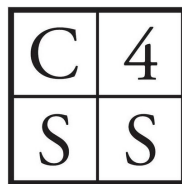


It is testimony to the human spirit of persistence in adversity that the climate of esteem and recognition is slowly turning in favour of gender diversity, but more, much more needs to be done.

It is argued here that libertarians can assist in providing the additional efforts required. They should be the indispensable allies, rather than spectators, joining transgender and gender-diverse people in illuminating the need for reform of statist interventions and stifling customs that hold people back from reaching their fullest potentials.



Center for a Stateless Society





what it does attempt to do, in its own small way, is elucidate the fundamental truth of the idea that the exercise of diversity in gender identity is not only a pressing matter for reform in our time, but is indelibly a libertarian issue.

Together - libertarians as allies with people identifying with and expressing their gender diversity - we can build the foundation of the next rights revolution characterised by a deep and abiding acceptance, respect, and tolerance of the rich diversity that is human gender identity.

## **ABSTRACT**

People who do not identify with a gender status consistent with conventional fixed, binary gender stereotypes remain the target of a complex array of typically intertwining state policies and civil societal norms which greatly inhibit their liberties.

Transgender and other gender-diverse people are, for example, routinely subjected to discriminatory identity documentation and service access policies. In addition, they often confront episodes of abuse, ridicule, and violence by cisgender people seeking to enforce prevailing gender identity standards. The consequences of such practices are, in turn, reflected in a large amount of evidence pointing to a lack of economic and social participation on several fronts.

Several key issues affecting people within diverse gender communities are considered through a libertarian perspective, with its emphasis on the primacy of the individual and endorsement of mutually assenting and voluntary actions.

Identifying with and expressing one's innately felt sense of gender identity is consistent with the free development and flourishing of the individual human being. Efforts by political institutions to suppress diverse gender identities, for example a refusal to enable individuals to easily alter gender markers on identity documents, thus violate the liberties and rights of transgender and gender-diverse individuals, just like many other regulatory, and fiscal, policies are prone to do.

Further, grassroots activism raising greater awareness of the diversity inherent within gender identity, and actions seeking the prevention of transphobia from state and non-state sources, is

conformable with time-tested libertarian concerns of freedom of association and expression.

By the same token, assessing the circumstances affecting transgender and gender-diverse people also potentially recasts certain features of conventional libertarian thinking in a different light.

For example, libertarians overwhelmingly perceive emergent, or spontaneous, orders to be the beneficial by-products of decentralised human action. But a cultural and social pathogen such as transphobia may also be interpreted as a spontaneous order, to the extent that decentralised, but largely uncoordinated, harmful actions against exercising gender diversity induces perverse effects, such as a widespread delaying or suppression of procedures to assume non-cisgender identities.

Even if some conditions which prevail over the lives of people in diverse gender communities, both here and around the world, challenge some presumptions in modern libertarian circles, there remains a compelling case for a sympathetic libertarian reception to the need for transgender and gender-diverse liberation and social justice.

The desire to remove statist inhibitions upon freely identifying and expressing a diverse range of gender identities should be an obvious candidate for libertarian policy advocacy and concern. Liberalising gender market policies pertaining to identification documents remains a pressing priority for transgender and gender-diverse people, not least because of discrimination often resulting from one's lived gender being inconsistent with that proclaimed by the gender marker.

Libertarians should also take a much greater interest in gender identity issues because non-state vigilante acts of abuse,

which our formal institutions and our informal modes of interpersonal conduct extend humane and equal treatment to some of the most persecuted, vulnerable minorities in our communities: individuals who wish to identify with and express a gender which is non-conforming with the fixed binary.

The deprivation of capacity faced by too many transgender and gender-diverse people to: use their inherent talents to acquire economically valuable properties and build wealth; to be included in the intimate or great acts of social encompassment routinely partaken by the wider human community; and, worse of all, even in some circumstances maintain their basic right to live, has flown in the face of modernist instincts of embracing the values of equality, liberty, and justice.

Despite the shamefully real and present dangers of violence against the person, the loss of social esteem, and loss of economic liberties, people of diverse gender identities have made great strides, especially in recent years, to promote awareness and visibility of their circumstances to cisgender majorities.

It is testimony to the human spirit of persistence in adversity that the climate of esteem and recognition is slowly turning in favour of gender diversity, but more, much more needs to be done.

It is argued here that libertarians can assist in providing the additional efforts required. They should be the indispensable allies, rather than spectators, joining transgender and gender-diverse people in illuminating the need for reform of statist interventions and stifling customs that hold people back from reaching their fullest potentials.

This paper does not pretend to be a comprehensive account of the issues affecting gender diverse communities, and nor does it purport to speak for all people with diverse gender identities. But

## CONCLUSION

The modern struggle to enable diverse gender identities to be realised, and to flourish, in an open society can reasonably be seen through the lens of the broader historical trajectory of greater toleration and respect accorded to minorities, and those otherwise oppressed by statism, custom, or a mixture of both.

In its philosophically embryonic stages, libertarianism served as a plea for respect and toleration of religious belief, ensuring that the realm of the spiritual serves as no prohibitive barrier to fruitful relations between human beings. Thanks to the efforts of such luminaries as Adam Smith, it quickly branched out as a plea for an acceptance of mutually consenting economic interactions between peoples of varying endowments and talents.

Following the seismic economic contributions of the Scottish Enlightenment in particular, libertarianism then forged ahead to make compelling cases for respect and toleration to be extended toward people of different races, of different sexes, and, most recently, of different sexual preferences.

Now, it is argued in this paper, the time is overdue for the basic principles of equality, liberty, and justice to be extended to human beings regardless of their gender identities.

For transgender and gender-diverse people to self identify under a gender status according to their own lights, and for them to express their deeply and innately felt sense of gender identity to the world in which they live, represents a constitutive element of their individuality and personhood. This, in other words, cannot be anything but libertarianism at its core.

Surely, the condition under which our liberties are found in contemporary societies can be rightly adjudged by the extent to

discrimination, and violence exert similar effects to that which would otherwise be seen in episodes of outright coercion by statist actors.

It is the profound deprivation of economic and social liberties experienced by transgender and gender-diverse people, from all sources, that should be the prime concern here, rather than furtively attempting to parse out which are the greater or lesser instances of coercion that ought to receive libertarian attention. Whilst libertarians tend to doctrinally bicker over whether state and/or non-state coercion constitute appropriate methodological concerns, the basic individual liberty to express one's own gender identity continues to be annulled or diminished.

Transgender and other gender-diverse people desperately need allies in cisgender communities if they are to be afforded genuine equality, justice, and liberty which has been previously won by other minorities and groups oppressed throughout human history. Indeed, libertarians are well equipped to stand in favour of gender diversity, given their previously pivotal roles in calling for the end of domination and subjection of religious minorities, racial minorities, women, sexual minorities, and others.

In the final analysis, a faithful libertarian reading of the causes and consequences of diverse gender identity should lead its activists, intellectuals, philosophers, and scholars to join transgender and gender-diverse people in their struggle for a gender identity freed from the impersonal impositions of government and the stifling strictures of convention.

## 1 INTRODUCTION

In recent years there has been a significant growth in public interest concerning the economic and social circumstances under which individuals subscribing to diverse gender identities face, and the influence of cultural, legal and other factors in promoting, or hampering, the expression of diverse gender identity roles in economic and social affairs.<sup>1</sup>

These trends have been closely accompanied by the more intensive efforts of gender-diverse people to engage in efforts of political activism rectifying legal discrimination, and in using mainstream and social media to promote their greater visibility throughout the broader community. Some commentators have opined that the promotion of rights and tolerance for transgender people, and others expressing diverse gender identity behavioural roles, represents the ‘next civil rights frontier,’ following previous acts of emancipating people of colour, women, and gays and lesbians.<sup>2</sup>

The ability to adjust one’s gender identity to better suit their

- 1 The terms ‘diverse gender identity’ or ‘gender diversity’ employed in this paper refers to the innate, deeply felt senses of gender (male, female, something other, or in between) held by individuals which are not in conformance with conventional social notions of biological sex and gender identity into two, fixed categories of male and female. Diverse gender identity is inclusive of transgender, genderqueer, gender fluid, agender, cross-dressing, and other attributes and practices conventionally conceived as gender non-conforming. Diverse gender identity, as described here, is in contrast with the concepts of cisgender (referring to those people who identify with the gender (and biological sex) they were assigned at birth) and intersex (referring to those people whose anatomical or physiological characteristics differ from conventional social notions of maleness or femaleness).
- 2 Nico Machlitt, 2014, ‘The Next Civil Rights Frontier: How the Transgender Movement Is Taking Over’, Huffpost Gay Voices blog, 14 October, [http://www.huffingtonpost.com/nico-machlitt/the-transgender-movement-is-taking-over\\_b\\_5974198.html](http://www.huffingtonpost.com/nico-machlitt/the-transgender-movement-is-taking-over_b_5974198.html).

a very high percentage of Americans express a discomfort with the idea of their child dating a transgender person, as well as resistance to the idea of transgender people playing team sports.<sup>106</sup>

Therefore, there is the continuing need for innovative social activism to respond to transphobia, and other aspects of antipathy toward gender diversity, by raising awareness and promote acceptance, respect, and tolerance in the United States and elsewhere.

106 GLAAD, 2015, *Accelerating Acceptance: Executive Summary*, <http://www.glaad.org/publications/glaad-accelerating-acceptance>.

against women.<sup>102</sup> These include battered women's shelters and rape crisis centres, rallies and other efforts at speaking out publicly, efforts at 'culture-jamming' which encourage men and women to question the underlying presumptions facilitating gender-based violence, among other ventures.

For Johnson, feminist responses to the rape culture 'had little if any connection to hierarchical power-politics or the male-dominated State, and all could productively be understood as *voluntarily-coordinated, polycentric, but consciously organized* political resistance to a *polycentric, emergent, coercive* order of violent oppression.'<sup>103</sup> And so it is also the case regarding much of the activism already undertaken by gender diversity communities, and which should continue to be undertaken.

Whilst there is scant data on changes in attitudes over time, what evidence has been collated suggests there has been a considerable shift in support for transgender people in recent years, even if that support is less than that expressed for (cisgender) gays and lesbians.<sup>104</sup> Consistent with this theme, other surveys indicate that most Americans believe that transgender people deserve the same rights and protections as others.<sup>105</sup> It would not be unreasonable to suggest that 'bottom up' community efforts have played an important role in fashioning these reported trends.

Nonetheless discriminatory attitudes unfortunately remain rife, to the detriment of people seeking to affirm their own gender identities. A recent survey undertaken by GLAAD has shown that

102 Charles W. Johnson, 2013, 'Women and the Invisible Fist: How Violence Against Women Enforces the Unwritten Law of Patriarchy', <http://charleswjohanson.name/essays/women-and-the-invisible-fist/>.

103 Ibid., p. 25.

104 Andrew R. Flores, 2014, 'National Trends in Public Opinion on LGBT Rights in the United States', The Williams Institute.

105 Judi Lerman, 2014, 'Discrimination and Public Attitudes Toward the Transgender Community', Public Opinion Monthly, May.

preferences and circumstances would seem to represent a critical element of individual freedom, which is, in turn, a hallmark of libertarianism.<sup>3</sup> Furthermore, libertarians have long lauded the importance of widespread toleration for diverse, unique individuals, engaging in the varied projects and ventures they each deem fit.

However, there appears to have been scant interest in diverse gender identity issues, and the challenges faced by gender-diversity communities, from a libertarian perspective.<sup>4</sup> This is a puzzling oversight.

The purpose of this paper is to interpret diversity in gender identity through the lens of libertarian thought, finding that the two concepts, indeed, constitute an inextricable link with each other.

The next section will discuss the central elements of the theory of the individual within the history of libertarian thought, so as to provide generic parameters for the ensuing discussion. Following this will be a discussion of the ways in which diverse gender identities have been expressed, both in historical and contemporary circumstances, representing a strand of individuality being exercised in practice by some people.

3 It is important to note the term 'libertarianism' is often referred to in the Anglosphere (outside of the United States) as 'classical liberalism.'

4 Some recent exceptions to this rule include: Nick Cohen, 2013, 'What would Hayek say about gendered violence?', in Legatum Institute, ed., *What Would Hayek Say Today (Really?)*, Charles Street Symposium, London; Charles M. E. Davies, 2014, 'Government Discrimination Against the Transgender Community', Students for Liberty blog, 20 November, <http://studentsforliberty.org/blog/2014/11/20/in-respect-to-transgender-awareness-month/>; and Winter Trabex, 2014, 'Being Transgender in the Liberty Community', Liberty.me, 22 June, <http://wintertrabex.liberty.me/2014/06/22/being-transgender-in-the-liberty-community/>.

Next, there will be an explanation of the concept of a 'freed gender identity.' This relates to a situation in which transgender (and other gender-diverse) individuals can emergently construct their own gender identities, entirely of their own volition, and without obligation to the fixed, binary 'male-female' construct traditionally imposed by cisgender social majorities.

There are numerous powerful barriers against the realisation of freed gender identity, in modern Western societies and elsewhere. Governments continue to make it extremely difficult for many people affiliated with diverse gender identities to legally alter their identity, not to mention the application and enforcement of policies (including law enforcement and justice administration) which disproportionately harm gender-diverse people.

Compounding the difficulties presented by legal and policy discriminations are the acts of highly variable, but usually detrimental, acts of discrimination, ostracism and violence against transgender and other gender-diverse people, mainly waged by cisgender individuals in their private capacities.

In the end, efforts to bring about a freed gender identity for all human beings, removed from the co-dependent strictures of formal government impositions and informal social conventions, are entirely consistent with the libertarian project. This consists, most powerfully, of enabling all people to etch their self-made plans – including efforts aimed at realising a more perfectible sense of gender identity – over the canvas of their own lives, regardless of their numerical strength within the wider community.

The Institute for Transgender Economic Advancement (formerly Association of Transgender Professionals) in the United States is involved in several activities including career networking and mentoring.<sup>99</sup> It has developed an online facility dedicated to linking individuals to prospective employers with strong diversity and inclusion workplace programs. The Transgender Job Bank website also provides listings of vacancies for employees, and provides a means through which employers can communicate job openings to the community.<sup>100</sup>

An important issue especially for transgender people is the provision of sound advice and information to help employers understand the key issues affecting people who transition gender in the workplace, such as appropriate use of names and pronouns, bathroom access, and so on. The Out & Equal Advocates group, for example, collaborates with Fortune 1000 companies and government agencies to provide a safe and supportive environment for transgender employees.<sup>101</sup>

The complex array of decentralised, bottom-up advocacy and reform activities organised by transgender and gender-diverse communities are reminiscent of feminist responses to another example of a perverse emergent order - namely the problem of rape culture or, as some have put it in a broader sense, male attitudes of sexual entitlement to women's bodies.

As explained in an important paper by Charles W. Johnson, numerous women-led nonviolent social movements have emerged over the years to respond to, and to redress, diffuse male violence

99 Institute for Transgender Economic Advancement website, <http://transgenderprofessionals.org/>.

100 Transgender Job Bank website, <http://www.tjobbank.com/about/>.

101 Out & Equal Workplace Advocates website, <http://www.outandequal.org/connect/about/>.



deemed by his/her peers as being ‘a girl’s toy’ or ‘a boy’s toy.’”<sup>98</sup>

Popular depictions of gender diversity in art, film, literature, and the media is also regarded as having an important contextual effect in influencing perceptions about the appropriateness of self identification and expression within society.

Despite recent attempts to provide more sympathetic accounts of transgender and gender-diverse lives, most depictions have been traditionally hostile toward the identification and expression of gender diversities. These have including portraying transgender women, in particular, as either non-passing crossdressers subjected to public ridicule, and unrepresentative depictions of gender-confused homicidal maniacs in films such as ‘The Silence of the Lambs.’

Whilst acknowledging the good intent behind many of the more recent sympathetic portrayals of gender diversity in society, activists have pointed out the desirability for diverse gender roles in movies and theatre to be played by transgender and gender-diverse people themselves. It is envisaged that such a change would help provide more accurate and sensitive representations of gender diversity issues in the mass production of culture, and help shift attitudes in a more favourable direction in the longer term.

There is little doubt that overcoming discrimination in the labour market remains a significant issue for transgender and gender-diverse people, but by the same token various concerned groups and individuals in gender diversity communities have been active in efforts to promote better employment outcomes.

98 [Play Unlimited Facebook page, https://www.facebook.com/playunlimited/info?tab=page\\_info](https://www.facebook.com/playunlimited/info?tab=page_info). A similar campaign is the United Kingdom ‘Let Toys Be Toys’ campaign (<http://www.lettoysbetoys.org.uk/>).

## 2 FREED GENDER IDENTITY AS A LIBERTARIAN ISSUE

### 2.1 THE CONTOURS OF INDIVIDUALISM IN LIBERTARIAN THOUGHT: KEY THEMES

A distinguishing feature of libertarian philosophy has been its consistent elevation of the individual human being, as a central focus of both methodological thought and of civic, and political, advocacy. The American libertarian scholar David Boaz succinctly outlines the importance of individualism, and the distinctions between individual and group actions:

‘the basic unit of social analysis is the individual. It’s hard to imagine how it could be anything else. Individuals are, in all cases, the source and foundation of creativity, activity, and society. Only individuals can think, love, pursue projects, act. Groups don’t have plans or intentions. Only individuals are capable of choice, in the sense of anticipating the outcomes of alternative courses of action and weighing the consequences. Individuals, of course, often create and deliberate in groups, but it is the individual mind that ultimately makes choices. Most important, only individuals can take responsibility for their actions.’<sup>5</sup>

Accompanying this greater esteem for the individual is a growing acknowledgement of the unique attributes and qualities embodied within each person, with each person possessing their own attitudes, aspirations, beliefs, capabilities, desires, dreams and goals.

As a corollary to this, there is a consistent libertarian aversion toward acts of coercion and domination over individuals, as exerted by others, on the basis that such practices would likely stifle the exercise of individuality. To be certain, this represents a radicalising position contraindicating the perspectives of those asserting that the individual ought to defer to the prerogatives of

5 David Boaz, 1997, *Libertarianism: A Primer*, The Free Press, New York, p. 16.

authority, for reasons of divine rights, cultural or ethnic preservation, national security, or other rationales.

English philosopher John Locke provided a seminal treatment of the scope in which individualism applies, in his work *Two Treatises of Government*. It is here that Locke expresses the proposition that a great measure of self-ownership inheres within each individual human being: ‘every Man has a Property in his own Person. This no Body has any Right to but himself. The Labour of his Body, and the Work of his Hands, we may say, are properly his.’<sup>6</sup>

In a similar vein to Overton, Locke contended that an individual may do whatever it is they wish, with their own bodies, labouring efforts and several properties, so long as the relevant acts are consistent with ‘self-preservation’ norms preventing the infliction of harm. The imperative for self-preservation applies not only to the acting individual, but applies to those actions of the individual which extend unto others, or affects them in some way.

Specifically, to ensure everyone’s natural right to self-ownership of their lives, limbs, and properties, Locke asserted that individuals would effectively combine, as if under a ‘social contract,’ to delegate responsibility for the protection of individual liberty to government. He is at pains to make clear that laws maintained and enforced by government are not to exhaust the freedom of individuals:

‘the end of Law is not to abolish or restrain, but to preserve and enlarge Freedom: For in all the states of created beings capable of Laws, where there is no Law, there is no Freedom. For Liberty is to be free from restraint and violence from others.’<sup>7</sup>

6 John Locke, [1689] 2004, *Two Treatises of Government*, Cambridge Texts in the History of Political Thought, Fifteenth Edition, Cambridge, p. 287-288.

7 Ibid., p. 306.

- provision of teacher and staff training on gender awareness matters.
- campaigning for gender-neutral bathrooms, for example a single-stall restroom accessible to students of any gender.
- allowance for visual activism and poster campaigns to encourage others to respect transgender students or challenge the conventional gender binary.<sup>96</sup>

In addition, there have also been efforts by gender diverse communities to raise awareness about some of the underlying cultural and social circumstances fostering the entrenchment of cisgender privilege.

A multitude of personal testimonies and relevant academic literature demonstrates the provision of toys to children, on the basis of gender assigned to them at birth, has both practical and symbolic significances in terms of the formation of gender identity understandings, both at a young age and later in life.<sup>97</sup>

An Australian group named Play Unlimited undertook a ‘No Gender December’ campaign with the aim of education parents and the community about the implications of gendered marketing of toys. Calling for all children to enjoy the widest possible range of play experiences, the group noted ‘the perpetuation of gender segregated toys provides fertile ground for bullying, should a child be perceived as playing with a toy

96 GSA Network, ‘Beyond the Binary’, <http://www.gsanetwork.org/get-involved/change-your-school/campaigns/beyond-binary>.

97 For example, a study by Olson, Eaton and Key, to be published in *Psychological Science*, indicates that transgender children showed similar patterns of gender identification as cisgender children, including toy preferences. A personal account about the use of gender-specific toys in childhood, among other things, was recently provided by transwoman Astrid Wilde, in her testimony to the Idaho legislature for greater legal protections. The text of Ms Wilde’s testimony is provided at <http://astridwilde.tumblr.com/post/109605480661/my-testimony-before-the-idaho-state-affairs>.

Other groups which are presently active in promoting the liberties and rights for people of colour in the United States include the Trans People of Color Coalition, which seeks to educate and inspire on racism and transphobia intersectionality, and the Audre Lorde Project focussing on community wellness and socio-economic justice.<sup>95</sup>

Given the acute risks faced by young diverse gender people facing bullying, harassment, and other forms of persecution, which can increase absenteeism rates and harm learning outcomes, various groups have been increasingly active in calling for safer and more respectful schooling environments.

For example, the California-based group Gay-Straight Alliance Network (GSA Network) maintains a 'Beyond the Binary' campaign to educate students and staff about gender diversity issues, and to enable students to launch petitions about any of the following matters:

- the listing of gender identity and expression in school non-discrimination policies, and that model policies protect transgender and gender-diverse students by covering matters such as bathroom and locker room use to dress codes and school records.
- ensure gender-inclusive school functions, such as proms, dances, and graduations, including allowing students of any gender to run for 'king' or 'queen' of prom or other school dances.
- encourage awareness of Transgender Day of Remembrance in the school setting, and participation in associated events.
- provision of student training about gender diversity issues, including learning about terminology and understanding challenges faced by transgender and gender-diverse students at school.

95 Elizabeth Tate, op. cit.

The exercise of individualism not only ensures a sphere of action, for each and every human person, that is sufficiently separate from those actions entertained through our formalised collective capacities, especially governmental action. An emphasis on individuality is also stressed since to do so best provide, according to libertarians, a basis for both the autonomous and fulsome development and embodiment of idiosyncratic personal character.

A prominent example of these ideas at play were expressed in the work of eighteenth-century Prussian philosopher Wilhelm von Humboldt, whose work *The Limits of State Action* depicts the importance of a climate of freedom for the self-development of each individual person: 'reason cannot desire for many any other condition than that in which each individual ... enjoys the most absolute freedom of developing himself by his own energies, in his perfect individuality.'<sup>8</sup>

For Humboldt, diversity in circumstances and in personal character, or as he described it 'a variety of situations,' is also essential to the most complete development of people, and that freedom of individual action and the attributes of individual diversity are mutually reinforcing.

Inspired by the work of Humboldt, the nineteenth-century English philosopher John Stuart Mill made formative contributions to the liberal theory of the individual along similar lines. A dignity and respect accorded to the individual is important to Mill, since this allows for the most appropriate development of the unique self:

'A person whose desires and impulses are his own – are the expression of his own nature, as it has been developed and modified by his own culture – is said

8 Wilhelm von Humboldt, [1792/1854] 1969, *The Limits of State Action*, Cambridge University Press, Cambridge, p. 20.

to have a character. One whose desires and impulses are not his own has no character, no more than a steam engine has a character.<sup>9</sup>

Mill not only feared the subjection of the individual resulting from an arbitrary application of the political powers, thus reflected in his support for 'elective and responsible government,'<sup>10</sup> but displayed trepidation about the potentially oppressing exercise of social convention for the exercise of individuality to its fullest extent.

A feature of Mill's famed work, *On Liberty*, which distinguishes it from most other contributions in the voluminous libertarian literature, is the lauding of eccentric individual characteristics in a social world with tendencies to place a premium upon conformity of features and conduct.

In this context, it may well be said, as some libertarians such as Friedrich Hayek have done, that customs and traditions, among other things, ensure reasonably predictable sets of expectations concerning how multitudinous individuals will interact with each other, given various circumstances. However, for Mill, pressures upon individuals to conform to the expectations of others come with the very real risk of suppressing individuality itself:

'In our times, from the highest class of society down to the lowest, everyone lives as under the eye of a hostile and dreaded censorship. Not only in what concerns others, but in what concerns only themselves, the individual or the family do not ask themselves--what do I prefer? or, what would suit my character and disposition? or, what would allow the best and highest in me to have fair play, and enable it to grow and thrive? They ask themselves, what is suitable to my position? what is usually done by persons of my station and pecuniary circumstances? or (worse still) what is usually done by persons of a station and circumstances superior to mine? I do not mean that they choose what is customary in preference to what suits their own inclination. It does not

9 John Stuart Mill, [1859] 1985, *On Liberty*, Penguin Classics Edition, Penguin, London and New York, p. 124.

10 Ibid., p. 62.

they can become more effective allies in the struggle for greater transgender and gender-diverse recognition and acceptance.

Through its 'Straight for Equality' website PFLAG have offered an online 'Guide to Being a Trans\* Ally' for cisgender people, regardless of their background, covering issues including appropriate terms to use in daily life and in advocacy forums, an explanation of the current barriers against gender diversity, and suggested ways in which allies can support transgender and gender-diverse people.<sup>91</sup>

Other examples of recent efforts to promote greater awareness and respect toward gender diversity among cisgender people include the 'I AM YOU: Be A Trans Ally' website,<sup>92</sup> and the acclaimed 'What Makes an Ally?' youth campaign by the Australian advocacy group Transgender Victoria.<sup>93</sup>

In the United States transgender and gender-diverse women of colour have been particularly affected by violence, misogyny, hate crimes, and legal injustices. In response to these issues, a social justice campaign has risen up 'to defend our sisters from the misogynistic, transphobic and racist forces that fuel our oppression and to challenge the discriminatory laws and unjust courts that often fail us.'<sup>94</sup> The group maintains a significant presence on social media, raising greater awareness of the problems facing transwomen of colour, using the hashtag #BlackTransWomensLivesMatter.

91 Straight for Equality, 'Guide to Being a Trans\* Ally', <http://www.straightforequality.org/document.doc?id=893>.

92 'I AM YOU: Be A Trans Ally' website, <http://mytransally.weebly.com/>.

93 Transgender Victoria, "What Makes an Ally?" Youth Project', <http://www.transgendervictoria.com/projects/ally-project>.

94 'Black Trans\* Women's Lives Matter' website, <http://blacktranswomenslivesmatter.blogspot.com.au/>.

The tragic passing of young Ohio transwoman Leelah Alcorn in late 2014 has placed much greater emphasis upon the need to provide supportive family environments for transgender and gender-diverse children, and to ensure quality parenting which accommodates (rather than stifles) the expression of gender diversity.

The Transgender Child website provides information, and a listing of events and support groups, for parents of transgender children at the local level in the United States.<sup>88</sup> In Canada the TransParent organisation strives to use the power of privilege so that parents 'use our voices to help to bring the concerns of our trans children to the people, agencies, and organizations that can best serve them.'<sup>89</sup>

It is also important to be mindful of the fact that gender diversity matters are not restricted to those between cisgender parents and transgender and gender-diverse children. Indeed, it is not uncommon that parents of children themselves embrace their innermost sense of gender diversity.

Some of the issues raised by those familial relationships are canvassed, for example, by the TransParentcy website, which aims to 'support the transgender parent, and their supporters and advocates (lawyers, mental health professionals, friends, family, allies) by providing information and resources to educate and thus dispel the myths about being transgendered/transsexual having an adverse impact on one's children.'<sup>90</sup>

Several gender diversity groups around the world have sought to disseminate information to cisgender communities about how

88 Transgender Child website, <http://www.transgenderchild.net/>.

89 TransParent Canada website, <http://www.transparentcanada.ca/?file=kop1.php>.

90 TransParentcy website, <http://www.transparentcy.org/>.

occur to them to have any inclination except for what is customary. Thus the mind itself is bowed to the yoke: even in what people do for pleasure, conformity is the first thing thought of; they like in crowds; they exercise choice only among things commonly done: peculiarity of taste, eccentricity of conduct are shunned equally with crimes, until by dint of not following their own nature they have no nature to follow: their human capacities are withered and starved; they become incapable of any strong wishes or native pleasures, and are generally without either opinions or feelings of home growth, or properly their own. Now is this, or is it not, the desirable condition of human nature?'<sup>11</sup>

Warning against the 'tyranny of the majority,' both in their political and social guises, Mill lauded the cultivation of healthful interpersonal variations associated with ennobling individual freedom:

'As it is useful that while mankind are imperfect there should be different opinions, so is it that there should be different experiments of living; that free scope should be given to varieties of character, short of injury to others; and that the worth of different modes of life should be proved practically, when any one thinks fit to try them. It is desirable, in short, that in things which do not primarily concern others, individuality should assert itself. Where, not the person's own character, but the traditions of customs of other people are the rule of conduct, there is wanting one of the principal ingredients of human happiness, and quite the chief ingredient of individual and social progress.'<sup>12</sup>

Inasmuch as inherent self-ownership and development of personal characteristics embodies the libertarian perspective of individualism, there have also been some important libertarian philosophical meditations regarding the construction and maintenance of individual identity, or the ways in which individuals define or perceive their own selves.

In his *Essay Concerning Human Understanding* John Locke presents a concept of personal identity as grounded in the psychological continuity of memory ascribed to a person, 'a

11 Ibid., p. 125-126.

12 Ibid., p. 120.

thinking intelligent being, that has reason and reflection, and can consider itself as itself, the same thinking thing, in different times and places.’<sup>13</sup>

To illustrate the importance of this, he sets up a ‘prince and cobbler’ thought experiment, in which the mind of a powerful prince awakens in the body of a lowly cobbler. The question Locke then asks is this: is the man in the cobbler’s body now the prince, or still the cobbler?

According to Locke, consequent to the annexation of the cobbler’s body by the prince the prince would still be construed as the prince, given that the prince has retained all of the attributes essential to his unique identity – viz. his princely memories and thoughts.<sup>14</sup> Therefore, it is the maintenance of consciousness, rather than continuity of body, which informs the nature of identity inhered within the individual.

The famed twentieth-century libertarian philosopher Robert Nozick also contributed to the debate about personal identity through his formulation of the ‘closest continuer’ theory.

Drawing upon the Lockean thought experiment, Nozick argues if we take consciousness or memory as being of relatively greater importance to individuality than bodily characteristics then the closest continuer of the prince would, indeed, be the man in the cobbler’s body. On the other hand, if bodily characteristics are conceived to be of greater importance than memory, then the

Erickson-Schroth makes:

Trans groups and organizations take many forms. Some are gender-specific (transwomen, transmen, gender-variant/genderqueer people); some are for specific identities or experiences (trans people of color, Two-Spirit people, trans people with disabilities, trans parents); and some are a mix of everything. There are also many groups specifically for young people, such as Queer Youth Seattle, the Transgender Youth Drop-In Center (Chicago), and the Attic Youth Center (Philadelphia).<sup>87</sup>

Reference is also made to specific-interest transgender associations, such as those assisting incarcerated people, or transgender people with HIV and other medical issues, as well as formal conferences and events in which transgender people congregate to discuss their pressing concerns.

An important development in associational life for transgender and gender-diverse people has been the development of ‘virtual associations,’ or groups primarily constituted online ranging from online chat rooms to e-clubs, and so on.

The information and services provided by those virtual associations can be accessed at relatively low cost and by anyone with internet access, which is most efficacious for those experiencing social isolation in its various guises. Online associations can also be accessed in relative anonymity (an important factor for those preparing for, or in their very early stages of, transition, or living in an unwelcoming home environment).

Another critical response to the perverted emergent order of transphobia, by associations and individuals alike, are efforts to foster more positive attitudes towards gender diversity within the community more broadly.

<sup>87</sup> Ibid., p. 144-145.

<sup>13</sup> John Locke, [1689] 1825, *An Essay Concerning Human Understanding*, Twenty-Fifth Edition, Thomas Davison, London, p. 225.

<sup>14</sup> Perhaps there is an analogy to the question of bodily self ownership in the context of the regeneration effect of Gallifreyan Time Lords in the science fiction series, *Doctor Who*. The Doctor has undertaken a process of regeneration, appearing after each regeneration with new bodily features, but is, nonetheless, still considered The Doctor by self and by others as such.

individuals and groups acting in their own capacities:

'Both economic discrimination and experiencing violence could be the result of a larger social climate that severely sanctions people for not conforming to society's norms concerning gender; as such, both would be strongly associated with each other.'<sup>85</sup>

To express the thrust of the idea in another way, decentralised and bottom-up community activism responding to the challenges faced by gender diverse communities are perfectly compatible with freedom of action within a dynamic, open civil society.

A first and rather obvious social action is for people of diverse gender identities to actively create safe spaces where individuals can express themselves more freely, and associate with others who challenge and question conventional gender norms and stereotypes. In fact, one of the more impressive features of gender diversity is the increasingly willing inclination of people to take advantage of the benefits of freedom of association in forming community groups, providing decentralised, non-governmental services.

It is not possible to provide a definitive account of the numbers, and scope of activities, undertaken by transgender associations, given what Laura Erickson-Schroth describes in her book, *Trans Bodies, Trans Selves*, as 'an explosion in the number and variety of resources that are available for trans people in the United States, both regionally and nationally.'<sup>86</sup> The complexity of modern transgender associational life is underlined by another point

85 Emilia L. Lombardi, Riki Anne Wilchins, Dana Priesling and Diana Malouf, 2002, 'Gender Violence', *Journal of Homosexuality* 42 (1): 89-101, p. 90.

86 Heath Mackenzie Reynolds and Zil Garner Goldstein, 2014, 'Social Transition', in Laura Erickson-Schroth, ed., *Trans Bodies, Trans Selves: A Resource for the Transgender Community*, Oxford University Press: Oxford, p. 143.

closest continuer of the prince is whoever remains in the prince's initial body regardless of the memories now assumed.

The implication of Nozick's theory is that what matters to the conception of individual identity, in the presence of personal change, is not necessarily Locke's thesis - in which all weightings informing identity are assigned to psychological continuity - but the individual person's own conception of what attributes are most important:

'What is special about people, about selves, is that what constitutes their identity through time is partially determined by their own conception of themselves, a conception which may vary, perhaps appropriately does vary, from person to person.'<sup>15</sup>

What has been presented in this section is admittedly a highly selective account of libertarian philosophical constructs regarding the essence of individualism. Nonetheless, there are several key themes distilled here which would inform libertarian perspectives endorsing the freedom of individual human beings fashioning their own gender identities. They include:

- the inalienable right of each person in the ownership of their own bodies, minds, and properties that help facilitate the realisation of their aspirations and plans, including in the identification of their own selves;
- the virtues of freedom for each person for the broader purposes of the cultivation of interpersonal diversities in attributes and character; and
- the discretion afforded to each person in fashioning their own conceptions of self, separate to their prerogatives and whims of other individuals.

15 Robert Nozick, 1981, *Philosophical Explanations*, Harvard University Press, Cambridge, p. 69.

## 2.2 FREED GENDER IDENTITY: THE UNKNOWN IDEAL

In its modern activist guise libertarianism has tended to focus rather inordinately upon the properties of human action within the economic realm, and the formal institutional structures most conducive to ensuring that economic interactions between people are conducted in a spirit of mutually-assenting voluntarism to the greatest extent possible.

At first glance it would seem that the modern libertarian focus upon the properties and roles of market competition, property rights, free contracting, and the like, have emerged in response to the obvious trend, observed throughout the Western world, of the dramatic expansion in the scale and scope of the public sector. As libertarian theorists have, not without good reason, stated for years, decades, and, indeed, centuries on end, the growing influence of coercive politicisation which interfere with our economic affairs represents one of the greatest dangers for the exercise of liberty known to humankind.

The libertarian economic narrative is unquestionably a distinguishing feature of its activism and philosophy today, and which starkly sets it apart from its rivals most notably conservatism, progressivism, and socialism. But it may be argued, with firm justification, that the origin of libertarianism is not found in the elevation of economic freedom as a virtue, but in the efforts of activists and scholars to promulgate a wider sense of acceptance, respect, and toleration for differences between individuals.

An early manifestation of this was the libertarian plea for religious toleration. Found in the works of figures such as Richard Overton, John Locke, and David Hume, among others, these pleas were centred upon the refutation of vain efforts to impose spiritual uniformity upon all human beings, as well as toleration

According to Courtney Michaluk and Daniel Burnett, anti-discrimination legislation could create a culture in which some employers become too risk-adverse to employ people from various gender diverse backgrounds:

‘employers and workers can become too frightened of a lawsuit to reach even briefly from the shackles of the politically correct, but suddenly costly training seminars and stricter guidelines turn LGBT employees into liabilities. On paper they won’t be hired for one reason or another, while in reality the hidden cost of ENDA [Employment Non-Discrimination Act] is the culprit.’<sup>84</sup>

In addition, anti-discrimination legislation cannot effectively counter the discriminatory sentiments induced as a consequence of a person being forcibly ‘outed,’ given the commonplace inconsistencies between a person’s lived gender and gender status on official identity documentation.

So, it is not enough for gender diverse communities to delegate the problems they face to unresponsive governments that have traditionally, and in many instances remains contemporarily, been maliciously hostile to their needs, concerns and interests. This strategy does not appear to eliminate the discrimination and violence experienced and, indeed, in some cases merely perpetuates these pathologies.

From a libertarian perspective it is certainly legitimate for transgender and gender-diverse people, and their allies in cisgender communities, to respond to comprehensive non-state aggression at source, which is through comprehensive non-state responses. Consistent with this, Lombardi et. al. observed the interconnected basis in which transgender and gender-diverse people endure discrimination, harassment and violence from

84 Courtney Michaluk and Daniel Burnett, 2013, ‘Gayconomics 101: Why the Latest LGBT Rights Legislation Could Be the ‘ENDA’ the Road for Some Job Seekers’, Huffington Post, 25 November.



person-centred as possible. This project would, no doubt, entail nothing short of 'significant changes in the law regarding the regulation and administration of gender categories.'<sup>81</sup>

But governments, and the policy actions they have favoured, even those with the laudable objective of helping improve the lives of gender-diverse people, have their limits and unintended consequences, too.

In several important contributions compiled in the edited essay collection, *Against Equality: Queer Revolution, Not Mere Inclusion*, it had been stated that 'hate crime' legislation, for instance, would be ineffective, and even in some respects counterproductive, in addressing transphobic violence.<sup>82</sup>

Aside from uneven application by various law enforcement authorities, legislation against hate crimes do not address the core problem of cisgender-supremacist culture: 'hate crimes occur because, time and time again, our society demonstrates that certain people are worth less than others, that certain people are wrong, are perverse, are immoral in their very being.'<sup>83</sup> In addition, any punishment of offenders merely perpetuates the expansive incarceration complex which magnifies state power over vulnerable minorities and individuals.

Anti-discrimination employment provisions have represented a plank in governmental efforts to (at least be seen to) ameliorate the relatively higher rate of unemployment experienced by transgender and gender-diverse people. There are remaining questions about whether these strategies are effective in reducing discrimination in the labour market.

81 Spade, 2008, op. cit., p. 35.

82 Ryan Conrad, ed., 2014, *Against Equality: Queer Revolution, Not Mere Inclusion*, AK Press: Oakland, CA.

83 Jason Lydon, 2014, 'A Compilation of Critiques on Hate Crime Legislation', in *Ibid.*, p. 179.

of varying opinions. To do so, according at least to early libertarians, would enable individuals to more completely develop their own consciences, and peacefully respect (even if in disagreement) the unfolding 'experiments in living' embarked upon by others.

These original insights fortuitously serve as an all-purpose template for application to other non-economic matters, including the most appropriate stances to assume in light of the fact that individuals actively seek to assume and to express their own conceptions of gender identity (including no gender identity) in their own ways.

As the previous discussion, in fact the discussion replete throughout this paper, suggests, it is thoroughly desirable from the standpoint of basic libertarian foundations to enable individuals to assume and express their own unique gender identity, unencumbered by the circumscriptions, constraints, interferences or restrictions of formal institutional rules and informal social customs.

Given the populist, but deeply erroneous, conflation of biological sex and gender identity it is widely perceived that diversity in gender identity, where it is allowable (albeit typically met with a mix of hostility and indifference), is limited to the experiences of transgender people who seek to transition from one gender identity to another within the binary 'female-male' classifications.

Within this it is usually insisted that the process of transition from male to female, or from female to male, be a 'complete' one, in the sense that the person assuming a new gender identity must publicly present themselves in line with cultural and social stereotypes, and must undertake a host of medical and surgical interventions to ensure at least the outward appearance of sex-gender conformance to the greatest extent practicable.

There are doubtlessly a great many people (including the author of this paper) who have successfully transitioned from one end of the binary to the other, encountering the full gamut of legal obstructionism and medical pathologisation in the process. Transgender identity is a legitimate identity as much as cisgender identity. But the sentiment expressed here is that true diversity in gender identity also calls for a genuine acceptance, respect, and toleration not only for those who effectively repudiate fixity of gender identity.

Unapologetically respecting the radically subjectivist underpinnings of a human person's own sense of gender identity, there is a compelling libertarian rationale for embracing a much more broadly-encompassing 'freed gender identity' which allows for other people to transcend the conventional and legalistic binary classifications altogether.

All in all, the presently unknown ideal of freed gender identity embraces cisgender and transgender identities, as well as other individuals outside the female-male binary including self-identified genderqueers, gender neutrals, non-gender-identifying people, and others. Attaining freed gender identity for all human beings necessitates nothing less than a rejection of civic and political norms and standards privileging cisgender identity, and the prerogatives deemed necessary for its propagation, over all other gender identities.

Those of left-libertarian persuasion, or at least familiar with those ideas, may be able to discern an analogy between the concept of freed gender identity and that of freed markets.

To digress, the 'freed market' notion depicts an economic situation exemplified by a radical divorce between voluntaristic modes of economic organisation and forms of control, the latter

practised.

#### **4.4 RESPONDING TO THE PERVERSE EMERGENT ORDER OF TRANSPHOBIA**

It is tempting, although ironic, for many gender diversity activists to perceive the planned application of force by the coercive state as a valid institutional means through which the perverted emergent ordering of non-state discriminations and hatreds can be quelled.

The attitudes disposed towards state-salvationism for transgender people is incompatible with the ill-treatment still meted out by political agents against transgender and gender-diverse people, let alone others in our queer communities, even in the much-touted tolerant Western world.<sup>80</sup> As noted previously, harassment by police and other law enforcement officials remains a significant problem, and transgender people continue to face difficulties in accessing appropriate and responsive services through the likes of government-subsidised health care and housing.

That said, even if we all travel in the same coercive orbit - as a result of the all-powerful statist gravitational pull of regulation, subsidisation, and taxation - transgender and gender-diverse people reserve a basic political right, just like everybody else, in majoritarian democracies to express their views about reforms which would enhance their rights and liberties.

As described in this paper, therefore it is entirely appropriate, from a libertarian standpoint, to push governments to radically liberalise (even eliminating) identity documentation regulations, ensuring that the nomination of gender identity is as

80 Will Smith, 2015, 'Dear Queer Community: The State is Our Enemy', Can't Steer Queer blog, <http://cantsteerqueer.com/2015/01/25/dear-queer-community-the-state-is-our-enemy/>.

industry seems, at least anecdotally, to be anything but a 'forced choice' for many to undertake such activity. Further, it is speculated here there would be immense benefits associated with countering the misplaced stereotype that (pre-operative or non-operative) transgender women, in particular, are incapable of, or uninterested in, anything but the provision of paid sexual services for (primarily) men with certain fetishist inclinations.

It is conventionally held in economic theory, attributed to Gary Becker, that discrimination is economically detrimental, in that free markets penalise an employer who discriminates for reasons unrelated to ability and productivity.<sup>79</sup> However, the prevalence of non-state discrimination appears to indicate social prejudices against transgender and gender-diverse people dominate economic concerns – namely, the expectation that a worker (in this case, with a non-conforming gender identity) would add value through labouring within production processes.

It could also be said, however, that the presently hampered labour market - typified by an extensive degree of public sector intervention in the determination of the wages and conditions, and in which government identification documents readily allow cisgender supremacist employers to discriminate on the basis of gender identity - resembles nothing like the freed labour markets in which it is hypothesised that discrimination would be dissipated.

As discussed below, given the cultural pre-eminence of cisgender supremacy, it may not be sufficient to seek the political emancipation of relations between employees and employers. Other forms of action – and certainly not additional government labour market involvement – might be necessary to significantly dampen the extent to which discrimination is economically

79 Gary Becker, 1971, *The Economics of Discrimination*, University of Chicago Press, Chicago, IL.

enforced by a combination of statist coercion and capitalist-mercantilist privileges.<sup>16</sup> The freed market is also conceptually separated from the concept of 'free market,' extolled by much of the modern libertarian establishment, often referring to aspirations of economic institutional and policy changes which merely recombine statist-capitalist-mercantilist controls.

In a similar vein, the notion of freed gender identity insists that the freedom to assume and express diversity in gender identity is not merely a choice between one or the other of the female or male classifications in the conventional binary construct. Allowance for the recombination of one's gender identity from male to female, or vice-versa, is simply insufficient in a free, liberal, and open society. All people must be freed to assume, and to express, their own gender identity as they see fit.

It is not possible, at the outset, to move beyond what Friedrich Hayek described as 'pattern predictions'<sup>17</sup> in considering which gender identities, or population distributions thereof, would establish themselves once the concept of gender itself is freed from the strictures of conventions and norms most amenable to cisgender existence. That said, in an important recent contribution British academic Nick Cowen stressed both the complexity and emergence attributes of gender identity and sexual preference:

'Polycentric orders offer choice: whether identify as straight, gay, male, female or anything else. In this context, 'queer' individuals take the role of social

16 Charles Johnson and Gary Chartier, 2011, *Markets Not Capitalism: Individualist Anarchism Against Bosses, Inequality, Corporate Power, and Structural Poverty*, Minor Compositions.

17 In his 1974 Nobel Prize lecture, Hayek defined pattern predictions as 'predictions of some of the general attributes of the structures that will form themselves, but not containing specific statements about the individual elements of which the structures will be made up.' Friedrich August von Hayek, [1974] 1989, 'The Pretence of Knowledge', *The American Economic Review* 79 (6): 3-7, p. 4.

entrepreneurs, combining ways of living in new ways. The more successful or aesthetically-engaging lifestyles are further developed by others. Popular identities remain common but are not enforced through violence or legislation. Alternatives to existing sexualities are allowed to flourish. People are not bound by one abstract order, statutorily enforced, but are allowed to develop new orders that use and display our personalities in different ways.<sup>18</sup>

The radically subjective nature of gender identities, and of their expressions in civil society, would suggest that the diverse patterns arrived at are likely, in the final analysis, to be attributable to the free choices that individuals make for themselves, best suiting their own unique desires and needs.

often denied access to, forced out of or grossly mistreated in traditional employment markets, underground work can pose as an essential survival strategy. These survival-oriented accounts of the motives for participating in the shadow economy are at odds with conventional libertarian accounts of shadow economy participation as a dedicated, heroic act in philosophical anti-statism. As explained by Richard Johnson:

‘The difficulty of educational attainment contributes to severe employment discrimination, making it very difficult or impossible for transgender people to obtain employment consistent with their level of education or ability. This contributes greatly to marginalizing transgender people, *pushing* many male-to-female transgender people, particularly the young, into the shadow economy of prostitution.’<sup>77</sup>

Regardless of the motivation for providing prostitution services, in many parts of the world prostitution remains a criminal activity. This means that working conditions are precarious for many sex workers, particularly transgender people who tend to bear the brunt of abuse and violence from clients and by the general public at large.

A growing number of libertarians have called for the decriminalisation of prostitution as an important means to reduce violence in the industry, to promote health and safety for sex workers.<sup>78</sup> Decriminalising prostitution would reduce police harassment, and eliminate the justice system ascribing a criminal record for those transgender sex workers which would present a formidable barrier to entry into formal employment in the future.

The economic engagement of gender-diverse people with the sex

<sup>77</sup> Richard Gregory Johnson, 2009, *A Twenty-First Century Approach to Teaching Social Justice: Educating for Both Advocacy and Action*, Peter Lang, New York, NY, p. 32; italics added.

<sup>78</sup> Cathy Reisenwitz, 2014, ‘Why It’s Time to Legalize Prostitution’, *The Daily Beast*, 15 August.

<sup>18</sup> Nick Cowen, 2013, ‘What Would Hayek Say About Gendered Violence?’, in Legatum Institute, *What Would Hayek Say Today (Really)?*, Charles Street Symposium Essays, p. 29.

that it is taking place against the background of often very high levels of human capital accumulated by them.

The *State of Transgender California* survey, for example, suggests that those transgender people surveyed were twice as likely to possess a bachelor's degree as the general California state population as a whole.<sup>74</sup> A similarly heightened prevalence of highly qualified transgender and gender-diverse people were found in Europe,<sup>75</sup> and in Australia.<sup>76</sup>

Since transgender and gender-diverse people need to consume and accumulate assets, much like cisgender people, some avoid the risk of dependency upon menial government income transfers by participating in the 'shadow economy,' in which certain activities in which taxes are avoided or evaded, or are not registered, or poorly registered, in official national accounting statistics.

Some transgender people, particularly pre-operative male-to-female transgender people, participate in the shadow economy through offering prostitution services, in order to survive and, if they so choose, to build up sufficient finances to pay for gender affirmation surgeries in the long term. According to the US National Transgender Discrimination Survey in 2011, 16 per cent of transgender respondents stated they had engaged in the shadow economy, including through sex work, to subsist.

Given that people subscribing to diverse gender identities are

74 E. Hartzell, et. al., 2009, *The State Of Transgender California: Results from the 2008 California Transgender Economic Health Survey*, Transgender Law Center: San Francisco, CA.

75 Stephen Whittle, et. al., 2008, *Transgender EuroStudy: Legal Survey and Focus on the Transgender Experience of Health Care*, ILGA-Europe and Transgender Europe.

76 Fiona David, et. al., 2011, *Gender Diversity in the ACT: A Survey of Trans Experiences*, A Gender Agenda.

### **3 GOVERNMENTAL RESTRICTIONS OF FREED GENDER IDENTITY**

#### **3.1 GENDER IDENTITY AND THE STATE: A FRAUGHT RELATIONSHIP**

A deep and abiding concern for all libertarians surrounds the application and prevalence of coercive methods forcing individuals to undertake activities, or perform roles, inconsistent with their desires, needs, and preferences. In particular, there is a healthy scepticism within the libertarian mindset regarding the ability of political agents to efficiently and effectively substitute their actions for those of otherwise freely acting individuals.

Despite evidence of transgenderism and other forms of gender variation throughout history, there has been a rather chequered history with regard to the treatment of diversity in gender identity by the state. In particular, the state - or, more specifically, that organisational expression of the state which is commonly known as 'government' - has demonstrated a persistent inclination to severely circumscribe the liberties of people embodying allegedly 'deviant,' non-fixed-binary forms of gender identity.

In Western countries there had been known instances of numerous transgender and gender-diverse people incarcerated in insane asylums, particularly prior to the late twentieth century, on account of allegedly displaying 'aberrant' behaviour for living under a gender identity inconsistent with their birth sex.<sup>19</sup>

It is fortunate, at least in the West, that some of these more

19 Kate Bornstein, 2011, 'A Strange Sort of Being' *The Transgender Life of Lucy Ann/Joseph Israel Lobdell, 1829-1912*, McFarland & Co.: Jefferson, NC; Ruth Ford, 2000, 'They 'were wed, and merrily rang the bells': Gender-crossing and same-sex marriage in Australia, 1900-1940', in Graham Willet and David Phillips, eds., *Australian Gay and Lesbian Perspectives 5*, Australian Centre for Lesbian and Gay Research, 41-66.

extreme violations against the expression of gender identity are no longer practised, at least on a broad scale. Even if such claims are upheld, it could not be reasonably asserted that governmental treatment of transgender and other gender-diverse people in all respects is now particularly enlightened.

A contemporary example of the state's continuing antipathy towards practiced conceptions of diverse gender identity has been the systemic abuse and harassment by law enforcement officials, especially police forces, over time.

Transgender and gender-diverse people have been assaulted or imprisoned by police for publicly displaying behaviours, or dispositions, mainly perceived by cisgender people to be 'abnormal' or, to exposit it more dryly, 'disturbing the public peace.' A prominent example of this was the persecution of transwomen (sometimes mislabelled in accounts as 'drag queens' or 'crossdressers') in New York prior to, and during, the iconic Stonewall riots of 1969 which, in turn, catalysed the emergence of the modern gay rights movement.

To be discussed later, the lack of access to employment in formal labour markets, often as a result of discriminatory practices by employers, often leads transgender and gender-diverse people striving to attain incomes through 'black,' and other informal, markets.<sup>20</sup> Detection of activities such as the provision of prostitution services and the sale of drugs, where these are not legalised, can bring forth another situation in which gender-diverse people are victimised by law enforcers:

'The ... lack of access to even the remaining shreds of the welfare system leaves a disproportionate number of trans people in severe

20 Peter Boettke, Christopher J. Coyne and Peter T. Leeson, 2004, 'The Many Faces of the Market', *Journal des Economistes et des Etudes Humaines* 14 (2): 71-86.

resumes of equally qualified job applicants, but which differed only on account of transgender status, were assessed. Transgender job applicants received a lower rate of call-back interviews, devaluation of applicant credentials, and were assigned a lower recommended starting salary.<sup>71</sup>

Finally, some studies undertaken in the United Kingdom have examined the various forms of discrimination which materialise for transgender people as they embark on gender transitioning processes.

According to Whittle et. al., 'transition in a place of work is a major trigger point for experiencing inequality and discrimination. For trans people, discrimination and inequalities seem to occur from the point of transition and not before in their career. ... many trans people have successful careers ... up to the point of beginning to live in their acquired gender – the transition is the point where problems occur.'<sup>72</sup> Rundall and Vecchietti found that many surveyed transgender and gender-diverse people attempted to ameliorate discrimination from other workers by undertaking conscious efforts to 'utilise more determinate and iconic representations associated with their preferred gender,' at least initially.<sup>73</sup>

One of the more astounding features of the employment discrimination against transgender and gender-diverse people is

71 Jill Weinberg, 2009, 'Jane (Formerly Known as John): Labor Market Discrimination of Transgender Individuals', Paper presented at annual meeting of The Law and Society Association, 25 May, [http://citation.allacademic.com/meta/p304633\\_index.html](http://citation.allacademic.com/meta/p304633_index.html).

72 Stephen Whittle, Lewis Turner and Maryam Al-Alami, 2007, *Engendered Penalties: Transgender and Transsexual People's Experiences of Inequality and Discrimination*, The Equalities Review.

73 Em Rundall and Vincent Vecchietti, 2010, '(In)Visibility in the Workplace: The Experiences of Trans-Employees in the UK', in Sally Hines and Tam Sanger, eds., *Transgender Identities: Towards a Social Analysis of Gender Diversity*, Taylor & Francis: Hoboken, NJ, p. 135.

A study of the employment experiences of transwomen in two Midwestern US cities also found that, in their own assessments, workers experienced a loss in workplace status, and were subjected to greater levels of harassment, upon transitioning from male to female. The study author concluded, on the basis of the survey responses, that:

‘transwomen are assumed to be less competent than they previously were as men; through various social cues, transwomen come to understand that their work or opinions are not as valued after their transition. These various cues collectively teach transwomen to align their behaviors with female status beliefs that deem them less capable.’<sup>69</sup>

In 2007, a study of workplace biases by M. V. Lee Badgett and others found that transgender people reported even higher levels of workplace discrimination - constituting such events as retrenchment, denied employment or a promotion, or harassment - than their gay and lesbian counterparts.<sup>70</sup>

An interesting paper presented to the United States Law and Society Association undertook social experiments in which the

poverty and dependent on criminalized work such as prostitution or the drug economy to survive. This, in turn, results in large numbers of trans people being entangled in the juvenile and adult criminal justice systems where they are subjected to extreme harassment and violence.<sup>21</sup>

Last year American transgender woman of colour, Monica Jones, was deported from Australia, and subjected to sensationalist media coverage, on account of being recorded by immigration authorities as a ‘possible threat’ to the Australian community.<sup>22</sup> This adverse recording in the Australian international person movements listings was made as a result of a previous conviction of ‘manifesting prostitution’ in Phoenix, Arizona.

Jones herself has been a notable critic of law enforcement efforts to crack down on prostitution which disproportionately targets transgender sex workers, and which led to mass arrests, imprisonment without charges, and forced religious-based rehabilitation programs.<sup>23</sup>

A final point of contact between people of diverse gender identities and law enforcement sometimes comes in the form of imprisonment, of either short or lengthy terms, for certain criminal acts.

In an important recent contribution, Nathan Goodman noted the elevated levels of violence against incarcerated transgender people, particularly transwomen, arising from prison policies which house

21 Dean Spade, 2006, ‘Compliance Is Gendered: Struggling for Gender Self-Determination in a Hostile Economy’, in Paisley Currah, Richard M. Juang and Shannon Price Minter, eds., *Transgender Rights*, University of Minnesota Press: Minneapolis, MN.

22 ABC Lateline, 2014, ‘Monica Jones fights deportation’, 1 December, <http://www.abc.net.au/lateline/content/2014/s4140059.htm>.

23 Eloise Brook, 2014, ‘Monica Jones: from transgender social worker to national threat’, *The Guardian*, 3 December.

69 Jill Evelyn Yavorsky, 2012, “‘Welcome to Womanhood!’ The Impact of (Trans) Gender at Work’, Ohio State University, Master thesis, p. 63.

70 M. V. Lee Badgett et. al., 2007, ‘Bias in the Workplace: Consistent Evidence of Sexual Orientation and Gender Identity Discrimination’, University of California, The Williams Institute.

transwomen with ciswomen.<sup>24</sup> Compounding the problems of personal safety for gender-diverse prisoners in sex-segregated facilities based on birth-assigned gender, there is a worrying pattern of sexual abuse and physical violence perpetrated against inmates by corrections staff.

Even in public service scenarios designed, at least in theory, to help rather than punish people, discriminatory practices can work against the interests of gender-diverse people, even to the point of engendering very serious harms.

In 1995 African-American transgender woman Tyra Hunter died after being critically injured in a motor vehicle accident.<sup>25</sup> Her passing occurred as a result of emergency service workers on the scene discovering Ms Hunter was male designated at birth (MDAB). The workers ridiculed the still-conscious Ms Hunter, allowing her to bleed profusely in refusing to provide adequate assistance. She passed later from heavy blood loss in a general hospital.

This most tragic episode of discrimination is deeply ingrained within the cultural narratives of the transgender community, in particular, concerning the risks of interfacing, at least in a candid and open manner, with service providers. Many reports suggest, in fact, discrimination in service provision is reflected in the lived experiences of gender-diverse people, for example with regard to access to health services, public housing, and so on.

24 Nathan Goodman, 2015, 'Prison Rape as an LGBTQ Issue', Can't Steer Queer blog, <http://cantsteerqueer.com/2015/01/14/prison-rape-as-an-lgbtq-issue/>.

25 Sarah D. Fox, 1998, 'Damages Awarded after Transsexual Woman's Death: Payout to Mother of Victim of Bigoted Emergency Workers' Negligence', *Polare*, <http://www.gendercentre.org.au/resources/polare-archive/archived-articles/damages-awarded-after-transsexual-womans-death.htm>.

and regions throughout the world, including Australia,<sup>65</sup> Canada,<sup>66</sup> and the United Kingdom.<sup>67</sup>

Against the background of the broader debate about the extent of economic discrimination which exists for other groupings in society (for example, all women), economists in recent years have shown some interest in the labour market experiences faced by continuously employed transgender people, say, before and after their gender transitions.

Schilt and Wiswall surveyed a number of transgender people to assess changes in earnings and employment experiences, before and after gender transitions were undertaken.<sup>68</sup> It was found that, despite retaining the same human capital endowments after their transitions, the average earnings of transwomen fell by about 30 per cent post-transition. By contrast, for transmen their average earnings increased slightly.

Accompanying qualitative evidence reported in the study suggested that transgender women, whose roles were not terminated, experienced a loss of status and an increase in workplace harassment. The surveyed transmen found an increase in respect and authority in the workplace.

65 Murray Couch, Marian Pitts, et. al., 2007, *Tranznation: A report on the health and wellbeing of transgender people in Australia and New Zealand*, LaTrobe University, Australian Research Centre in Sex, Health & Society.

66 Trans Pulse, 2011, 'We've Got Work to Do: Workplace Discrimination and Employment Challenges for Trans People in Ontario', E-Bulletin, 30 May.

67 Stephen Whittle, 'Employment Discrimination and Transsexual People', [http://www.academia.edu/4767212/EMPLOYMENT\\_DISCRIMINATION\\_AND\\_TRANSSEXUAL\\_PEOPLE](http://www.academia.edu/4767212/EMPLOYMENT_DISCRIMINATION_AND_TRANSSEXUAL_PEOPLE).

68 Kristen Schilt and Matthew Wiswall, 2008, 'Before and After: Gender Transitions, Human Capital, and Workplace Experiences', *The B. E. Journal of Economic Analysis & Policy* 8 (1): 1-26.



Of course, inconsistencies between gender markers on government identity documentation - which in many cases cannot be altered in the absence of living 'full time' in one's preferred gender, sterilisation, or surgery - and the lived gender of everyday existence may only embolden employers to discriminate against talented gender-diverse people.

There has been a widespread lack of initiative, to date, by official statistical agencies to specifically match census, let alone economic, data to the gender identity of non-cisgender individuals. It has been speculated that this has been, partly, on account of perceptions that to specifically ask about gender identity would attract negative reactions from (presumably mainly cisgender) survey respondents, with potential implications for the quality of responses.<sup>63</sup> Accordingly, what is known about the extent of unemployment experienced by the gender diversity community has been gleaned, for the most part, from non-official surveys.

The 2011 National Transgender Discrimination Survey found that the rate of unemployment for American transgender people (at about 14 per cent) was about double that for the population as a whole (about seven per cent), with unemployment rates for transgender people of colour reaching as much as four times the national US unemployment rate.<sup>64</sup>

Relatively higher rates of unemployment for transgender and gender-diverse people appear as a consistent trend across countries

63 Mona Chalabi, 2014, 'Why We Don't Know The Size Of The Transgender Population', *FiveThirtyEightLife*, 29 July.

64 Jaime M. Grant, Lisa A. Mottet, et. al., 2011, *Injustice at every turn: A report of the National Transgender Discrimination Survey*, National Center for Transgender Equality and National Gay and Lesbian Task Force, Washington.

As many people with diverse gender identities are fully aware, the malign influence of the modern state does not end with the design and enforcement of policies concerning policing and justice administrative functions, or the provision of welfare. In some important respects, the statist influence over the lives of transgender and gender-diverse people still extend over the extent to which individuals can autonomously exude a command over their own bodies and senses of identity.

The symbiotic relationships between the state and the heavily regulated, and subsidised, medical professions has manifested itself in the pathologisation of diverse gender identity, classified as an instance of 'dysphoria' or, later, a 'disorder.' Notably, as homosexuality was removed from the American Psychiatric Association's *Diagnostic and Statistical Manual of Registered Mental Illnesses*, gender dysphoria (now gender identity disorder) was placed within it.<sup>26</sup>

The interpretation of the expression of diverse gender identities as a medical issue creates circumstances in which general health practitioners and certain medical specialists, particularly endocrinologists, psychiatrists and psychologists, have assumed 'gatekeeping' roles. This, in turn, creates a 'supplier-induced demand' with regard to, say, the provision of expensive hormonal treatments and gender affirmation surgeries for those people who seek to transition gender.

Concerns held by some are that gender-diverse individuals, not all of whom require medical interventions to realise their identity, are drawn into interaction with the medical professions (encouraged, to some extent, by friends and peers within the community) to access certain services. As a consequence of gatekeeping roles, it is argued suppliers may also oblige individuals to perform various

26 Zoe Brain, 2015, 'It wasn't always like this....', A. E. Brain blog, <http://aebrain.blogspot.com.au/2015/01/it-wasnt-always-like-this.html>.

acts (for example, living 'full time' in preferred gender roles), which may not be necessary in every circumstance, as a condition of attaining additional, or more intensive, services in time.

More generally speaking, the conception of diverse gender identities as a psychological 'disorder' by the medical profession, it could be argued, probably contributes to fomenting a great degree of social stigma towards the expression of gender diversity in daily life. For some, this arises by the perception that highly detailed standards of care driven by the medical professions imply an inherent incapacity, in turn suggesting some loss in personal autonomy, on the part of transgender and gender-diverse individuals.<sup>27</sup>

So, the provision of services, and the design and enforcement of regulations, acts in certain ways to limit the freedom of people to identify, to live, and to prosper in their preferred gender. At this juncture, a 'devil's advocate' question might be posed as follows: is there some broad sense in which governmental actions constraining the capacity of individuals to express their gender identity legitimate?

To put this in another way: is there some meritorious weighting procedure which leans towards upholding the safety of the community, say, or some other 'public interest' notion in repressing diversity in gender identity?

The answer to those questions must, simply, be 'no.'

As stated previously, libertarian theorists of individuality stressed that the free conduct of human beings ought to be subject to a 'defeasibility condition' in which the freedom of each is limited

27 C. Jacob Hale, 2007, 'Ethical Problems with the Mental Health Evaluation Standards of Care for Adult Gender Variant Prospective Patients', *Perspectives in Biology and Medicine* 50 (4): 491-505.

with diverse gender identities; as noted recently, 'trans people don't commit suicide because they're trans; they commit suicide because the rest of us don't treat them like people.'<sup>62</sup>

There is a perception, very keenly felt amongst transgender and gender-diverse people, that vigilantism, in the name of ensuring gender conformance, remains commonplace throughout modern society. Such acts render genuine and serious harms toward those people who wish to identify and express their gender.

But even if private aggressions against the person are deemed by 'thin libertarians' to be an event at least meritorious of self-defence responses, it is very notable that such advocates for freedom do not appear to have, as far as it can be readily established, publicly taken on gender-based violence as a keystone issue. This oversight necessitates rectification if the libertarian movement is, at least, to be seen to offer empathetic and genuine solutions for enhancing the liberties of some of the most vulnerable in our communities.

### **4.3 THE DIMENSIONS OF NON-STATE EMPLOYMENT DISCRIMINATION**

The capacity of transgender and gender-diverse individuals to accumulate savings, to be applied later for (as they deem it) appropriate clothing, hormonal treatments and gender affirmation surgeries, and so on, if these are so desired, can be severely limited by the reluctance of employers to hire them. It is notable that such reluctance may even persist in the presence of anti-discrimination legislative protections erected by the state.

62 Mark Joseph Stern, 2014, 'What Drives So Many Trans\* People to Suicide?', *Slate Outward* blog, [http://www.slate.com/blogs/outward/2014/01/28/trans\\_suicide\\_we\\_arent\\_stopping\\_the\\_epidemic.html](http://www.slate.com/blogs/outward/2014/01/28/trans_suicide_we_arent_stopping_the_epidemic.html).

comments, verbal abuse, threatening behaviour, physical and sexual abuse – in the public square.<sup>61</sup>

Transphobic incidents, no matter how isolated they may be, ‘project outwards’ to members of gender diverse communities that individual efforts to realise one’s true, and genuinely felt, sense of gender identity is unwelcomed by a sizeable numerical majority of other members of the community. This, in turn, shapes expectations about customarily accepted behaviours and roles, deleteriously affecting people identifying with diverse gender identities in several, often interrelated, ways:

- limitations of movement: the freedom of movement for gender-diverse people, especially at night, tends to be more limited for fear of encountering instances of random transphobic hate, including the dangerously real, or threatened, vigilante violence of ‘gender policing.’
- social isolation: transgender and gender-diverse people tend to be isolated from others, often for lengthy periods of time, due to ostracism by family, friends, partners, neighbours or work colleagues and by self-directed acts of social exclusion in the interests of keeping oneself safe from harm.
- self-expression delaying or deterrence effects: broadscale community animosity can discourage, often temporarily, but sometimes permanently, attempts by people to gender transition or otherwise assume a gender identity outside of the fixed and binary conventions.
- internalised transphobia: a cultural fear and loathing of diverse gender identities could lead to gender-diverse people possessing low levels of personal self esteem, reinforcing some of the other consequences of transphobic social environments.
- suicide, and suicide attempts: studies have shown a far greater prevalence of suicide, and suicide attempts, among people

61 Lewis Turner, et. al. 2009, *Transphobic Hate Crime in the European Union*, ILGA-Europe and Press for Change.

by the equal freedom of others. However, this condition would not apply to the matters surrounding the freedom of the individual to identity with, and express, their preferred gender.

Returning to Mill, who arguably provided the most resolute case for allowing individuals to freely develop their unique personalities, he propounded a demarcation between individuality of ‘the part of life in which it is chiefly the individual that is interested,’ and society ‘the part which chiefly interests society.’<sup>28</sup>

It is not unreasonable to claim that the process of transitioning gender or, in some other way, assuming a preferred gender identity benefits the individual who undertakes such a course of action, in the most immediate sense. This is reflected in a hefty weight of evidence concerning the greater perceived self-satisfaction and an improved quality of life surrounding the expression of gender identity:

- In the *Journal of Sexual Science*, a study found hormonal treatment reduces the degree of reported bodily uneasiness, and this occurred for transwomen even in the absence of gender affirmation surgery.<sup>29</sup>
- A study in the *Journal of Nervous and Mental Disease* found that the provision of hormonal therapies were associated with greater self-esteem, less severe depression symptoms, and other quality-of-life considerations for transgender people.<sup>30</sup>
- The *International Journal of Sexual Health* recently reported that the dispensation of testosterone treatment for transmen, and undertaking chest reconstruction surgery, was associated

28 Mill, op. cit., p. 141.

29 Alessandra D. Fisher, et. al., 2014, ‘Cross-Sex Hormonal Treatment and Body Uneasiness in Individuals with Gender Dysphoria’, *Journal of Sexual Medicine* 11 (3): 709-719.

30 Audrey Gorin-Lazard, et. al., 2013, ‘Hormonal Therapy Is Associated With Better Self-Esteem, Mood, and Quality of Life in Transsexuals’, *Journal of Nervous and Mental Disease* 201 (11): 996-1000.

with a positive effect on various mental health measures.<sup>31</sup>

- Recent research into the psychological outcomes experienced by adolescent transgender people found that puberty suppression and gender affirmation surgery alleviated gender dysphoria and improved psychological functioning.<sup>32</sup>
- A brief meta-survey of quality-of-life studies for transgender people found most studies reported positive changes for those who undertook transition, either by way of hormonal therapy and/or gender affirmation surgery.<sup>33</sup>

To the extent that human beings have at least a passing interest in the affairs of others, it should stand to reason that there are no sound rationales for social cohorts, however organised including politically, to impede their fellow humans from assuming their gender identity, given the manifest benefits to the individuals concerned in partaking in such self-regarding actions.

There seems a certain strain of argument, especially popular in modern times, that democratically elected governments are obliged to act as delegates for the legal enforcement of attitudes, prejudices, and norms shared by a numerical majority of citizens. In this context, cisgender people are argued to be in a position of legitimately behaving policymakers to enforce conventional gendered norms, privileging a fixed and binary conception of gender identity.

For Mill inhibiting freedom of individual expression, where it

31 Samuel A Davis and S. Colton Meier, 2014, 'Effects of Testosterone Treatment and Chest Reconstruction Surgery on Mental Health and Sexuality in Female-To-Male Transgender People', *International Journal of Sexual Health* 26 (2): 113-128.

32 Annelou L. C. de Vries, et. al., 2014, 'Young Adult Psychological Outcome After Puberty Suppression and Gender Reassignment', *Pediatrics* 134 (4): 696-704.

33 'Quality of Life in Treated Transsexuals', Transas City blog, <http://transascity.org/quality-of-life-in-treated-transsexuals/>.

The violence that is often experienced is the product of a 'bottom-up,' rather than forwardly planned 'top-down,' expression of ill-feeling against those who seek to express their own gender according to their own lights. This proposition is corroborated by anecdotal reports within several studies revealing the often opportunistic nature of violence against gender diversity, in which brutality is inflicted upon gender-diverse people by the mere virtue of their presence among those who prefer others to adhere to conventional gender norms.

Consistent with other studies concerning the sources of perpetration of violence, there is growing evidence that violence against transgender people, for instance serious physical assault, is overwhelmingly perpetrated by people who are known to the victim. Even so, there are also high rates of violence and harassment perpetrated against transgender people by complete strangers, consistent with the idea expressed here of the existence of a perverse emergent order of transphobia.

It is more likely than not that transphobia experienced in public places would be committed, largely but not exclusively, by strangers to the victim. In a survey of hate crimes recorded in the US state of Massachusetts, Gorton noted that the expression of hateful or violent sentiments based on gender identity frequently occur in public places, such as streets, sidewalks, parking lots or garages, or while in transit on a bus, train, or in a taxi.<sup>60</sup> The study also referred to the high rate of animosity toward transgender people expressed by strangers.

A 2009 study of transphobia in the European Union found consistently high degree of harassment – such as negative

60 Donald Gorton, 2011, *Anti-Transgender Hate Crimes: The Challenge for Law Enforcement, The Anti-Violence Project of Massachusetts*, Gay and Lesbian Anti-Violence Fund: Boston.

throughout their lives.<sup>57</sup>

Table 1 summarises self-reported survey evidence of the prevalence of violence perpetrated against transgender people.

**Table 1: Summary of selective self-survey reports of violence against transgender people**

	McGowan (1999)	Reback et al. (2001)	Lombardi et al. (2001)	Witten (2003)	Wyss (2004)	FORGE (2005)	Xavier et al. (2005)	Clements-Nolle et al. (2006)	Xavier et al. (2007)	Dang (2007)
Location	New York	Los Angeles	USA	US and abroad	Not spec.	Mid-west	D.C.	San Francisco	Virginia	USA
Sample	83		84		77	188		392	112	491
MTF			81		121	60		123	34	14
FTM	11				16					6
Other/not specified		244		174	24					52
Sexual assault/rape			13%	15%	86%	28%	*10%		*15%	
Sexual harassment				23%						
Violence "or crime"	33%		27%							
Physical assault/beaten		47%	20%	39%	86%		*15%	36%	*28%	49%
Robbed			14%	*29%						
Objects thrown at you			17%							
Assaulted w/a weapon			10%							
Followed/stalked			23%	41%						
Harassment			56%	48%						*69%
Verbal abuse		80%						83%		

<sup>a</sup> Reflects the fraction of the entire population.

<sup>b</sup> Witten (2003) reported "muggings" specifically, but this statistic was counted into the "robbery" category.

<sup>c</sup> Dang (2007) included "discrimination or harassment" together.

**Source:** Rebecca L. Stotzer, 2009, 'Violence against transgender people: A review of United States data', *Aggression and Violent Behavior* 14: 170-179, p. 172.

Most disconcertingly, the Stotzer study revealed at least 50 per cent of transgender people reported forms of sexual violence at some point in their lifetime. The available surveys indicate that the incidence of forced sex or rape is higher for male-to-female transgender people than for female-to-male transgender people, and that these acts of violence were disproportionately experienced by young gender-diverse people.<sup>58</sup>

Furthermore, there is some suggestion that the rate of sexual violence against transgender people is grossly underreported because of the distinct possibility of victimisation, or re-victimisation, levelled at gender-diverse people by police, health care or social services providers.<sup>59</sup>

57 Rebecca L. Stotzer, 2009, 'Violence against transgender people: A review of United States data', *Aggression and Violent Behavior* 14: 170-179, p. 170.

58 Ibid., p. 172.

59 Ibid., p. 173.

renders no harm to others, by observance of custom or, to the point, by force of politics invoking custom, would represent an unconscionable act:

'Customs are made for customary circumstances, and customary characters: and his circumstances or his character may be uncustomary. ... The human faculties of perception, judgment, discriminative feeling, mental activity, and even moral preference, are exercised only in making a choice. He who does anything because it is the custom, makes no choice. He gains no practice either in discerning or in desiring what is best. The mental and moral, like the muscular powers, are improved only by being used. ... He who lets the world, or his own portion of it, choose his plan of life for him, has no need of any other faculty than the ape-like one of imitation. He who chooses his plan for himself, employs all his faculties.'<sup>34</sup>

Libertarian principles surrounding the primacy of the individual, and the long, unenviable record of statist persecutions, suggests that one take a very dim view of public sector interventions stymieing the assumption and expression of diverse gender identities.

### 3.2 TOWARDS PERSON-CENTRED IDENTIFICATION: BASES AND PRINCIPLES OF GENDER MARKER LIBERALISATION REFORM

An important ongoing restraint upon freed gender identity imposed by the political classes, which affects all people but people in gender diverse communities more acutely so, is the insistence that an individual's gender identity be enumerated on numerous forms of official documentation.

With some of these 'gender markers' mandated on the occasion of an individual's birth – in other words, when the affected individual has no capacity to express their own identity to relevant authorities - the identified gender of a person often

34 Mill, op. cit., p. 122-123. The word 'person,' or suitably similar descriptions, can readily be substituted for the subject pronoun 'he' or possessive pronoun 'his' that Mill frequently uses.

cannot be altered later in life when needed and desired, at least not without effort and expense in many countries.

Before we consider the economic implications of hardship in altering gender markers on identity documentation furnished by the public sector, it would be a useful digression to discuss why it is so that the state possesses an interest in identifying individual human beings (including their gender identity) and their activities.

One of the better recent treatments of this issue in recent years has been provided by James C. Scott, in his 1998 book *Seeing Like A State*. For Scott, the emergence of practices to identify people has been part and parcel of systemic political projects 'to make society legible, to arrange the population in ways that simplified the classic state functions of taxation, conscription, and prevention of rebellion.'<sup>35</sup>

The techniques employed by the state to identify individuals have varied over time, all of which involve differing degrees of intrusion upon personal privacy. These include: an insistence that individuals assume publicly known last names; the identification of fixed residential addresses; the assignment of birth and death certificates to individuals; issuance of identity cards and passports; the provision of reference numbers to individuals facilitating taxation, transfer payment and service provision episodes; and rendering photographs, fingerprints, and DNA profiles of individuals.<sup>36</sup>

To be sure, government-prescribed identification, and associated identity documents, has provided those citizens who have held

35 James C. Scott, 1998, *Seeing Like A State: How Certain Schemes to Improve the Human Condition Have Failed*, Yale University Press: New Haven and London, p. 2.

36 *Ibid.*, p. 71.

Whilst it is generally understood, at least within queer communities, that the incidence of violence perpetrated against transgender and gender-diverse people is relatively higher than for those identifying as non-heterosexual, transphobic violence itself is typically not the product of centralised or deliberative design by perpetrators, formally and collaboratively organised in a common cause to enforce the fixed and binary gendered social construct.

The available statistics concerning the extent of violence against people of diverse genders is as damning as it is staggering, even in this modern age purportedly widely subscribing to the virtues of diversity and inclusion.

Reflecting the promiscuous degree of vigilante violence waged against those seeking to express their own gender identity, transgender and gender-diverse communities around the world have set aside 20 November of each year to memorialise those people killed as a result of transphobia. In addition, gender diversity activist groups maintain databases recording the numbers of transgender people murdered by vigilantes seeking to eliminate expressions of gender variation in the community.

According to the 'Transrespect versus Transphobia Worldwide' project, preliminary records suggest over 1,600 transgender people have been murdered in 62 countries since 2008.<sup>56</sup> Most homicides have been recorded in the Americas.

Reviewing a series of data sources chronicling the extent of abuse and violence against transgender people in the United States, Rebecca Stotzer found that 'violence against transgender people starts early in life, that transgender people are at risk for multiple types and incidences of violence, and that this threat lasts

56 Transgender Europe, 'TDOR 2014 update', [http://www.transrespect-transphobia.org/en\\_US/tvt-project/tmm-results/tdor-2014.htm](http://www.transrespect-transphobia.org/en_US/tvt-project/tmm-results/tdor-2014.htm).

impression of representativeness, thin libertarianism conveys the sense that the entire *corpus* of libertarian thinking, and the purveyors of such thinking, has nothing to say about gender identity issues.

This view is mistaken, and is, sadly, one which libertarians have propagated - either through a deafening silence about the real and detrimental consequences of cultural, economic, legal, political and social norms privileging the fixed and binary gender codes; or, even worse, hostility toward the expression of concerns by gender diversity communities as somehow a nefarious conspiracy by 'gender radicals' to foist a liberty-ennervating 'political correctness' upon the wider population.

These misconceptions need to be put to rest, once and for all.

It is an incontrovertible fact that the ability to freely express one's own sense of gender identity is a core libertarian issue, and that libertarians should stand in solidarity with gender diverse people in tackling obstacles toward their self expression.

Given the widespread effects of both state controls and civil societal oppressions in inhibiting gender diversity, libertarians should take a lead in proactively redressing stifling cisgender privilege in all of its forms, and in ways which honour its venerable traditions of equality, liberty, and justice for all human beings.

## **4.2 THE DIMENSIONS OF NON-STATE VIOLENCE**

The most pernicious aspect of the perverse emergent order affecting the wellbeing of gender-diverse people is the projected effects of isolated, but all too frequent, extra-legal violent acts mainly by cisgender individuals against the identification and expression of gender diversity.

them with various legal privileges, and the ability to access publicly-provided payments and services. Similarly, as noted by Brumberg et. al., identification enables governments to collate statistics concerning the planning, management, and evaluation of health programs, especially catering for infants.<sup>37</sup>

Identification methodologies have, in their broadest guises, served as mechanisms by which the agents of the state could mould aptitudes and dispositions concerning how individuals are to interact with the state, and even with each other:

'identity documentation is essential for the operations of the police state as well as the welfare state, the fortress state as well as the immigrant state, and the totalitarian state as well as the democratic state. In other words, the documentation of individual identity can serve both liberatory and oppressive ends, for instance, by enabling transactions among people at opposite ends of the earth and by enabling governments to locate and persecute members of stigmatized groups.'<sup>38</sup>

The codification of gender identity, or 'gender markers,' are prevalent in most forms of official government identity documentation and, as numerous gender-diversity activists have noted, the identification of 'male' or 'female' markers on a birth certificate remains a particularly crucial matter in many regards.

A birth certificate invariably serves as a mandatory form of identification required by most, if not all, government agencies and numerous private employment and service providers (e.g., financial institutions, real estate agents, training providers, etc.), with copies of birth certificates taken and used in conformity with their own administrative protocols.

37 H. L. Brumberg, D. Dozor and S. G. Golombek, 2012, 'History of the birth certificate: from inception to the future of electronic data', *Journal of Perinatology* 32: 407-411.

38 Laurie Shrage, 2012, 'Does the Government Need to Know Your Sex?', *The Journal of Political Philosophy* 20 (2): 225-247, p. 228.

The reality is that for gender-diverse people many gender markers are inconsistent with the status of the lived gender under which they perform their daily routines and obligations in life. The implications of this reality are significant.

Altering the gender marker on official documentation is invariably a laborious and costly process, in which the person whose gender identity needs to be corrected typically undergoes the embarrassment and humiliation of having to explain to a government official, often within hearing range of others (mainly cisgender people), the intention to alter relevant gender markers.

In many countries the ability of gender-diverse individuals to alter their gender markers is entirely conditional on their having undertaken invasive, typically irreversible and almost always expensive, gender affirmation surgical processes. Existing laws in various European countries, for example, force people seeking to alter their documented gender identities to undergo inhumane sterilisation procedures.<sup>39</sup>

Such government policies serve as an insidious barrier against the realisation of a freed gender identity for all people. This matter also greatly affects genderqueer people, and those who do not wish to have any gender identity ascribed to them whatsoever, since the option to appropriately alter their gender markers on public sector identification documents are simply unavailable.

In an important recent contribution, state-captive Chelsea Manning referred to the difficulties presented by the administrative regime of gender markers applied to government-issued identification and other documents. To quote her at length:

39 Tris Reid-Smith, 2013, 'Trans people forced to be sterilized across Europe', Gay Star News, 30 April.

Elizabeth Tate recently stated:

'If we want people to live free, we must realize that trans folks are always in danger of aggression from other individuals and the state itself. It is not a political issue at all. This is an issue of human lives. This is an issue that, if we do not take it upon ourselves to learn and listen, will continue. We must care not just because we are libertarians, but because we are human, and because most of us will never have to face these dangers. If we ever want people to be free, we have to care about the people society leaves out the most. This means more than just advocating for policies that help trans folks. It means challenging ourselves to release preconceived notions of gender being static and accepting trans folks as they identify. It means calling out transphobic or hurtful language we hear around us and offering vocal support to trans folks. It means listening to the voices of trans folks and amplifying them, instead of trying to speak for something we have never experienced.'<sup>55</sup>

The perspective adopted in this paper is that libertarianism should not be typecast as merely a dry, disembodied system of logical deduction merely attempting to distinguish between what is, and what is not, legitimised coercion.

As amply illustrated through its long and distinguished intellectual history, libertarianism represents a broader cast of mind seeking to enhance the life of each person, and to extend to them maximum respect for their dignity, freedom, and individuality. This must include the dignity, freedom, and individuality inherent in the ways in which people identify with, and express their, gender identity, if libertarianism is to maintain some semblance of relevance to people's lives.

As numerous transgender and gender-diverse people (as have members of other oppressed minority groups) have pointed out, libertarianism in its thin rendition appears both dismissive and ignorant of the difficulties experienced throughout daily life for people of non-cisgender identities. Projecting out a false

55 Elizabeth Tate, 2015, 'Trans Lives Matter.', Students for Liberty blog, <http://studentsforliberty.org/blog/2015/01/10/trans-lives-matter/>.



their own efforts to reinforce fixed and binary gender norms.

Non-state coercion powerfully limits freedom of expression, identity, movement, and speech for people in diverse gender communities, and places severe constraints upon people's freedom to accumulate incomes and properties and to build social networks.

The consequences and implications of non-state actions promoting cisgender supremacy are just as debilitating in their effect as statist actions, and exert similar outcomes by way of an expunging of individual freedoms, liberties, and rights. Moral exhortations in favour of gender norms supportive of fixed and binary conceptions of identity are, for all intents and purposes, equivalent to explicit government regulatory edicts, or other modes of statist intervention, similarly favouring the fixed, binary gender norm.

There are similarities between the civic and political enforcement of fixed and binary gender conventions, and those patriarchal norms privileging malehood over femalehood. With respect to the latter concern, Grant Babcock further adds that 'gender roles are learned when we are children and continually reinforced as we grow. Failure to conform to them is met with emotional abuse, or, as a last resort, physical violence, first at the hands of our parents and, later, also our peer group. Libertarians will recognize many parallels between this process and the way in which people are socialized into viewing their obedience to a government as an integral part of their identity.'<sup>54</sup>

In an impassioned plea for libertarians, and for all people, to respect the inherent right of people to simply be themselves and to go about their lives peaceably, the trans ally libertarian

54 Grant Babcock, 2012, 'Libertarianism, Feminism, and Nonviolent Action: A Synthesis', *Libertarian Papers* 4 (2): 119-138, p. 132.

'most people who are cisgender ... focus too much on the administrative, legal and medical aspects of trans identity. Such a focus on these institutional definitions of gender is constricting, and too often it leads to difficult obstacles for most trans people. Take something as basic as obtaining photo identification. Many people need photo ID for their workplace. You need one to drive, you often need one to vote ... For many in the trans community, just applying for basic identification documents is a hostile experience. You're told you don't belong because you don't fit into one of the tiny boxes offered by the system. ... In the United States, the UK and most of Europe, there are only two options available for gender designation on government-issued identification documents: male and female. As a result, trans people are assumed to have a gender that aligns with the sex they were assigned at birth – that is, male for trans women and female for trans men – and those not conforming to either of those choices are assumed not to exist. So trans people are forced to either use a document that does not reflect their identity or to spend the time, effort and money necessary to alter such records. Both situations are frustrating, embarrassing and can expose us to humiliation, ridicule and even violence.'<sup>40</sup>

For some, the underlying presumption surrounding the glacial pace of reform in this area rests on 'the myth that transgender people do not exist. ... When ID issuing agencies refuse to change the gender marker on an ID, they are operating on the idea that birth-assigned gender should be permanent and no accommodation is necessary for those for whom such an assignment does not match their lived experience of gender.'<sup>41</sup>

As shall be described in further detail below, inconsistencies between officially recorded gender identity and lived gender identity can come at a very great cost to those embracing their gender diversity, most notably in the form of economic discrimination in employment.

The interaction of policies allowing for gender markers to be

40 Chelsea E. Manning, 2014, 'I am a transgender woman and the government is denying my civil rights', *The Guardian*, 8 December.

41 Dean Spade, 2008, 'Trans Formation', *Los Angeles Lawyer* (October): 35-41, p. 36.

changed can, in some countries, interact with other policies and legislation in malignant ways, for example effectively aggravating the extensive social exclusion that many transgender and gender-diverse people often experience during their transitioning phases.

Cases in Australia and Europe, to the extent that marriage equality arrangements do not apply, have revealed that married people seeking to be legally recognised in their true gender identity must divorce their partners to ensure recognition.<sup>42</sup> This is an entirely counterproductive policy, in that people are obliged, by virtue of the effects of policy interaction, to forgo their most intimate relationships during the exact period of time when maintaining relationships are most intensely prized.

Several principles have emerged which would serve to remedy gender markers on identity documentation reflecting the preferences of cisgender people, to the exclusion of transgender and gender-diverse people seeking to express their identity in their own ways. These principles include:

- The alteration of gender markers are person-centred, in that the resultant change to official documentation reflects a self-defined identity held by the individual rather than that verified or determined by others (e.g., authorising bureaucrats, medical examiners).
- Available markers allow for more than the conventional binary 'male/female' gender identity options to be shown on identity documents, allowing a broad range of gender-diverse people (and intersex people) to have their preferences reflected in documentation. This may include the removal of gender

42 Scott Roberts, 2014, 'European Court of Human Rights confirms forced divorce of trans people is legal', PinkNews, 17 July; Elias Jahshan, 2014, 'Bills to end 'forced trans\* divorce' introduced in NSW, SA and Tas parliaments', Star Observer, 16 October;

An alternative strand of thinking within libertarianism, more commonly associated with the old American and English classical liberals, argues for a 'thick libertarian' approach toward assessing the merits of human interactions in various contexts.

Under this approach, it is conceived that the case for freedom is broader than that which is strictly concerned with the extent to which the state circumscribes the scope of individual conduct. Here, it is implored that libertarians should be equally concerned with non-state forms of domination and subjection of individual human beings, on whichever grounds such practices are rationalised.

Thick libertarianism, in other words, concerns itself about addressing violations of individual liberties that do not solely, or at least directly, owe their origins to public sector interventionism. There are also grounds for libertarians, in this view, to propound solutions countering non-state prejudices and hatreds. A fairly representative account of this viewpoint has been provided by American libertarian activist Cory Massimino:

'Put simply, libertarians are for one overriding principle: liberty. This principle applies to situations involving the state and situations that don't. Being concerned about non-state injustices in addition to state created ones strengthens our commitment to liberty. It means libertarianism is about more than anti-statism.'<sup>53</sup>

To be discussed in greater detail below, transgender and gender-diverse people not only confront frequent restrictions of their liberties at the hands of the coercive state, but must contend with discrimination, hatred and even violence meted out by primarily cisgender people, acting on their own volition and in

March.

53 Cory Massimino, 2014, 'Libertarianism is More than Anti-Statism', Center for a Stateless Society, 8 April.

extent of governmental intervention ought to be extensively minimised, if not abandoned altogether.

Now, in some quarters, the thin libertarian strand of argumentation has been used to justify claims that individuals can personally subscribe to views, such as homophobia, racism, sexism, and transphobia, which might be regarded as morally repugnant to others.

One of the chief promulgators of this line of thinking, the infamous but niche figure Hans-Hermann Hoppe, suggests that individuals are free to exclude gays, lesbians, immigrants, and others, from their conception of the 'polite society,' insofar as the NAP is not violated by virtue of coercive public sector actions.

Further, in the conduct of their own affairs the thin libertarian might conceive it is not illegitimate for individuals to exclude from their economic or social affairs those they consider unworthy of due or equal consideration, for as long as such exclusionary practices are not applied forcefully. For instance, a men's clothing retailer could refrain from selling male clothing to a transman, and this would be regarded as appropriate according to thin libertarian ideals.

In a critical assessment of the thin libertarian disposition, Jeffrey Tucker described that, for thin libertarians:

'what's impressive about liberty is that it allows people to assert their individual preferences, to form homogeneous tribes, to work out their biases in action, to ostracize people based on "politically incorrect" standards, to hate to their heart's content so long as no violence is used as a means, to shout down people based on their demographics or political opinions, to be openly racist and sexist, to exclude and isolate and be generally malcontented with modernity, and to reject civil standards of values and etiquette in favor of antisocial norms.'<sup>52</sup>

52 Jeffrey Tucker, 2014, 'Against Libertarian Brutalism', The Freeman, 12

markers from identity documents.

- Changing gender markers can be readily undertaken by those individuals who choose to partake in such amendment, without recourse to any of the following actions or procedures: hormonal therapy, sterilisation or gender affirmation surgeries; a medical diagnosis of 'gender dysphoria' or 'gender identity disorder;' a requirement to live continuously or permanently in one's gender identity; and/or divorcing a partner in marriage.<sup>43</sup>

It is against these principles that policy efforts to liberalise gender marker and similar documentation policies, affecting the circumstances and interests of those who subscribe to diversity in gender identity, can be assessed.

### **3.2 GENDER MARKER LIBERALISATION REFORM: SOME RECENT CASES**

Although the pace of change has been slow and uneven around the world, there have been some encouraging, albeit small-scale, instances of gender marker liberalisation, with regard to the treatment of gender markers which could serve as template for practical reforms elsewhere.

In 2012 Argentina implemented path-breaking reform allowing people to record changes to their gender, along with changes in first name and recorded image, on the likes of birth certificates, national identity cards and passports without the need to prove surgical procedures, hormonal therapies or psychological or medical treatment has taken place.

Winning overwhelming approval through the Argentine legislature, the opening passages of the Gender Identity and

43 Open Society Foundation, 2014, *License To Be Yourself: Laws and advocacy for legal gender recognition of trans people*, p. 9.

Health Comprehensive Care for Trans People Act ('Gender Identity Law') is instructive since it expresses aspirations regarding an individual's fundamental determination to express their own gender identity:

'Article 1 – Right to gender identity. All persons have the right, (a) To the recognition of their gender identity; (b) To the free development of their person according to their gender identity; (c) To be treated according to their gender identity and, particularly, to be identified in that way in the documents proving their identity in terms of name/s, image and sex recorded there.'<sup>44</sup>

The Gender Identity Law followed initiatives in Argentina to enable partners of the same gender to marry each other, which effectively removed the 'forced divorce' problem faced by married individuals who were transitioning gender.

Denmark has also enacted regulatory reform in which legal gender identity recognition is grounded in the self-determination of people whose gender is identified in governmental documentation, rather than on the basis of medical intervention or third-party opinions.

Applicable to people aged at least 18 years, and a six-month waiting period for reconfirmation of an initial application to change the gender marker, this change has been hailed as one which acknowledges 'that trans people are the only experts about their own gender identity but protects as well their human dignity by not stigmatising them as mentally disordered.'<sup>45</sup>

In Australia, the Australian Capital Territory adopted similar legislative change conducive to greater self-determination in gender identity. In 2013 the ACT removed the requirement for

44 Transgender Europe, 'Argentina Gender Identity Law', [http://www.tgeu.org/Argentina\\_Gender\\_Identity\\_Law](http://www.tgeu.org/Argentina_Gender_Identity_Law).

45 Transgender Europe, 2014, 'Denmark goes Argentina! Denmark passes best legal gender recognition law in Europe', TGEU Statement, 11 June.

## **4 NON-GOVERNMENTAL RESTRICTIONS OF FREED GENDER IDENTITY**

### **4.1 'THICK' VERSUS 'THIN' LIBERTARIANISM DEBATES, AND ITS RELEVANCE TO GENDER IDENTITY**

A critical debate within libertarian circles today, of great import for the wellbeing of diverse gender people today, relates to what extent should activities undertaken by individuals and groups be deemed as illegitimate from the philosophical vantage point of maintaining conditions for the exercise of liberty to its greatest extent possible.

Some advocates for freedom promote what has been described as 'thin libertarian' arguments, in which it is conceived only acts of aggression against the person, or their properties, can be deemed as coercive acts, thus warranting their prevention (including through means of self-defence). A reasonably representative account of these ideas had been expressed by Walter Block:

'I am a staunch thin or pure libertarian. For me, the correct (Rothbardian) libertarianism is firmly predicated on the non aggression principle (NAP): the law should prohibit the initiation of violence against innocent people and their property. That is it. That is entirely it. There is no more to thin libertarianism, other than implications of this basic axiom; well, that's quite a lot.'<sup>51</sup>

For many who adhere to the NAP construct, the organisational apparatus of the state (i.e., government) are regarded as the most obvious, indeed sole, entity whose applications of force - fiscal, regulatory, and even physical - violate peaceful, voluntaristic interactions between individuals. Challenging the statist exertion of force, thin libertarians contend such actions violate peaceful, voluntaristic interactions between individuals and, thus, the

51 Walter Block, 2014, 'Both Left and Right are Guilty', LewRockwell.com, <http://www.lewrockwell.com/2014/05/walter-e-block/pure-libertarianism/>.

In the case of birth certificates, Spade contends a public health case could be made to record the biological sex (presumably, in cases where that can be reasonably identified) of an individual at birth but such records could be maintained by relevant government agencies and not presented on a birth certificate:

'It might be argued that recording gender as one of the vital statistics collected at birth—allowing the government to know what sex is being assigned at birth in the population as a whole—could yield significant data for tracking health issues. However, even if that information is useful at the population level, does it still need to be applied at the individual level? Perhaps birth gender could be reported with statewide vital statistics but not marked on birth certificates that stay with the individual for life as an identity verification document.'<sup>48</sup>

Laurie Shrage has also maintained a sceptical view about the desirability of gender markers presented on government identity documents: 'the methods and procedures currently in use in the U.S. and elsewhere for determining a person's legal sex involve violations of medical privacy and equal treatment, and are based on erroneous and outdated ideas about sex determination, differentiation, and development.'<sup>49</sup>

Importantly Shrage notes due to a more hospitable climate toward people of different races, racial background is no longer incorporated into identity documents or, at the very least, individuals have been freed by the state to self-identify their racial background for the purpose of identification.<sup>50</sup> So, the great litmus test for greater acceptance, respect, and toleration of diverse gender identities should now be to what extent gender is no mandatorily presented, or that transgender and gender-diverse people be freed to identify their own gender, on identity documents.

48 Ibid., p. 806.

49 Shrage, op. cit., p. 246.

50 Ibid., p. 234-235.

gender affirmation surgery for people who seek to alter the gender marker on their birth certificate. It also permitted the creation of another gender-identity category (labelled 'X') to be recorded on a birth certificate, for the benefit of gender-diverse and intersex people if they so elect to use it.

More recently, other countries and regions around the world have either implemented, or are actively investigating, changes to liberalise gender marker alteration procedures on official documents. These locations include Israel, Malta, and the US state of New York, among others.

For too long, transgender and gender-diverse individuals have borne the brunt of ill-treatment in ways which have not ever been extended to cisgender people. As noted previously, the expression of individual identity through gender diversity has been stifled through a mix of discriminatory government policies and practices, including institutionalisation, police violence, and regulatory approval of medical pathologisation, among other things.

The ongoing interest of the state in the identification of individuals is another branch of the regime that, in effect, serves to repress diverse gender identity in modern societies. Indeed, it is has been astutely observed that, despite oft-stated political assurances, 'formal systems and protocols for ordering persons by sex and gender have changed very little.'<sup>46</sup>

For people subscribing to diverse gender identities, the obstinate nature of political disposition toward the marking of gender on public sector identification documents is, thankfully, beginning to change. But it would be disingenuous to suggest, as some defenders of the status quo may be prone to do, that the suggested reforms mentioned here, which would assist in the

46 Shrage, 2012, op. cit., p. 226.

movement towards a freed gender identity, are somehow lavish demands for special treatment.

### **3.3 ARE GENDER MARKERS EVEN NECESSARY?**

The modest suggestions posed here are, in the end, firmly within the bound of the time-tested libertarian agenda of ensuring equality of treatment under the law: cisgender people are readily accommodated under existing gender-identification protocols, whereas broadscale conceptions of gender diversity are not catered for in any satisfactory way.

In the absence of liberalisation, transgender people, and gender-diverse people in particular, are obliged to accept a fixed and binary codification of gender that is thoroughly ill-fitted with their needs. To the extent that identity documents furnished by the public sector are, in effect, treated as 'golden tickets' for employment and service access, a consequent lack of flexibility over altering gender markers powerfully serves to privilege cisgender people over all others.

In addition, liberalising gender markers could serve as a pivotal opportunity to erode, or even break, the symbiotic regulation-medical relationship which, in many jurisdictions around the world, still encourages the assumption of unnecessary medical treatments as a condition of changing gender markers on identity documentation.

To the extent that gender markers on public-sector identity documentation remain a policy imperative (and that proposition, alone, is highly debateable), enabling people subscribing to diverse gender identities to have their various identities easily and readily identified, and legally recognised, is nothing short of a libertarian social policy imperative in our time.

But in honouring the ideal of a freed gender identity it is necessary to go one step further and to ask: are gender markers on governmental identity documents even needed? Indeed, there is certain poignancy beneath this question in that gender markers are used to systematically discriminate against the assumption and expression of diverse gender identities. As Dean Spade put it, in a paper examining developments in United States gender marker policies:

'Certainly, the proposal to reduce medical evidentiary requirements in gender reclassification policies in favor of self-identity and/or to create a standard policy nationally would do a great deal to eliminate some of the worst consequences of the incoherence of the current policy matrix. The negative impacts on transgender people, as well as the confusion caused in administrative contexts would be reduced. However, to imagine only these reforms is to miss the greater insight that this matrix of policies allows, and the larger questions it invites.'<sup>47</sup>

Spade suggests that it is not entirely necessary to maintain gender markers on various forms of identification. The very process of gender transitioning, or an assumption of a gender status not consistent with fixed binary norms, indicates that gender is not a stable category of personal identification. Further, there are significant differences in legal provisions and rulings applied by the various agencies of government, some of which alter gender markers upon evidence of medical or psychological treatments and others not.

Revolutionary changes in the way in which identity information has been recorded, and the declining costs of retaining such information, would also suggest that gender markers are not necessary for printing on official documentation that people use as proof of identity to access services, work, and so on.

47 Dean Spade, 2008, 'Documenting Gender', *Hastings Law Journal* 59: 731-842; p. 802.