THE REDEFINITION OF SEX: CONSEQUENCES FOR MEDICAL PROFESSIONALS AND A NATURAL LAW APPROACH

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INTRODUCTION

The definition of sex is no longer strictly biological. Federal and state law defines sex as applying to one's identity, appearance, or behavior, regardless of biological characteristics.[1] The federal government, in Section 1557 of the Affordable Care Act (ACA), attempts to classify sex discrimination as *per se* discrimination, which includes gender identity. Implementing this provision penalizes medical and healthcare professionals "that, as a matter of faith, moral conviction, or professional medical judgment, believe that maleness and femaleness are biological realities to be respected and affirmed, not altered or treated as diseases."[2]

This paper explores how the reinterpretation of sex as promulgated by the government under Section 1557 of the ACA contradicts the inherent principles of natural law, and explores how the scope and meaning of such a reinterpretation is an imposition on Constitutional and natural rights. This paper takes the position that a denigration and redefinition of the meaning of sex according to an expanded interpretation of law results in undermining a physician's medical judgment, and denigrates its fundamental meaning to that of pure subjectivity rather than biology.

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1. Littler Mendleson, *California Assembly Adds Sexual Identity to Definition of Sex Bias*, 10 No. 7 Cal. Emp. L. Monitor 5 (June 12, 2000).

2. Roger Severino & Ryan T. Anderson, *Proposed Obamacare Gender Identity Mandate Threatens Freedom of Conscience and the Independence of Physicians*, BACKGROUNDER: THE HERITAGE FOUNDATION, Jan. 8, 2016, at 2, https://www.heritage.org/health-care-reform/report/proposed-obamacare-gender-identity-mandate-threatens-freedom-conscience.

I. PROVISIONS OF THE MANDATE

A. *Regulatory History of Section 1557*

On August 1, 2013, the Office for Civil Rights (OCR) published a Request for Information in the Federal Register to gather feedback from the general public regarding concerns with the previous language of Section 1557.[3] OCR received approximately 402 comments from various organizations and private persons.[4] Taking into consideration various concerns, OCR proposed a new rule in the Federal Register titled, "Nondiscrimination in Health Programs and Activities," which aimed to assist minority populations most vulnerable to discrimination and provide equal access to health care and health coverage.[5] A few months later, OCR again sought and received feedback from various notable organizations regarding the proposed rule including The National Women's Law Center,[6] Transgender Legal Defense & Education Fund,[7] and the National Center for Transgender Equality.[8] These organizations invoked OCR to implement its newly-written rule and supported the efforts of the government to "promote health and equal access to health care and equal access to health care, with the eventual goal of ensuring that no individual will be unfairly denied the care and coverage they need," particularly the Lesbian Gay Bisexual Transgender community.[9] In addition, OCR received many comments asking it to define which acts were considered discriminatory and suggested, for example, that "limiting health care and gender transition services to transgender individuals over the age of 18 [would be]

3. Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. No. 96, 31376 (May 18, 2016) (to be codified at 45 C.F.R. pt. 92) [hereinafter Nondiscrimination].

4. *Id.*

5. Office of Civil Rights, *Nondiscrimination in Health Programs and Activities Proposed Rule*, U.S. DEPT. OF HEALTH & HUM. SERVS. https://www.hhs.gov/civil-rights/for-individuals/section-1557/nondiscrimination-health-programs-and-activities-proposed-rule/index.html (last reviewed Sept. 3, 2015).

6. NAT'L WOMEN'S LAW CTR., Comment Letter on Proposed Rule for Nondiscrimination in Certain Health Programs or Activities in the Context of Section 1557 of the Affordable Care Act (Sept. 30, 2013), https://www.regulations.gov/document?D=HHS-OCR-2013-0007-0125.

7. Transgender Legal Defense & Education Fund, Comment Letter on Proposed Rule for Nondiscrimination in Certain Health Programs or Activities in the Context of Section 1557 of the Affordable Care Act (Sept. 30, 2013), https://www.regulations.gov/document?D=HHS-OCR-2013-0007-0158.

8. *See generally* Nat'l Ctr. for Transgender Equality, Comment Letter on Proposed Rule for Nondiscrimination in Certain Health Programs or Activities in the Context of Section 1557 of the Affordable Care Act (Sept. 30, 2013), https://www.regulations.gov/document?D=HHS-OCR-2013-0007-0155.

9. *Id.* at 1.

discriminatory."[10] And, for the sake of clarity, commentators requested that OCR include in-depth analyses and examples of what constituted discriminatory actions as it applied to this group.[11]

On May 13, 2016, the Health and Human Services Office for Civil Rights (HHS) issued a final rule implementing Section 1557of the 2010 ACA designed based upon the opinions it had received from these organizations.[12] According to the government, this new rule would "help to advance equity and reduce health disparities by protecting some of the populations that have been most vulnerable to discrimination in the health care context."[13] The final rule incorporates the language of Section 1557 in order to clarify and codify "existing nondiscrimination requirements and sets forth new [antidiscrimination] standards" on the basis of sex in health programs administered by the HHS Department.[14] In its final form, Section 1557 prohibits discrimination by certain health programs and activities based upon race, color, national origin, sex, age, or disability.[15] Specifically, it reads that

> [A]n individual shall not, on the grounds prohibited under Title VI of the Civil Rights Act of 1964 (Title VI), . . . Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. 6181 *et seq.* (sex), . . . the Age Discrimination Act of 1975 (Age Act), . . . or Section 504 of the Rehabilitation Act of 1973 (disability), . . . be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance, or under any program or activity that is administered by an Executive Agency or any entity established under Title I of the Act or its amendments.[16]

Upon implementing the rule, religious organizations countered that Section 1557 ought to include a religious exemption for health care providers

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10. Nondiscrimination, *supra* note 3, at 31377.

11. *Id.*

12. *Section 1557 of the Patient Protection and Affordable Care Act*, U.S. DEP'T OF HEALTH & HUM. SERVS. 1 (2017), https://www.hhs.gov/civil-rights/for-individuals/section-1557/index.html (citing Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (codified as amended in scattered sections of 26 and 42 U.S.C.)).

13. *Summary: Final Rule Implementing Section 1557 of the Affordable Care Act*, U.S. DEP'T OF HEALTH & HUM. SERVICES 1 (2017), https://www.hhs.gov/civil-rights/for-individuals/section-1557/summary-of-final-rule/index.html [hereinafter *Summary*].

14. Nondiscrimination, 81 Fed. Reg. No. 96, 31376 (May 18, 2016) (to be codified at 45 C.F.R. pt. 92).

15. *Id.*

16. *Id.*

from providing gender transition services in order to be consistent with religious beliefs.[17] OCR responded that "certain protections already exist with respect to religious beliefs . . . [f]or example, we noted that the proposed rule would not displace the protections afforded by provider conscience laws," and the Religious Freedom Restoration Act (RFRA).[18] OCR maintained that because of existing policies already in place, health care professionals are exempt from having to provide gender transition services if violative of religiously held convictions. Notably, the rule does not include an explicit exemption for religious organizations in circumstances where nondiscrimination obligations conflict with religious beliefs.[19] Moreover, concerning sexual orientation discrimination, the final rule does not resolve whether one's sexual status alone can be considered a form of sex discrimination under Section 1557 but stipulates that OCR has the discretion to evaluate any complaint made on this basis.[20]

B. *Application and Problems with Section 1557 Regarding Gender Transition*

Section 1557 applies to "any 'health program or activities any part of which receives Federal financial assistance administered by HHS'" (hospitals that accept Medicare or Medicaid, for example) as well as "any health programs or activities . . . established under Title I of the ACA."[21] On its face, Section 1557 prohibits discriminatory actions towards a patient or private individual who participates in or receives public assistance for federally funded healthcare coverage.[22] It has also been expanded, however, to apply to "benefits covered by health insurance plans, the treatments provided by medical professionals," and private health insurance plans.[23] A "covered entity" means "[a]n entity that operates a health program or activity, any part of which receives Federal financial assistance."[24] Moreover, "Federal

17. *Id.* at 31376, 31379.

18. *Id.* at 31379.

19. *Id.* at 31380.

20. *Id.* at 31378.

21. Severino & Anderson, *supra* note 2, at 3 (quoting *Federal Register*, Vol. 80, No. 173 (Sept. 8, 2015), 54173).

22. Edmund F. Haislmaier, *The Obama Administration's Design for Imposing More Health Care Mandates*, BACKGROUNDER: THE HERITAGE FOUNDATION, Feb. 11, 2016, at 2, https://www.heritage.org/health-care-reform/report/the-obama-administrations-design-imposing-more-health-care-mandates.

23. *Id.*

24. U.S. DEP'T OF HEALTH AND HUM. SERVICES, Letter on Nondiscrimination in Health Programs and Activities RIN 0945-AA02 (Nov. 6, 2016), at 7 [hereinafter Letter].

financial assistance" is broadly defined as "assistance in the form of any grant, loan, or contract (other than a contract of insurance or guaranty)."[25] Under Section 1557, this includes all "tax credits . . .as well as payments, subsidies, or other funds extended by the Department to any entity providing health insurance coverage."[26] Thus, these regulations extend to "any 'hospital, health clinic, group health plan, health insurance issuer, physician's practice, community health center, nursing facility, . . . or other similar entity' . . . that receives HHS funds."[27]

The purpose and scope of Section 1557 as specified may seem clear and unproblematic: to "help to advance equity and reduce health disparities by protecting some of the populations that have been most vulnerable to discrimination in the health care context."[28] On its face, prohibition of any type kind of discrimination is a laudatory goal that the federal government arguably ought to combat. The problem, however, is that it results in the government regulating the power to impose "coverage mandates on private health plans and to determine what constitutes appropriate medical practice."[29] And, as a result, this creates serious freedom of conscience limitations for hospitals and deprives health care providers of independent medical judgment by penalizing them if, "as a matter of faith, moral conviction, or professional medical judgment, [they] believe that maleness and femaleness are biological realities to be respected and affirmed, not altered or treated as diseases."[30] Moreover, the regulation imposes heavy financial burdens upon medical providers if they seek to challenge the privileges carved out for gender identity.[31] Health care professionals are therefore effectively forced to perform certain procedures such as sex reassignment surgery despite otherwise religiously-held convictions because of the possibility of a burdensome financial penalty. Notably, a rule such as this—one that provides

25. *What is "Federal Financial Assistance" for Purposes of Civil Rights Complaints Handled by OCR?*, U.S. DEP'T OF HEALTH & HUM. SERVICES 1 (Nov. 30, 2015), https://www.hhs.gov/civil-rights/for-individuals/faqs/what-is-federal-financial-assistance-for-purposes-of-civil-rights-complaints-handled-by-OCR/402/index.html; *see* 42 U.S.C.A. § 2000d-4.

26. Nondiscrimination in Health Programs and Activities, 80 Fed. Reg. No. 173, 54172, 54216 (proposed Sept. 8, 2015) (to be codified as 45 C.F.R. pt. 173).

27. Severino & Anderson, *supra* note 2, at 3 (quoting *Federal Register*, Vol. 80, No. 173 (Sept. 8, 2015), 54216).

28. *Summary*, *supra* note 13, at 1.

29. Haislmaier, *supra* note 22, at 2.

30. Severino & Anderson, *supra* note 2, at 1–2.

31. *Id.* at 2.

virtually no religious exemption clause—makes it an anomaly from other government regulations.[32]

Overall, the justification by the government to require health care professionals to provide gender transition operations or treatments is that it is a medical necessity, the effects of which will help to eradicate gender identity discrimination. Yet, by "redefin[ing] discrimination on the basis of 'sex' to include 'sex stereotyping' [and] 'gender identity,'" this rule uses the force of law to regulate the patients that medical professionals treat. Failure to do so despite religious, moral, or even professional medical judgment subjects physicians and health care professionals to penalization or a federal lawsuit.[33]

II. ERRONEOUS RELIANCE ON TITLE IX AND TITLE VII

As previously explained, Section 1557 prohibits discrimination based on "sex," which includes "gender identity," an umbrella term for "persons whose gender identity, gender expression or behavior does not conform to that typically associated with the sex to which they were assigned at birth."[34] As authority, the government relies on Title VII of the Civil Rights Act of 1964 (Title VII),[35] Title IX of the Education Amendments of 1972 (Title IX),[36] Section 504 of the Rehabilitation Act of 1973 (Section 504),[37] and the Age Discrimination Act of 1975 (Age Act), [38] and argues that it "builds on prior Federal civil rights laws to prohibit sex discrimination in health care."[39] But, it is actually the first piece of federal legislation that specifically provides protection in healthcare on the basis of sex and gender identity. And this expansive definition of sex finds no basis under a textual interpretation of Titles VII or IX, case law, legislative history, or any other precedent from federal agencies. Consequently, because there is no basis in law to redefine sex as inclusive of gender identity and sexual orientation, there is no basis upon which to define this a protected class.

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32. *USCCB Chairmen Respond To 'Unprecedented and Extreme' Executive Order*, UNITED STATES CONFERENCE OF CATHOLIC BISHOPS (July 21, 2014), http://www.usccb.org/news/2014/14-126.cfm.

33. Severino & Anderson, *supra* note 2, at 3.

34. *Answers to Your Questions About Transgender People, Gender Identity, and Gender Expression*, AM. PSYCHOLOGICAL ASS'N (2014), http://www.apa.org/topics/lgbt/transgender.aspx.

35. *See* Title VII of Civil Rights Act of 1964, 42 U.S.C. § 2000e (1964).

36. Title IX of the Education Amendment of 1972, 20 U.S.C. § 1681 (1972).

37. Rehabilitation Act of 1973, 29 U.S.C. § 701 (1973).

38. Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 (1967).

39. *Summary*, *supra* note 13, at 1.

A. *Title VII: Problems in Applying Section 1557*

Title VII of the Civil Rights Act of 1964[40] prohibits employment discrimination by an employer "because of [an] individual's race, color, religion, sex, or national origin."[41] The textual provision itself does not define "sex" to include gender identity or sexual orientation and there is no precedent that reads in such an expansive definition. For instance, in *Ulane v. Eastern Airlines,*[42] the court rejected several attempts to amend Title VII to prohibit discrimination on the basis of sexual orientation.[43] There, the plaintiff Kenneth Ulane brought suit against his employer, Eastern Air Lines, Inc., alleging that he was discriminated against as a female and transsexual person under Title VII.[44] Ulane was born a biological male but while serving in the military, took female hormones and eventually underwent "sex reassignment surgery" to become a woman.[45] It was acknowledged by his physician that despite surgery, the operation would not change Ulane's biological chromosomes to that of a female.[46] The court held that the phrase in Title VII, in its plain meaning, "implies that it is unlawful to discriminate against women because they are women and against men because they are men [but] [t]he words of Title VII do not outlaw discrimination against a person who has a sexual identity disorder."[47] The court concluded that a prohibition against discrimination based on sex is not synonymous with discrimination based on a sexual identity disorder or "discontent with the sex into which they are born."[48]

Similarly, in *Johnson v. University of Pittsburgh,*[49] the court relied on its predecessor, *Ulane*, to hold that discrimination in the workplace based upon a person's status as transsexual was not considered discrimination within the meaning of Title VII.[50] Ultimately, these two cases drew the same rationale that although it acknowledged that scientific means may expand the scope of what constitutes "sex," it was not within its legislative authority to extend the

40. 42 U.S.C. § 2000e-2(a) (2000).
41. *Id.*
42. Ulane v. E. AirLines, 742 F.2d 1081 (7th Cir. 1984).
43. *Id.* at 1085.
44. *Id.* at 1082.
45. *Id.* at 1083.
46. *Id.*
47. *Id.* at 1085.
48. *Id.*
49. Johnson v. Univ. of Pittsburgh, 435 F. Supp. 1328 (W.D. Pa. 1977).
50. *Id.* at 1372.

meaning beyond these "two starkly defined categories of male and female."[51] Thus, both *Ulane* and *Johnson* concluded that the language of Title VII did not expand the biological meaning of sex to that of "an individual's internal sense of gender."[52]

Alternatively, the government looked to *Price Waterhouse v. Hopkins* for guidance.[53] There, the Court held that an accounting firm's failure to hire a female employee because of masculine mannerisms constituted sex stereotyping in violation of Title VII.[54] OCR argues that this holding reflects the position that "discrimination based on stereotypical notions of appropriate behavior, appearance or mannerisms for each gender constitutes sex discrimination."[55] Relying upon this holding, the court in *Smith v. City of Salem,*[56] upheld a violation of Title VII where the plaintiff complained of sex discrimination in the workplace because he did not conform to stereotypical gender norms as a male.[57] The court paralleled its holding with *Price Waterhouse* and held that "employers who discriminate against men because they . . . act femininely, are also engaging in sex discrimination, because the discrimination would not occur but for the victim's sex."[58]

However, there are limits on how far the holding in *Price Waterhouse* can be stretched because the vast majority of federal courts have concluded that stereotyping based upon on gender norms is a "distinct legal category that is not congruent with gender identity" and is therefore outside the scope of *Price Waterhouse*.[59] Consequently, they hold that Title VII's prohibition of "sex discrimination" does not constitute discrimination *per se* such that transsexual individuals are a protected class under Title VII. Moreover, the term "gender identity"' is both over-inclusive and under-inclusive.[60] It is over-inclusive because it goes beyond what is proscribed in Title VII, but under-inclusive according to the rationale of *Price Waterhouse* "because claims of sex stereotyping . . . do not require a showing of discrimination based on gender

51. Johnston v. University of Pittsburgh of Commonwealth Sys., 97 F. Supp. 3d 657, 676 (W.D. Pa. 2015) (quoting Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1221 (10th Cir. 2007)).

52. Letter, *supra* note 24, at 5.

53. *See* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

54. Nondiscrimination, *supra* note 3.

55. Nondiscrimination in Health Programs and Activities, 80 Fed. Reg. No. 173, 54172, 54176, (proposed Sept. 8, 2015).

56. Smith v. City of Salem, 378 F.3d 566, 571 (6th Cir. 2004).

57. *Id*. at 572.

58. *Id*. at 574.

59. Memorandum from the U.S. Conf. of Catholic Bishops on Proposed OPM Regulations on Non-Discrimination (Oct. 25, 2013), at 3.

60. Letter, *supra* note 24 at 6.

identity."[61] Nevertheless, based on *Ulane*, the court in *Johnston*[62] concluded that Congress intended to broaden the definition of "sex" to include transsexuals under Title IX.[63]

B. *Title IX: Problems in Applying Section 1557*

In 1972, Congress passed Title IX of the Education Amendments, which was implemented to protect "people from discrimination based on sex in education programs or activities that receive Federal financial assistance."[64] The provision provides in pertinent part that, "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any . . . activity receiving Federal financial assistance."[65] Notice that this provision makes no allowance for "gender identity" but rather, uses the term "sex" to include both male and female.[66] Moreover, it states that claims brought on behalf of students "based on discrimination due to . . . sexual orientation or perceived sexual orientation . . . are *not actionable* and must be dismissed."[67] Thus, to prevail on a Title IX student-on-student harassment claim against a school board, four elements must be satisfied: (1) the school board was a recipient of federal funds; (2) it "act[ed] with deliberate indifference to known acts of harassment in its programs or activities;" and (3) that the harassment was "so severe, pervasive, and objectively offensive that [(4)] it effectively bar[red] the victim's access to an educational opportunity or benefit."[68] This is a high threshold to meet because to determine whether gender-oriented conduct constitutes harassment first requires that the "behavior be serious enough to have the systemic effect of denying the victim equal access to an educational program or activity."[69] The plaintiff must show that the harm suffered was *invidious* discrimination, and not merely "simple acts of teasing and name-

61. *Id.*

62. Johnston v. University of Pittsburgh of Commonwealth Sys., 97 F. Supp. 3d 657, 671 (W.D. Pa. 2015).

63. *See generally id*. at 677.

64. *Title IX and Sex Discrimination*, U.S. DEP'T OF EDUC. OFF. FOR CIV. RIGHTS (Apr. 2015) https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html.

65. 20 U.S.C. § 1681(a) (2016).

66. Letter, *supra* note 24 at 4.

67. Montgomery v. Indep. Sch. Dist. No. 709, 109 F. Supp. 2d 1081, 1090 (D. Minn. 2000) (emphasis added).

68. Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 633 (1999).

69. *Id*. at 651–53.

calling."[70] This level of harassment was found in *Davis v. Monroe County Board of Education*,[71] where a mother brought suit on behalf of her daughter when a male student in the class displayed repeated acts of sexually suggestive behavior over the course of two months and no disciplinary action was taken by the school.[72] The Supreme Court allowed an award of damages under Title IX because the school district was deliberately indifferent to harassment that was "so severe, pervasive, and objectively offensive that it" can be said to deprive the victims of access to the educational opportunities or benefits by the school.[73] However, the holding of this case does not support OCR's reliance for expansion of sex discrimination as *per se* discrimination because the threshold standard that must be met to claim discrimination is so high.

This rationale was followed in *Johnston*,[74] where the court determined that protection of Title IX did not extend to transgender students.[75] There, it held that "Title IX does not prohibit discrimination on the basis of transgender itself because [it] is not a protected characteristic under the statute."[76] Therefore, the language of Title IX means "nothing more than male and female, under the traditional binary conception of sex consistent with one's birth or biological sex."[77] In that case, the plaintiff, a biological female who identified as male began using the men's restrooms, locker rooms, and enrolled in a men's weight training class at the University of Pittsburgh.[78] The plaintiff brought suit under Title IX claiming discrimination based on sex including "his transgender status and his perceived failure to conform to gender stereotypes" when University personnel prohibited him from using these facilities.[79] The court held that there are "differences between males and females that the Constitution necessarily recognizes" and therefore, it made no attempt to redefine the meaning of "sex."[80] This court also found no reliance of such expansion under Title VII; rather, "the word 'sex' . . . [was] to be given its traditional definition."[81]

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70. *Id*. at 652.

71. Davis *ex rel*. LaShonda D. v. Monroe City Bd. of Educ., 526 U.S. 629 (1999).

72. *See generally id*. at 633–35.

73. *Id*. at 633.

74. Johnston v. Univ. of Pittsburgh of the Commonwealth Sys. of Higher Educ., 97 F. Supp. 3d 657 (W.D. Pa. 2015).

75. *Id*. at 674.

76. *Id*.

77. *Id*. at 676 (citing Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1221 (10th Cir. 2007)).

78. *Id*. at 663.

79. *Id*. at 672.

80. *Id*. at 670 (quoting M. v. Superior Court, 450 U.S. 464, 478 (1981)).

81. *Id*. at 676.

In conclusion, there is no federal precedent to suggest that health plans must provide gender identity-covered services and OCR's reliance upon Title IX and Title VII for expanding the definition of sex to include gender identity is unfounded.[82]

PART III: GENDER DYSPHORIA AND THE PROCESS OF "TRANSFORMATION"

Let's begin this section with a hypothetical. Let's suppose that you are the parent of a fifteen-year-old daughter, Jane. Jane is beautiful, smart, and outgoing. You recently began to notice that Jane is unusually thin and despite making sure that she eats three hearty meals per day, she is below average weight for her age and height. A few months pass and a concerned friend of Jane comes to you and reveals that she has witnessed Jane getting sick in the bathroom after lunch at school. After some coaxing, Jane admits that she has an eating disorder and suffers from anorexia, "characterized by an abnormally low body weight, an intense fear of gaining weight and a distorted perception of weight."[83] As her parent, you seek out the proper medical and psychological treatment needed to help Jane realize that despite her misconception, she is abnormally thin and must gain weight to remain healthy. No one would argue that anorexia is a disorder and that the only way to combat this disease is with proper treatment to help Jane recognize her beauty and inherent value as a human person. In fact, it would be absurd to imagine a doctor or therapist telling Jane to continue to starve herself based upon the false perception that she is overweight.

But this scenario is analogous to that of someone who suffers from the condition of gender dysphoria. A girl or boy who believes that he or she is trapped in the wrong gender must be loved, supported, and affirmed in recognizing the objective reality of his or her biological sex, just like Jane must be helped in recognizing the objective reality that she is not overweight. Yet, oftentimes, the opposite takes place. Modern culture convinces those with gender dysphoria that sex reassignment surgery (SRS) is the correct and oftentimes, only solution to reverse the effects of feeling trapped in the wrong gender. As a result of feeling trapped, these individuals often seek SRS to correct what they perceive to be a biological error.

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82. *Id.* at 9.

83. *Anorexia Nervosa*, MAYO CLINIC https://www.mayoclinic.org/diseases-conditions/anorexia/symptoms-causes/syc-20353591.

In fact, we refuse to see gender dysphoria as a disorder at all, and instead convince ourselves and those who suffer from it, that it is a normal perception of oneself that must be accepted and embraced. Under the veil of "acceptance," our culture encourages the mutilation of the human body and we embrace transgenderism as a norm in the hopes of achieving fulfillment and happiness. What our culture fails to realize is that beneath this guise and push for normalcy is a *rejection* of the person and the suffering that he or she endures by reducing it to a feeling of dissatisfaction with gender that can ultimately be fixed with SRS. In doing so, we ultimately reject the reality of the person and the objective and inherent goodness imbedded within biological sex.

The argument proposed in these remaining sections is that the appropriate response to gender dysphoria must first begin with the recognition that it is indeed a disorder; one that cannot be simply whisked away or fixed through surgical means. Rather, the approach must be one of compassion in the hopes that the inherent goodness of each person is received through the reality that one's maleness and femaleness is perfectly ordered to that end.

A. *Classification of Gender Dysphoria*

Persons who have gender dysphoria often believe that they are trapped in the wrong body and the gender to which they were born was wrongly assigned. It is said that transgender persons are "those who live full-time or part-time in the gender role of the opposite biologic sex."[84] As a result, SRS is usually sought to correct this biological error.

Ray Blanchard discusses the development and origins of gender dysphoria in his paper, "Clinical Observations and Systematic Studies of Autogynephilia," in which he provides clinical data and research to describe the erotic phenomenon associated with "autogynephilia." In Greek, this term means "love of oneself as a woman."[85] There are several types of autogynephilia, but the type most related to gender dysphoria is called anatomic autogynephilia, represented by "rather static fantasies–one might call them images or icons–consisting of little more than the idea of having a woman's body."[86] For instance, a male typically fantasizes about having

84. Anne Lawrence, *Transgender Health Concerns*, THE HEALTH OF SEXUAL MINORITIES: PUBLIC HEALTH PERSPECTIVES ON LESBIAN, GAY, BISEXUAL AND TRANSGENDER POPULATIONS, 473 (Ilan H. Meyer and Mary E. Northbridge ed., Springer 2007).

85. Ray Blanchard, *Clinical Observations and Systematic Studies of Autogynephilia*, 17.4 J. OF SEX AND MARITAL THERAPY 235 (1991).

86. *Id*. at 237.

certain female anatomic structures such as breasts or hairless legs.[87] Fantasizing or being sexually stimulated by this "woman inside [him]" results from two different theories.[88] The first theory suggests that there is an error in some developmental process that occurs in normal males, which "keeps heterosexual learning 'on track'" and men who possess gender dysphoria experience a "modification of 'normal hetero-sexuality.'"[89] This modification occurs through behavioral intent and is usually exhibited at a very young age. Perhaps it could be argued that it is biological in origin, but there is no definitive scientific data to support this notion.[90]

The second explanation for gender dysphoria suggests that this is a learned disorder that can be attributed to emotional vulnerability. According to one study, gender dysphoria begins in early childhood through a weak mother-child connection and can be attributed to emotional vulnerability as a child.[91] For instance, a child who senses his mother's depression feels threatened by hostility or sadness exhibited by the mother, which he perceives to be directed at him. This results in the child's own feelings of anxiety and affects his development. "When anxiety occurs at such a sensitive developmental period, the child may choose behaviors common to the other sex, because in his mind these will make him more secure or more valued."[92]

This type of analysis leads some researchers to classify gender dysphoria as an anxiety disorder. Boys portray certain affinities towards female clothing as an attempt to pacify a deeper level of pressure or angst felt in the home and oftentimes, believe that expressing themselves as a female will result in being more valued by their families.[93]

In addition, parents often overlook outward signs of gender dysphoria expressed by their child. For instance, a mother might tolerate her son's cross-dressing because of her own fear of anxiety or aggression, whereas a father just assumes his son is homosexual.[94] These parents tend to ignore signs of gender dysphoria to the point where it becomes too blatant to dismiss.

87. *Id.*

88. *Id.* at 242.

89. *Id.* at 246–47.

90. *See generally* J. Michael Bailey et al., *Genetic and Environmental Influences on Sexual Orientation and Its Correlates in an Australian Twins Sample*, 78.3 J. OF PERSONALITY AND SOCIAL PSYCHOLOGY 524 (2000).

91. Richard Fitzgibbons, et al., *The Psychopathology of "Sex Reassignment" Surgery: Assessing Its Medical, Psychological, and Ethical Appropriateness*, 4.1 THE NAT'L CATHOLIC BIOETHICS QUARTERLY 97, 103 (2009).

92. *Id.* at 104.

93. *Id.*

94. *Id.*

Furthermore, "[b]ecause of their own problems, parents are sometimes unable to meet their child's needs for security, acceptance, love, and a positive image of his or her own sex."[95]

As a result, the typical solution proposed by many doctors is SRS. However, this type of treatment is problematic for the following reasons. First, it masks and attempts to remedy the underlying realization that gender dysphoria stems from a "disordered perception of self."[96] Such an understanding of one's body can properly be called a delusion because although surgery may be able to change the physical appearance of one's sexual organs, it cannot change one's DNA. In fact, SRS "violates basic medical and ethical principles" because it "mutilates a healthy, non-diseased body."[97] Furthermore, persons who undergo SRS as a solution "may [as a result] engage in acts which stimulate sexual intercourse between a male and female, but these acts are non-reproductive," and they do not create fertility.[98] Therefore, a biological male or female remains such, irrespective of the surgery he or she undergoes to change the appearance and even stimulation of his or her biological organs. Consequently, SRS does not adequately, nor correctly, address gender dysphoria but instead, tries to correct a psychological problem with a surgical fix as an attempt to remedy a disharmony between one's body and self-image.[99]

Second, the process one goes through to achieve sexual reassignment is lengthy and can lead to lifelong or life-threatening side effects. Prior to receiving sex reassignment surgery, candidates go through a series of extensive bodily and social transformations to achieve characteristics typically associated with the opposite sex. For instance, men must acclimate themselves towards "becoming female," which involves dressing as a woman in public. Men also receive electrolysis, a technique that uses a direct electric current to permanently remove unwanted body and facial hair, and decrease the size of an Adam's apple.[100] Next, both sets of candidates receive "cross-sex hormone therapy."[101] For men, this requires that they take estrogen and progesterone or medications with "progesterone-like activity" in order to achieve certain female traits such as enhanced breast size and a reduction in muscle growth.[102]

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95. *Id.*
96. *Id.* at 97.
97. *Id.*
98. *Id.* at 99.
99. *Id.*
100. *Id.* at 100–01.
101. *Id.* at 100.
102. Lawrence, *supra* note 84, at 476.

To achieve optimal results as a female, men undergo surgery through the "removal of the penis and testes, the creation of the pseudo-vagina, creation of an opening for the urethra," and any additional plastic surgery necessary to "become a woman."[103]

By contrast, women take testosterone to induce masculinization, which results in the growth of facial hair, deeper voices, and increased bone density. Testosterone also has the prolonged effect of reducing ovarian production of estrogen and progesterone.[104] The last stage in seeking SRS is to undergo a removal of breasts, a total hysterectomy, which permanently stops menstruation as well as "the creation of a pseudo-penis and testes."[105]

These treatments are managed carefully to ensure optimal effects and to diminish complications. Nevertheless, hormone treatments can, and often do, result in serious side effects and irreversible health problems because of the drastic physical transformation that takes place and the accelerated rate at which the body experiences these changes.[106] Men who take estrogen and feminizing hormones have been found to develop "blood clots, liver disease, pancreatitis, insulin resistance, and glucose intolerance."[107] In addition, women experience emotional and psychological effects from hormone treatment evidenced through "increases in aggressiveness, [and] anger-proneness."[108] The most overwhelming health complication experienced by transsexual patients is "venous thrombosis or pulmonary embolism,"[109] a disease whereby a blood clot blocks a blood vessel in the lungs, and when left untreated, may result in heart failure.[110] While it is true that undergoing any type of surgery involves a certain degree of risk, performing surgery on a healthy body invites unnecessary problems and unforeseen complications.

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103. Fitzgibbons, *supra* note 91, at 101.

104. Lawrence, *supra* note 84, at 479.

105. Fitzgibbons, *supra* note 91, at 101. ("Relatively few women who undergo SRS, even those with severe gender dysphoria, choose to take this last step . . . [still, w]hen this is done, the artificial organs are often small and are nonfunctional. A penis may be constructed to enable a mechanical erection and the simulation of sexual intercourse, but ejaculation is not possible. While the surgeons attempt to preserve sexual sensation in the pseudo-organs, they are not always successful.").

106. *Id*. at 100.

107. Lawrence, *supra* note 84, at 477–78 (citations omitted).

108. *Id*. at 480.

109. *Id*. at 478.

110. Asuka Ozaki & John R. Bartholomew, *Venous Thromboembolism (Deep Venous Thrombosis & Pulmonary Embolism)*, CLEVELAND CLINIC CTR FOR CONTINUING EDUC. (Dec. 2012), http://www.clevelandclinicmeded.com/medicalpubs/diseasemanagement/cardiology/venous-thromboembolism/.

Most notably, it involves the destruction of functioning and healthy reproductive organs.[111]

Finally, data shows that SRS confers no objective psychological rehabilitation. This observation was proven by Dr. Paul McHugh, a psychiatrist at Johns Hopkins University in Baltimore, Maryland, who investigated the effects of SRS surgery on his patients and whether they experienced an overall improved quality of life.[112] While most patients were not outwardly discontent with their lives, little had changed in the patients' psychological conditions after receiving SRS.[113] Overall, they experienced many of the same problems with "relationships, work, and emotions" showing that the hope of emerging from past psychological emotional grievances "had not been fulfilled."[114]

B. *The Proper Response to Gender Dysphoria*

The seemingly obvious, but easily overlooked response towards those suffering from gender dysphoria occurs in a few forms. First, gender dysphoria must be classified and appropriately treated as a *disorder*. As previously mentioned, psychotherapists and society at large, facilitate a child's rejection of his or her gender as normal and healthy because "many therapists are not skilled in uncovering and addressing these serious conflicts. Thus, SRS becomes an easy fix to deal with gender dysphoria and is often posed as the *only* solution.[115] This is seen readily in recent caselaw that redefines the true definition of sex under Title VII and Title IX. A concrete example is the way in which society refuses to acknowledge gender dysphoria as an objective disorder and instead, broadens the definition of "sex" to dictate that gender dysphoria become a cultural norm. The problem with redefining sex to be one of subjective intent results in the belief that a child is "born this way." Our culture accepts that gender dysphoria is not a disorder but a biological condition –either genetic or hormonal—and is therefore, unchangeable; but

111. Fitzgibbons, *supra* note 91, at 100. (It is important to note the difference between SRS and procedures that restore deformed reproductive organs, which can be caused through genetic abnormalities, congenital defects, injury, or disease. These latter types of surgeries are not performed to change one's sex but correct and restore an inherent deformity. These surgeries are therefore, morally justified and ethical. By contrast, those who seek SRS are genetically normal, and there is no deformity with their reproductive organs.).

112. *Id.* at 99–100.

113. *Id.* at 99.

114. *Id.*

115. *Id.* at 111.

there is no scientific evidence to support this conclusion.[116] Rather, a baby is conceived as a biological male or female and eventually, they discover the difference between these two sexes, and to which they "belong".[117]

Moreover, appropriately assessing an individual with gender dysphoria at an early age can result in a deeper parental bond with the child.[118] The second response then, is a recognition of the importance of the parental bond. "[A] girl needs to feel that she is safe, accepted, and loved as a girl and [understand] that being a girl is a good thing."[119] It has been discovered that boys with gender dysphoria experience weak relationships with their mothers.[120] Oftentimes, "boys with [gender dysphoria] appear to believe that they will be more valued by their families or that they will get in less trouble as girls than as boys."[121] These beliefs can be linked to a parent's own familial relationships. Therefore, parents must develop strong relationships with their children and encourage them to develop friendships with other children who share similar interests. For instance, boys who exhibit more artistic or creative characteristics rather than an affinity for sports-related activities must be affirmed in these interests and be supported as authentically masculine. It is no surprise that boys with gender dysphoria often experience rejection and mistreatment among their peers if they lack hand-eye coordination or do not acclimate to sports as readily as other boys their age.[122] In turn, this can lead to self-rejection and a desire to engage in more feminine activities.[123] Alternatively, girls with gender dysphoria are typically more athletic than their peers and prefer socializing with boys.[124] For this reason, they can fear the natural changes of their bodies in puberty and envy qualities of the opposite sex, which they believe they lack.[125] Boys and girls who experience this kind of rejection must be met with *positive* reinforcement of their biological masculinity or femininity by their parents and from psychotherapists through reshaping their patients' outlook and helping to reform broken relationships and friendships.[126]

116. *Id.* at 103.
117. *Id.*
118. *See generally id.* at 104.
119. *Id.* at 103.
120. *Id.*
121. *Id.* at 104.
122. *Id.* at 105.
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.*

The third response, which is part and parcel with the second, results in the recognition that at the heart of gender dysphoria lies a deeper desire for love. This desire is a natural and inherent response possessed by every male and female. Individuals who possess gender dysphoria experience a desire for communion with another person to the same extent as anyone else. However, true love and communion in otherness can only be found in respecting the inherent value that exists within sexual difference. The problem that exists in our culture is a denial of sexual difference, which is to say, a denial that man, by being born a man, desires woman and vice versa. Instead, we deny sexual difference altogether, such that we believe man can change his sexuality and by doing so, he will achieve love or he will find love if he is simply allowed to express himself and live as the opposite gender.

"Sexual difference is one of the important questions of our age, if not in fact the burning issue," and therefore, it is not within the scope of this Note to philosophize all the nuances and depth of what sexual difference, in relation to the other person, truly encompasses.[127] However, this Note proposes that "gender identity" is premised upon a conflation of the real meaning of sex as that of biology into one of immaterial subjectiveness. This is called "gender–as–social-construct-theory."[128] According to this theory, man takes on the role of creator rather than *created* and rejects the objective reality of his given biological nature by reconstructing it to be that which he feels or desires it to be. Put another way, "man is no longer what he is by virtue of his *being*, . . . but rather by virtue of *what is feasible, makeable*, . . . what can be changed, molded . . . in view of an open-ended future."[129] Ultimately, the gender construct theory is a view "of the body as a problematic limit to freedom–freedom conceived as pure self-initiating self-determination."[130] However, as Pope Emeritus Benedict XVI states that

> Man is not merely self-creating freedom. Man does not create himself. He is intellect and will, but he is also nature, and his will is rightly ordered if he respects his nature, listens to it and accepts himself for who he is, as one who

127. Margaret H. McCarthy, *Gender Ideology and the Humanum*, 43.2 COMMUNICO: INT'L CATHOLIC REV. 274, 274 (2016).

128. *Id.* at 284.

129. *Id.* at 286.

130. *Id.* at 284.

> did not create himself. In this way, and in no other, is true human freedom fulfilled.[131]

These words point to the fact that the person who suffers from gender dysphoria or "is confused about his sexual identity must, above all things, in order to be truly free–to be truly liberated–accept himself *as he truly* is."[132] Perhaps this seems to be a romantic and impractical outlook for one who thinks that he or she was born with the wrong sex. However, as much as society wants us to believe that our biological identities can be changed, this outlook cuts against the grain of who we are as humans: beings meant for communion with God and with another as revealed to us by our sexuality. Therefore, "[m]an's freedom requires living in accordance with the truth of sexuality revealed to us in nature."[133] In other words, true freedom—and therefore, love— is attained in accordance with man's nature as revealed to him through his body. "We have a certain way of being that is objectively true," and this is lived out in recognition of our sexuality because our bodies reveal this truth to us.[134] Therefore, it takes a lot of "gerrymandering of our brains to believe that a man can be a woman just because he says he is."[135]

However, the question still stands, how are we as a *society* supposed to treat individuals with gender dysphoria if we acknowledge that it is a per se disorder? It is the role of the Church and Christians alike—and naturally then, of society as a whole—"to adopt an approach of *accompaniment*" in understanding these pivotal questions of human nature.[136] It is not the role of the Church to dictate to her flock truth and morals, but rather to help each person discover the truth as embodied in his or her very person. "[T]he truth of one's being is revealed by a Witness of it, through whom one can see all of its positivity."[137] Both this position and the treatment of transgender patients posed earlier, stand in connection with one another: both affirm that sex is not merely a disembodied will that chooses an identity or social construct. Rather, sex is an inherent characteristic, or as the Catholic Church offers, the person

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131. Benedict XVI, *The Listening Heart: Reflections on the Foundations of Law*, LIBRERIA EDITRICE VATICANA 5 (address to the Bundestag, Berlin, September 22, 2011), http://w2.vatican.va/content/benedict-xvi/en/speeches/2011/september/documents/hf_ben-xvi_spe_20110922_reichstag-berlin.html.

132. Daniel Mattson, *Claiming Our Belovedness: Our Bodies Reveal the Truth to Us*, 43.2 COMMUNICO: INT'L CATHOLIC REV. 330, 332 (2016).

133. *Id.* at 331.

134. *Id.*

135. *Id.*

136. McCarthy, *supra* note 127, at 277.

137. *Id.*

stands "always already in relation to the Creator" and therefore, sex itself does the same. Sex *belongs* to the human person and to human nature.[138]

In summation, it is our role, as a Christian society first and foremost, to stand alongside those suffering through the dissatisfaction of one's biological sex. Daniel Mattson, a homosexual and author of "Why I Don't Call Myself Gay," writes that through his desire for another man, he became convinced that suffering helped him to understand that his same-sex attraction was a sign "that [he] suffered from the privation of the good of experiencing the reality of [his] true sexual orientation."[139] He writes, "I do *not* have a sexual orientation towards men but I do live with a sexual *disorientation*, which indicates the lack of something within me that should be present. Deep within my true nature as a man is an ordering toward women."[140] Admittedly, this in no way removes or reduces his desire for men. However, through recognizing that he is not his own creator, he can accept that he is a man, "which means [that he is] ordered toward sexual union with a woman and not another man–even if [his] desires tell [him] otherwise."[141]

Likewise, the man or woman who desires to be the opposite sex may never overcome this desire, but freedom can be attained for both the individual experiencing gender dysphoria and society in general, in the humbling reality that there exists an order, goodness, and inherent beauty in the maleness or femaleness that God bestowed at birth. "The humble man accepts the truth that God 'is closer and more intimate to us than we are to ourselves.' Humility recognizes the truth that man does not have the freedom to rename or redefine what has already been given a name by God."[142] Rather, humility allows man to accept the challenges and more precisely, the *sufferings* that come in any form to each and every person including those with gender dysphoria. Suffering is the way by which God draws us to Himself. Through suffering, man is able to disavow his will to that of the Creator and embrace the humility and tranquility that accompanies it by responding, "Thy will be done, not mine."[143]

138. *Id.* at 290.
139. Mattson, *supra* note 132, at 332.
140. *Id.* at 332–33.
141. *Id.* at 333.
142. *Id.* (citing JOSEF PIEPER, ON HOPE, (trans. Mary Frances McCarty, Ignatius Press 1986)).
143. *Id.* at 334.

CONCLUSION

In summation, under the guise of forbidding discrimination, the regulation imposed under Section 1557 implements it. In a word, the government's attempt to expand the natural meaning of sex forces an individualistic understanding upon society and particularly, upon medical professionals who must abide by this regulatory fiat to provide gender transitions regardless of their medical judgment. This regulation, with a stroke of a pen, lends the economic power of the federal government to a deeply flawed understanding of human sexuality and requires adherence to this misguided definition.