conventions

The obstacles faced by transgendered persons in achieving recognition of their human rights claims evidently has not foreclosed success in some regions of the world. In fact, in some states the recognition of transgender rights surpasses the recognition of comparable rights based on sexual orientation. Post-operative transsexuals have indeed obtained recognition of gender reassignment and even permission to marry someone of their birth sex in a few states that continue to criminalize homosexuality, such as Singapore, and in several that prohibit same-sex marriage, such as most of Western Europe. The most extreme example is Iran, where same-sex intercourse is punished by death, while transsexuals may obtain gender reassignment surgery and receive full recognition in their new gender.⁷⁰ The recognition of transsexualism in violently homophobic societies presents a bizarre paradox that this part will try to explain.

The distinction between the right to same-sex marriage among homosexuals and for a transsexual and someone of his or her birth sex is of course purely psychological. The former claim is based on the asserted irrelevance of the sex of the person's intimate partner; the latter claim is based on the asserted *relevance* of his or her self-perceived gender in contradistinction to biological sex. The homosexual denies the universality of the heterosexual paradigm, while the transsexual may reaffirm it but deny its inevitable tie to biology. As noted above, both human rights claims can be encompassed by a more general contention that sex and gender in general should have no *a priori* effect on a person's fundamental human rights to freedom from arbitrary discrimination, intimate association, and family life. How the claim to human rights is framed—as either the specific right to recognition of one's self-perceived gender or the general right to be free from any discrimination based on sex, gender, or sexual orientation—determines how the claim fits into the accepted *corpus* of international human rights law.

The claim to recognition of same-sex marriage among post-operative transsexuals has had more success thus far precisely because it reaffirms the heteronormative family law paradigm. Although most transsexuals are technically homosexuals, many do not consider themselves homosexuals; in fact, one (albeit dated) study of transsexual attitudes in the United States found that almost one-third of transsexuals were outright homophobic.⁷¹ The resolution of this apparent contradiction lies in the transsexuals' self-image as belonging to a sex other than the one that their biological organism expresses.⁷² It is perhaps for this reason that, in studies comparing public perceptions of transsexuality with homosexuality, more subjects found homosexuality morally objectionable than those who said the same of transsexuality.⁷³

70 See Raha Bahreini, *From Perversion to Pathology: Discourses and Practices of Gender Policing in the Islamic Republic of Iran*, 5 MUSLIM WORLD J. HUM. RTS. 1 (2008).

71 See A.J. Morgan, *Psychotherapy for Transsexual Candidates Screened Out of Surgery*, 7 ARCHIVES OF SEXUAL BEHAVIOR 273 (1978).

72 See, e.g., GREEN, *supra* note 60, at 51, 110.

73 See, e.g., Leitenberg & Slavin, *supra* note 6, at 341.

The paradox of transsexual acceptance in homophobic states, then, can be traced to its perceived reaffirmation of stereotyped gender roles. Transsexuals who seek surgical alteration of their anatomy and physiology do so precisely because of the self-perceived importance of sex and gender to their own identities. This is not to say that transgendered persons always seek to affirm gender stereotypes—some wish to break them down—but state authorities commonly frame the issue as a case of misalignment between sex and gender (so-called “gender dysphoria” or “gender identity disorder”⁷⁴) that needs to be “corrected.” It is no coincidence that Iran, with one of the most institutionally and violently misogynistic governments in the world,⁷⁵ accepts transsexuals on terms of full integration into the other gender while systematically murdering homosexuals. Transsexuals are perceived—again, not necessarily accurately—to be integratable into gender stereotypes in a way that homosexuals cannot be. The fact that Iran, for example, does not tolerate other forms of gender nonconformity, such as transvestitism, supports this interpretation.⁷⁶

The human rights claims of transgendered persons cannot, however, necessarily be impressed into the service of homophobic states. Transgender human rights claims are founded on the observation that sex and gender may matter a great deal to the individual without giving rise to a state interest in regulating sex and gender. Transgendered persons claim autonomy rights, as reflected in the Article 8 ECHR claims of the *Van Kück* and *Schlumpf* applicants. Homosexuals are thought to challenge the traditional conception of masculinity and femininity either by denying generally that attraction to the other sex and the procreative instinct define what it is to be male or female, or, like some feminist theorists, by challenging the cultural concept of gender altogether as an artifice.⁷⁷ Transgender claims coincide with homosexual claims in the larger sense that the state lacks any legitimate interest in interfering with or discriminating based on individual liberty to pursue gender roles of his or her choosing.

74 See, e.g., AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS §§ 302.6, 302.85 (4th ed., text-revised 2000) (defining two kinds of gender identity disorder).

75 On Iranian sex segregation and oppression, see, for example, Bahreini, *supra* note 70, at 5.

76 See *id.* at 20.

77 Most helpful for understanding how sexual minorities challenge gender constructs are the findings of research psychology. See generally, e.g., ALICE H. EAGLY, ANNE E. BEALL & ROBERT J. STERNBERG, THE PSYCHOLOGY OF GENDER (2005); THOMAS ECKES & HANNS M. TRAUTNER, THE DEVELOPMENTAL SOCIAL PSYCHOLOGY OF GENDER (2000); SHAWN M. BURN, THE SOCIAL PSYCHOLOGY OF GENDER (1995). There is also a rich if sometimes speculative queer and feminist theory literature available on the social construction of gender. See, e.g., JUDITH BUTLER, UNDOING GENDER (2004); ANNE FAUSTO-STERLING, SEXING THE BODY (2000); Steven Angelides, *Historicizing (Bi)Sexuality*, 52 J. HOMOSEXUALITY 125 (2006).

V. Conclusion

It is difficult to imagine an ethical basis for a human right doctrine that acknowledges a significant state interest in preserving gender stereotypes. The reasons that so many states cling to gender stereotypes are mostly cultural and religious rather than moral. As I have discussed at length elsewhere, official objections to sexual minority rights always resort to religious rather than ethical justifications and so cannot be reconciled with a human rights system incorporating strong principles of freedom of conscience and religion.⁷⁸ This point holds more broadly for the regulation of gender roles in society. While it could be argued that cultural norms exist independent of religious ideologies, the two prove difficult to separate.

In any case, the preservation of traditional cultures does not qualify as a persuasive justification for systematically discriminating against women or for suppressing the deeply felt gender identity of any individual. Even to those who would inflate the importance of preserving traditional culture, the claim that transgendered persons, making up as small a percentage of any given population as they do, threaten longstanding cultural norms is unpersuasive. Gender bending among less than one percent of the population is unlikely to create a revolution in gender roles among the remainder.

Any divergence between homosexual and bisexual human rights claims, on one hand, and transgender rights claims, on the other, at the “culture wars” level should not obscure their coexistence at the doctrinal level. Both groups seek the elevation of individual interests in privacy, autonomy, and self-determination above any perceived state interest in regulating gender roles. Perhaps more important to the development of international human rights doctrine is the overlap of both sets of claims with the quest for the elimination of global sex- and gender-based discrimination. Although some feminists have reviled male-to-female transsexuals for reaffirming gender stereotypes, the effect of transgendered persons on social stereotypes raises less consequential and pressing questions than does sex- and gender-based discrimination perpetrated or tolerated by the state. I recently learned that Michael Reisman is fond of using the phrase: *Quod licet Iovi non licet bovi* (“What is permitted to Jupiter is not permitted to cattle”). While the maxim expresses a general truism, in the realm of sex discrimination, *quod licet bovi non licet Iovi*.

78 See generally Fellmeth, *supra* note 4, at 911-19.