

Etat Civil et Personnes “Trans”

Droits non respectés et violation de la vie privée

Vital records and Transgender people

Contempt for their lives

October 2012

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There is a population in France and in many other countries that is stripped by the State of many of its fundamental rights – some for three to nine years and others for life – without any justification.

The consequences of this de facto deprivation of rights and violation of equality before the law are sometimes tragic, leading to a disastrous cycle of marginalization and fragilization from which many people never fully recover. The worst hit are those with little education or professional experience, with low incomes, who are isolated and who have suffered rejection from their families.

These people are commonly labeled “transgender” or “transsexuals”.

Introduction

What's new?



The condition that we are talking about is not a recent invention. It has existed in all cultures, since ancient times.

- **North Africa, Middle Ages:**

“The worst thing about it is having to share quarters (in certain inns in Fez, Morocco) with certain individuals, that are a sort of breed known as el-chena. These are men that dress like women and wear women’s finery. They shave their beards and are delighted to imitate women’s way of speaking. What am I saying, in their way of speaking? They will even sit down to spin! Each of these abject creatures has a concubine and behaves with him just like a wife does with her husband.” (Hassan Al-Wazzan (Leo Africanus - 1495 – 1548), History and Description of Africa)

- **Other cultures, other examples:**

Berdaches (North America), Inuits (raising of a child, until puberty, as a girl or a boy depending on the needs of the family unit, taking into account a deceased ancestor), **Katoeys or Khatoeys (Thailand), Fa’afafines (Samoa), Hijras (Indian subcontinent), Xaniths (Oman), Mahus (Pacific Isles), Masisis (Haiti)**

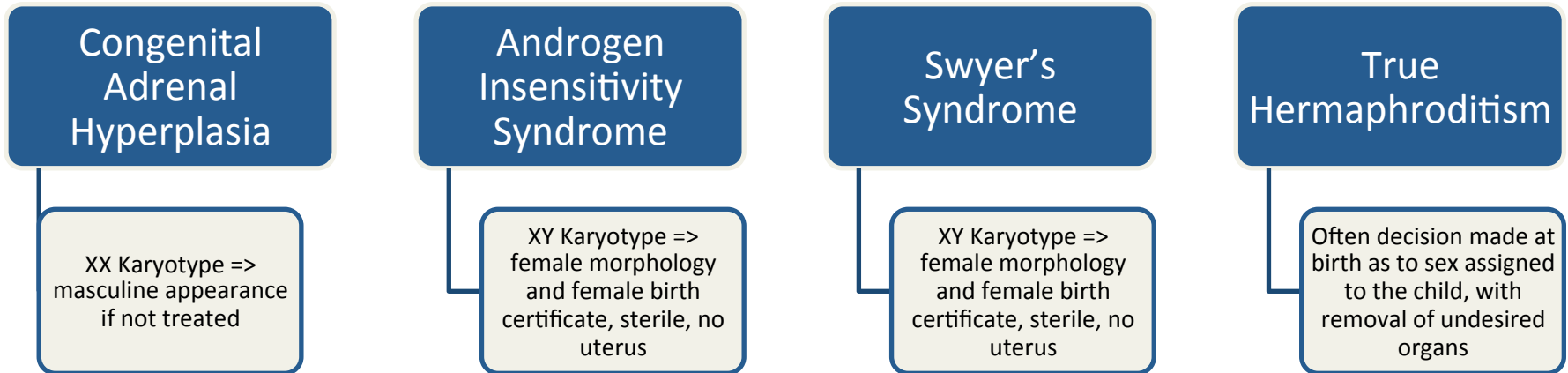


The only modern innovation: the medical capacity to perform a physical transformation, as can now be done for many other conditions that had been seen up until recently as untreatable

Introduction

What's the difference?

We can mention at this point people that are “*intersex*”, and specifically four types that are rare, but exist in France and elsewhere:



What's the difference?

a deliberate decision by the person to escape suffering that they did not choose

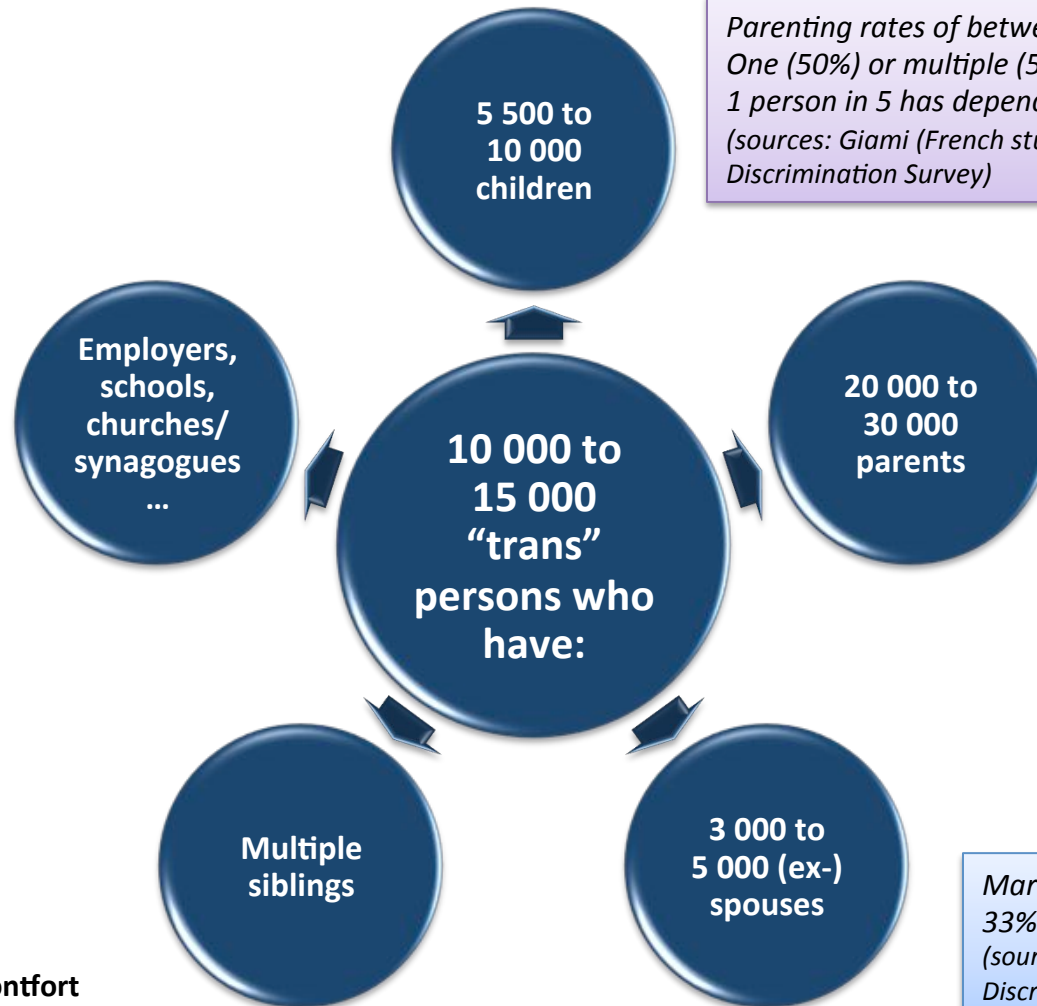
An identical result:

men with XX karyotype and women with XY karyotype

Introduction

A social fabric of tens of thousands of people

- 50 000 to 75 000 people in France are directly or indirectly concerned by these issues:



*Parenting rates of between 35 % et 39 %
One (50%) or multiple (50%) children
1 person in 5 has dependent children during their transition
(sources: Giami (French study); National Transgender Discrimination Survey)*

*Marriage/civil union rates of between 33% and 38%
(sources : Giami; National Transgender Discrimination Survey)*

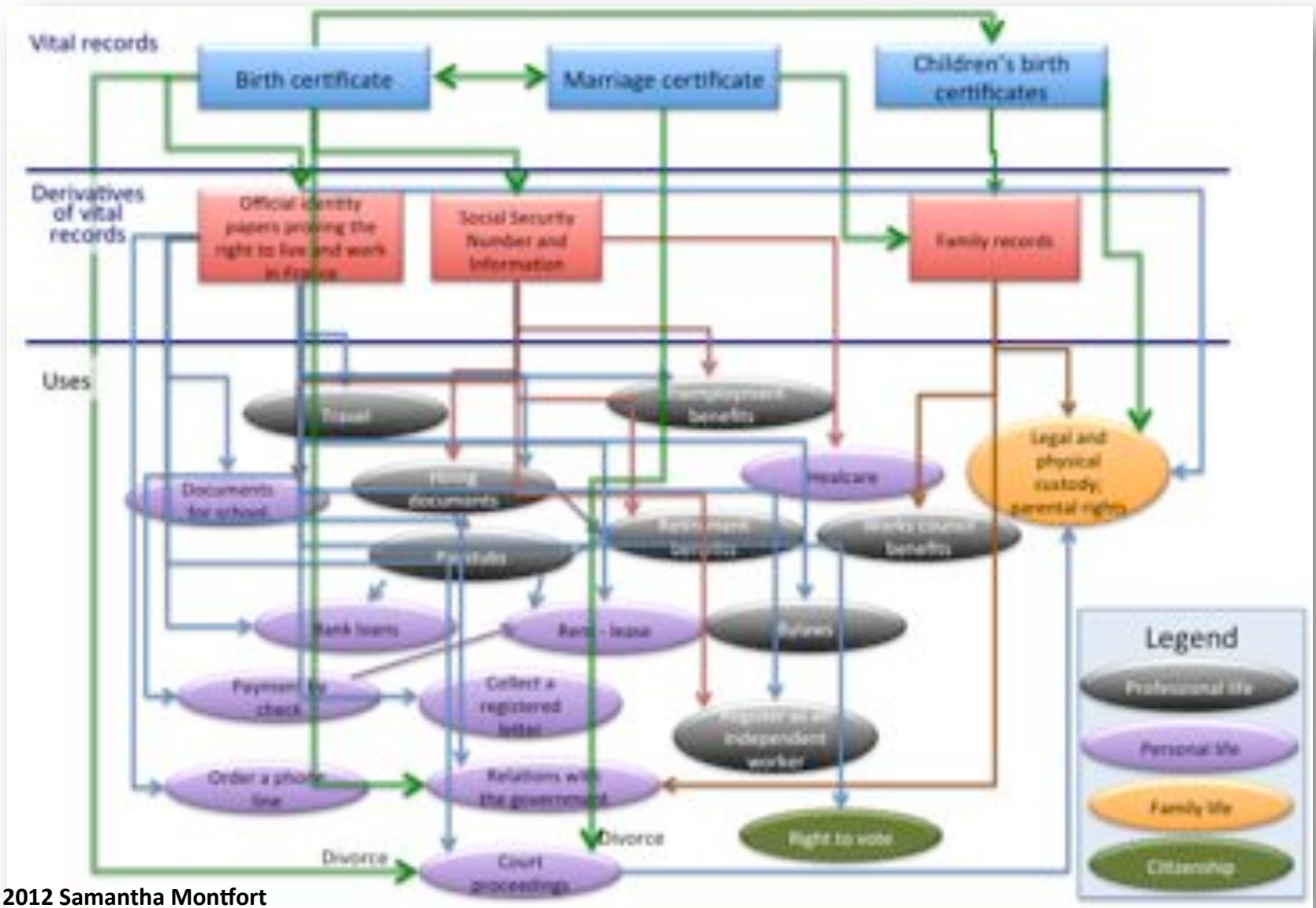
Why this white paper?

A result of our observations

- We provide assistance to “trans” people during their transitions.
- Our observation: the legal framework...
 - ... is far too often an aggravating factor in the difficulties that these people encounter both during their transitions and afterward.
 - ... is a deciding factor in the marginalization of many of them.
- Our decision: publish this white paper in order to help improve the situation for these people on the ground

Why this white paper?

The “Gordian Knot” of vital records



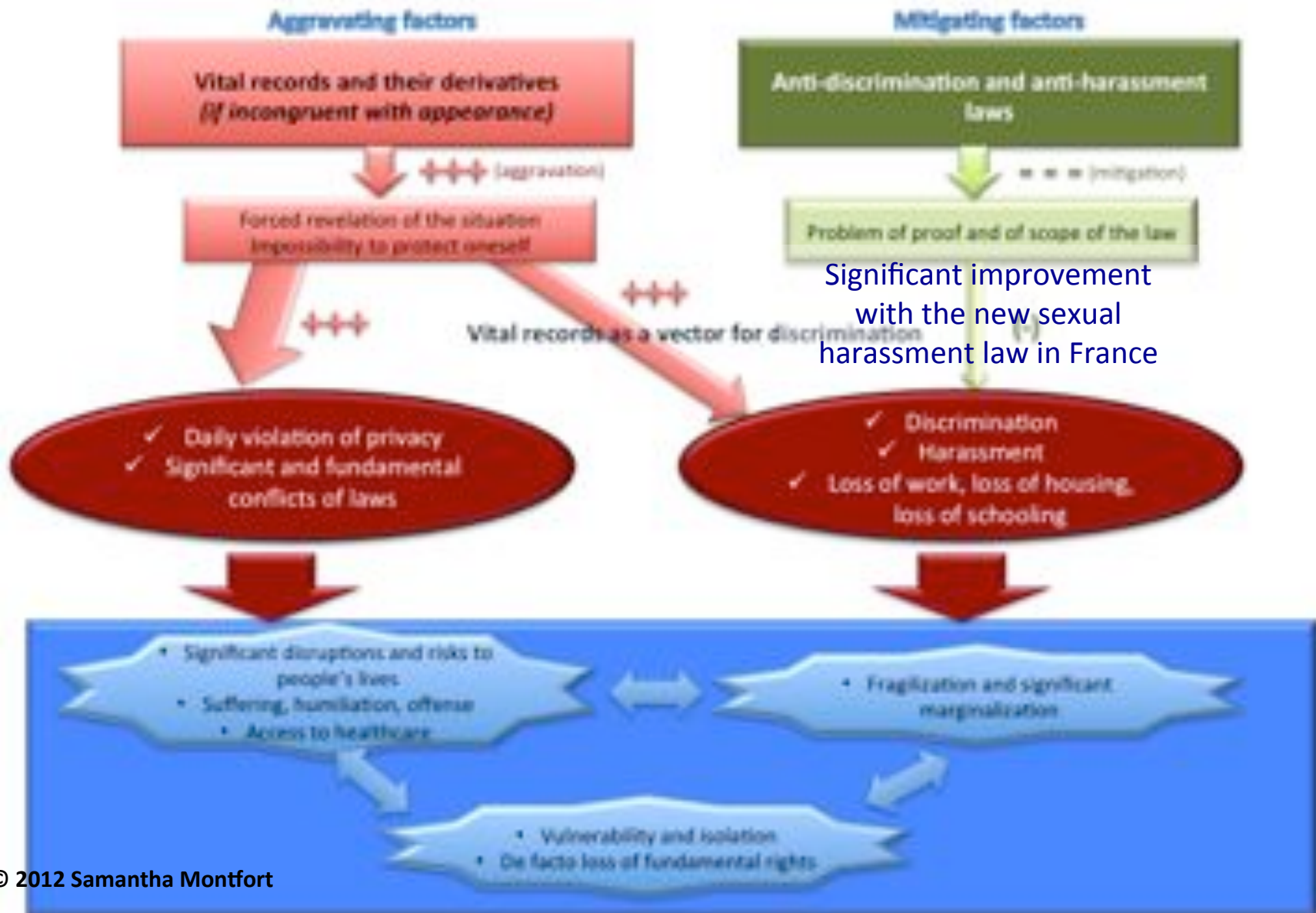
Why this White Paper?

Four penalizing factors



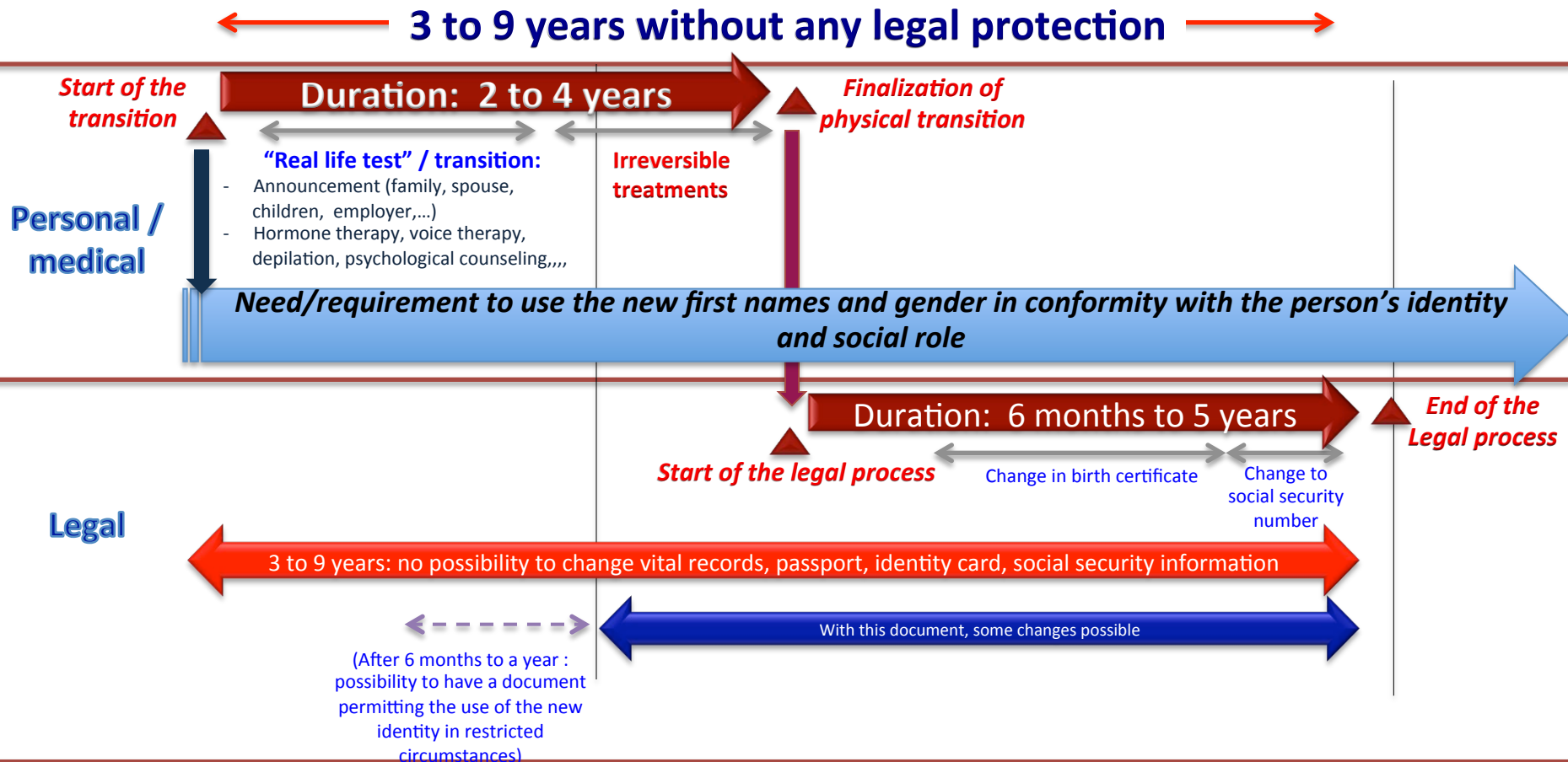
Why this White Paper?

Double trouble: vital records and discrimination



Why this white paper?

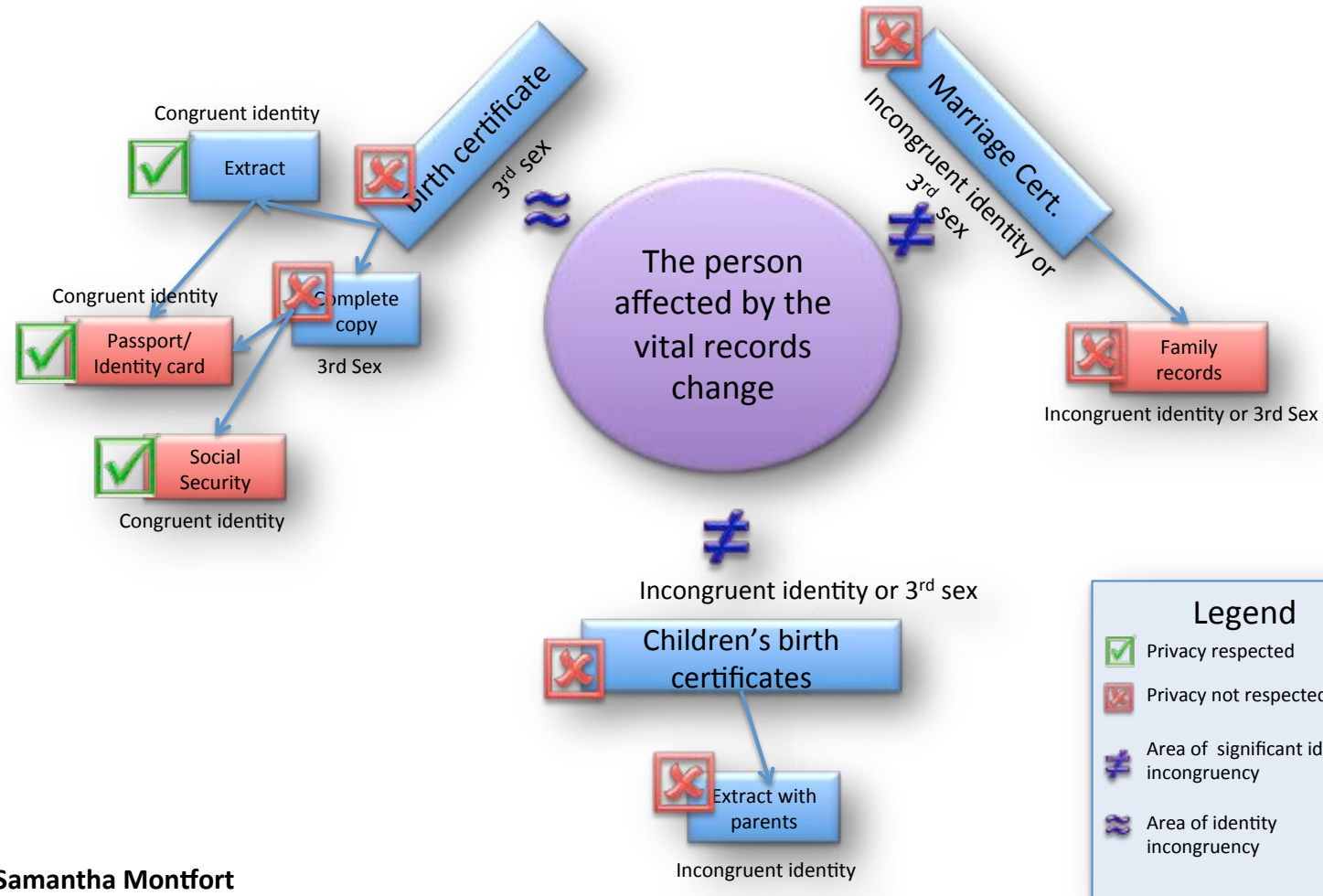
Significant disruption for three to nine years...



Why this white paper?

... with the creation of a “3rd Sex” at the end of it all

A 3rd sex in the vital records: the person is neither completely one sex nor the other, but a little bit of both, with multiple inconsistencies between records



Why this white paper?

The consequences - specifics

Life at work

Area	Violation of privacy		Choice between privacy and...	Risk of violation of physical privacy	Vital records as a vector for discrimination		Comments
	3 to 9 years	Permanent			Directly	Indirectly	
Hiring (see IV.B.3.a, below)	<input checked="" type="checkbox"/>		Working			<input checked="" type="checkbox"/>	Social Sec number, identity papers
Create a company (by-laws) (IV.B.3.d)	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	Pursuit an economic activity			<input checked="" type="checkbox"/>	With regard to potential customers
Self-employment (IV.B.3.d)	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	Pursuit of an economic activity			<input checked="" type="checkbox"/>	With regard to potential customers
Social Security No (IV.B.2.e)	<input checked="" type="checkbox"/>		Retirement benefits				
Provisional Soc Sec No (IV.B.3.f)			Retirement benefits			<input checked="" type="checkbox"/>	Risk of loss of retirement benefits
Unemployment (cIV.B.3.g)	<input checked="" type="checkbox"/>		Unemployment benefits				
Works council benefits (IV.B.3.h)	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	Benefits			<input checked="" type="checkbox"/>	If the employer was not already aware
Visitor reception at companies (IV.B.3.i)	<input checked="" type="checkbox"/>		Fulfill one's professional obligations				
Work related travel (IV.B.3.j)	<input checked="" type="checkbox"/>		Travel for work	<input checked="" type="checkbox"/>			

Why this white paper?

The consequences - specifics

Personal and family life

Area	Violation of privacy		Choice between privacy and...	Risk of violation of physical intimacy	Vital records as a vector for discrimination		Comments
	3 to 9 years	Permanent			Directly	Indirectly	
All aspects of daily life (see IV.C.3.a)	<input checked="" type="checkbox"/>		Paying by check, obtain a bank loan, get a registered letter, etc. etc. etc.			<input checked="" type="checkbox"/>	In certain circumstances
Access to healthcare (IV.C.3.b)	<input checked="" type="checkbox"/> (SS number)		Healthcare			<input checked="" type="checkbox"/>	Refusal to provide care (SS) Refusal of direct payment by health system (temporary number)
Dealings with the government (cf. IV.C.3.c)	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/> (when full copy of birth certificate required)	Any dealing with a government body			<input checked="" type="checkbox"/>	Sometimes, refusal to serve the person
Court proceedings (IV.C.3.c)	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/> (any time the full copy is required and for any judgement not rectified after the vital records change)	Any dealing with the courts		<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	De facto impairment of rights to bring actions before the courts
Housing (IV.C.3.d)	<input checked="" type="checkbox"/>		Finding adequate housing			<input checked="" type="checkbox"/>	Identity papers, down payment / deposit, paystubs
Schooling (IV.C.3.e)	<input checked="" type="checkbox"/>		Schooling			<input checked="" type="checkbox"/>	Getting kicked out of a new school
Legal and physical custody of children (cf. IV.C.3.e)	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	Pursuit of parental rights before the courts Real capacity to enforce legal and physical custody		<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	Divergence between identities for the same person : between vital records certificates and between the vital records and certain derivatives : between parent and child birth certificates, between identity papers and family records
Prison life (IV.E)				<input checked="" type="checkbox"/>			

What are the issues?

- The importance of vital records for the State
- The five major issues for the people involved
- The condemnation of France in 1992 by the European Court of Human Rights
- The about-face by the French Supreme Court nine months later that did not resolve the issues

What are the issues?

The importance of vital records for the State (1)

*“Nevertheless, the grounds for changing civil status are all enhedged in a multiplicity of formal and substantive rules which clearly indicate that **the subject remains a matter of public policy and that, even if the will of the individual can play a role, society intends on keeping control over the matter.**”* Court of Appeals, Bordeaux, March 5, 1987

Roman Law: only the State can decide on the civil status of people = **“inalienability of the status of individuals”*** (citizenship (≠ *banum* or clan), capacity, other key questions)

Canon Law

- Family, marriage
- Filiation
- Adam and Eve binary, question of equality

Public peace and order

- Health and hygiene
- Morals
- Tranquility
- Security

Reforms from the Age of Enlightenment and the Revolution

- Vital Records: statistical and predictive role
- Vital Records: identity papers and police controls
- Law of 6 fructidor of Year II of the Revolution (the only name that can be used is that on the birth certificate)

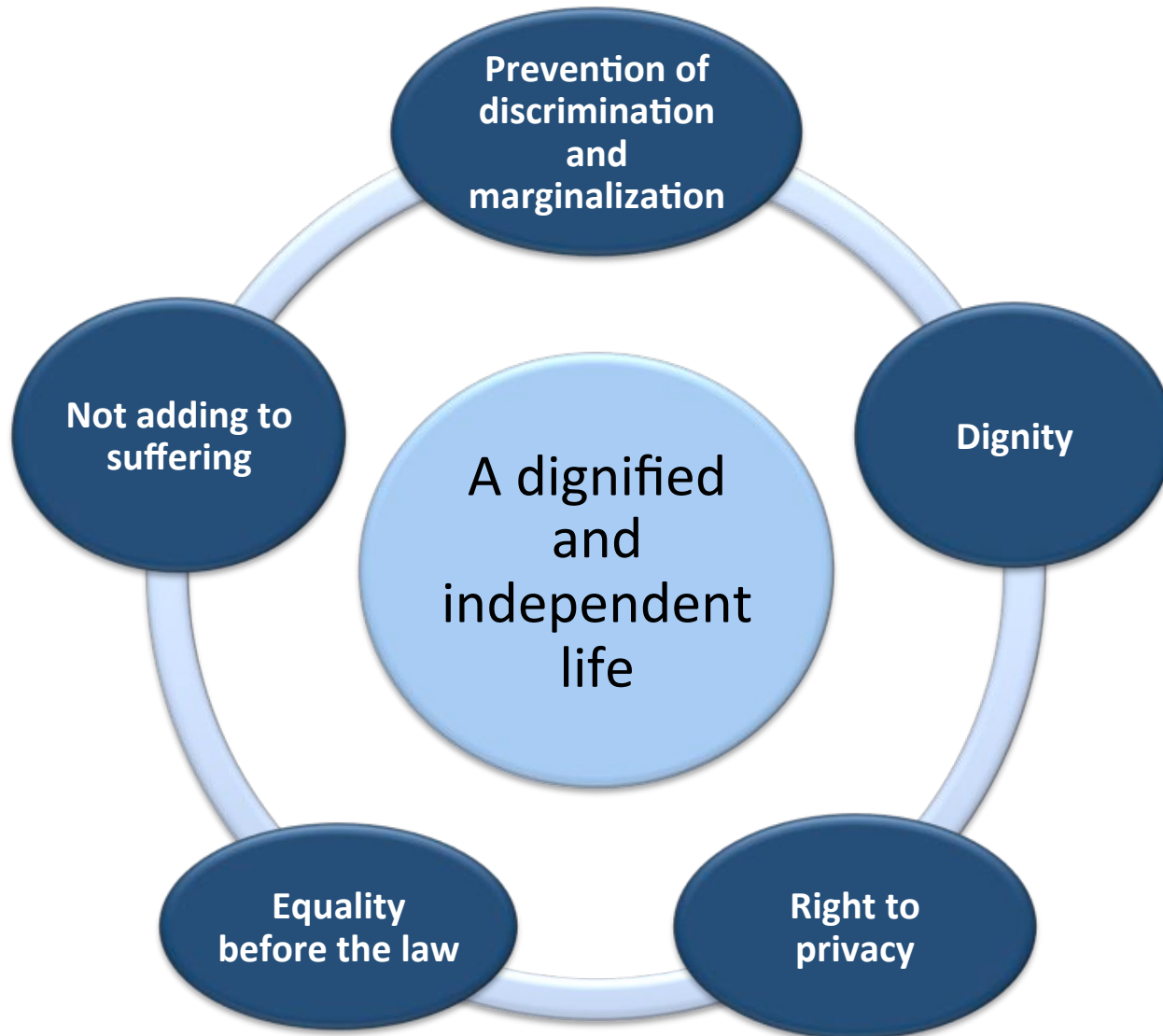
Napoleon: Civil Code

- “Father – Mother – Child” triptych
- Reuse and recodification of a large part of pre-revolutionary law
- “The civil constitution of the French people” Jean Carbonnier

* Translation of “*indisponibilité de l’état des personnes*” from the ECHR case *B. vs. France*, 1992

What are the issues?

The five major issues for the people involved



What are the issues?

The importance of vital records for the State (2)

The non-applicability of right to privacy laws (Article 9 of the Civil Code, Article 8 of the European Convention on Human Rights) to information on vital records

“Public security” aspect of public peace and order: inalienability of the status of individuals, “illusion”, deceit, presumption of fraud

Irrelevance of the distress of the people arising from difficulties caused by the situation or the well-being that would arise from a change

The non-acquisition of “essential characteristics” of the opposite sex (see also the notion of illusion)

“...the principle of inalienability of the status of individuals, in which public order has a vested interest, prohibits taking into consideration physical transformations obtained in such a way.”
French Supreme Court, December 16, 1975

“(h)is current physical state is not one resulting from a pre-operational condition ... but instead is the result of a deliberate decision by the subject.” French Supreme Court, March 31, 1987

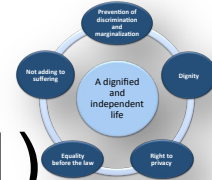
“(t)he psychological and social considerations invoked were insufficient to justify a change in sex which would be contrary to reality and which cannot be ordered with the sole objective of therapy for which the results are in no way guaranteed.” French Supreme Court, June 7, 1988

“...X... has the genetic and anatomic characteristics of a male, with the development of breasts and the absence of facial hair having been deliberately induced, ... the alleged psychological difficulties are insufficient to justify a change in sex”, French Supreme Court, May 10, 1989

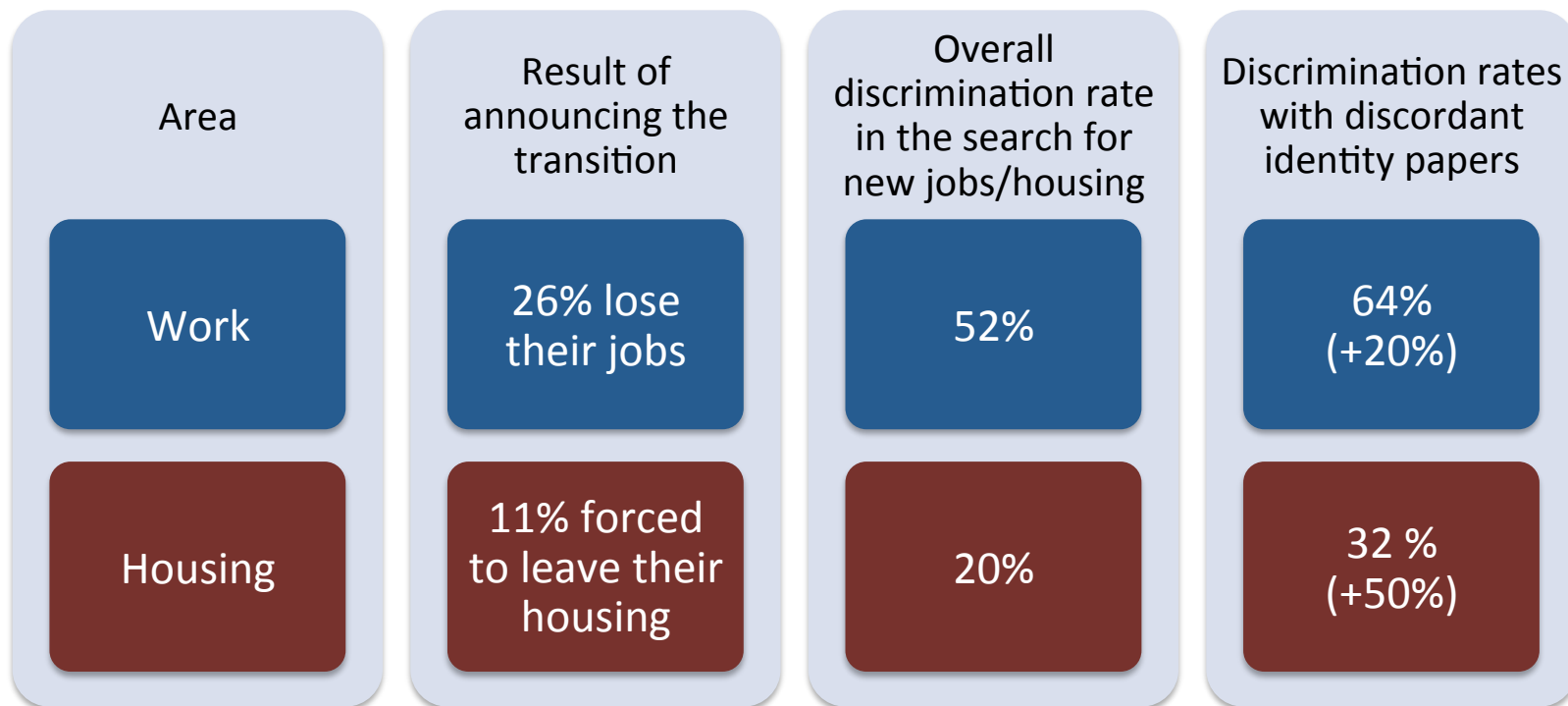
“...but given that transsexualism, even when it is medically established, cannot be ruled to be a real change in sex, as transsexuals, even if they have lost certain characteristics of their original sex, have not acquired those of the opposite one; and given that Article 8, paragraph 1, of the European Convention on Human Rights, in stipulating that every individual has the right to respect of their personal and family life, does not mandate assigning a sex to a transsexual that is not in reality his or hers...” French Supreme Court, May 21, 1990

What are the issues?

The five major issues for the people involved (1)



Discrimination and marginalization

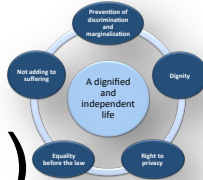


Source: National Transgender Discrimination Survey, 2011

“In this case, when the physical appearance of Ms. X and her Social Security information failed to match, she was forced to reveal her transsexualism to her employer, which led to her losing her job due to harassment by the latter.”

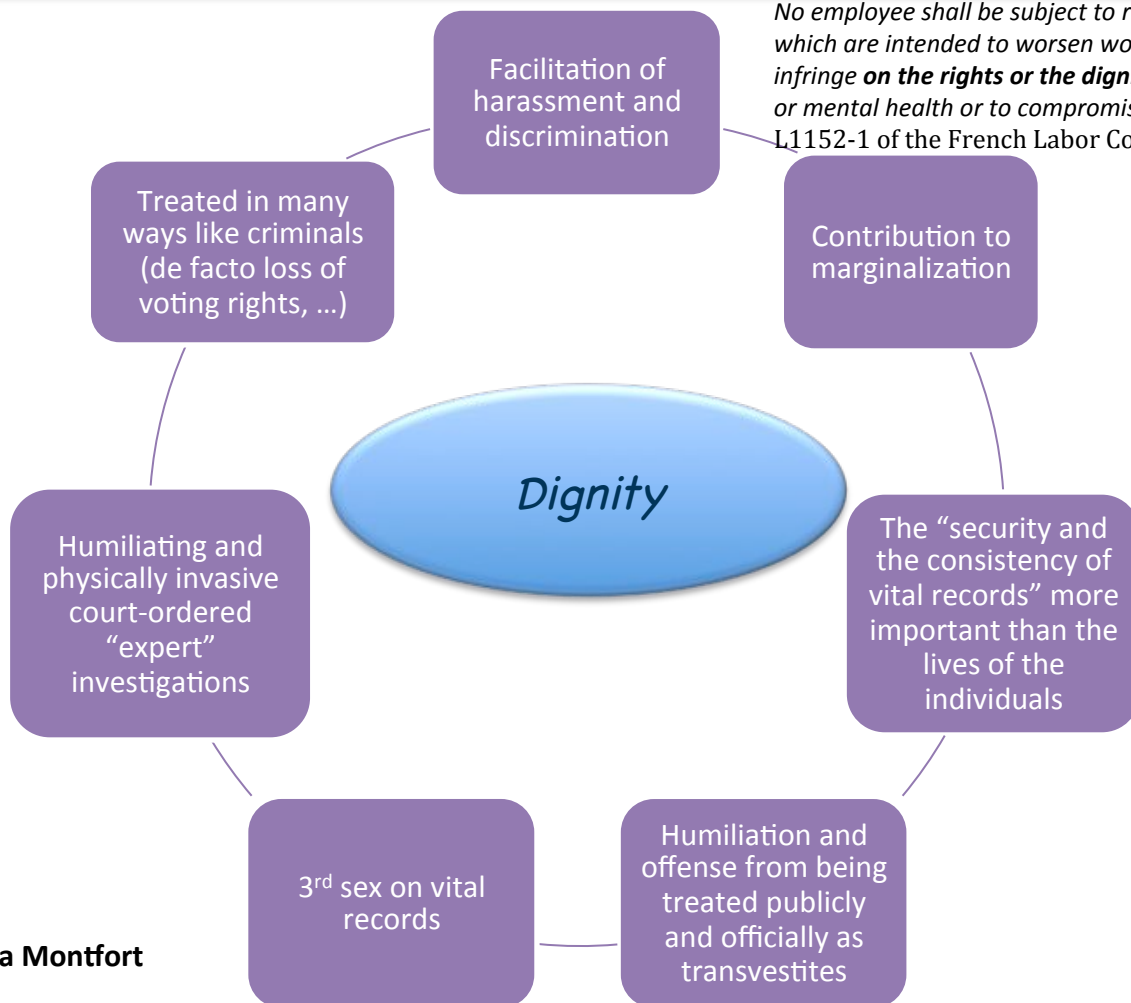
What are the issues?

The five major issues for the people involved (2)



“It follows, therefore, that the preservation of the dignity of the individual...is a constitutional principle”

Decision 94-343/344 DC, July 27, 1994, French Constitutional Court

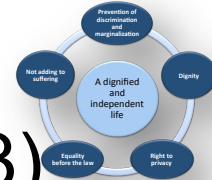


*No employee shall be subject to repeated acts of psychological harassment which are intended to worsen working conditions in such a way as to infringe **on the rights or the dignity** of the person, to affect their physical or mental health or to compromise their future as an employee. Article L1152-1 of the French Labor Code*

Article 16 of the Civil Code, which guarantees the primacy and the dignity of the individual

What are the issues?

The five major issues for the people involved (3)



Right to Privacy

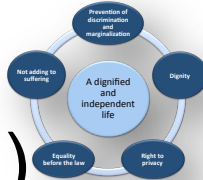


*Considering that the discrepancy between the gender used habitually by the plaintiff and the information on her identity card and passport is, necessarily, of a nature to force the plaintiff, when requested to justify her identity, to face significant and unpleasant difficulties in her daily life. Such difficulties can, in certain circumstances, either cause the plaintiff to give up certain of her rights or the pursuit of certain professional activities or, whenever these difficulties cannot be avoided, lead to **a violation of essential aspects of her private life.** (emphasis added)*

Versailles Administrative Court, 2011, Case number 0902930

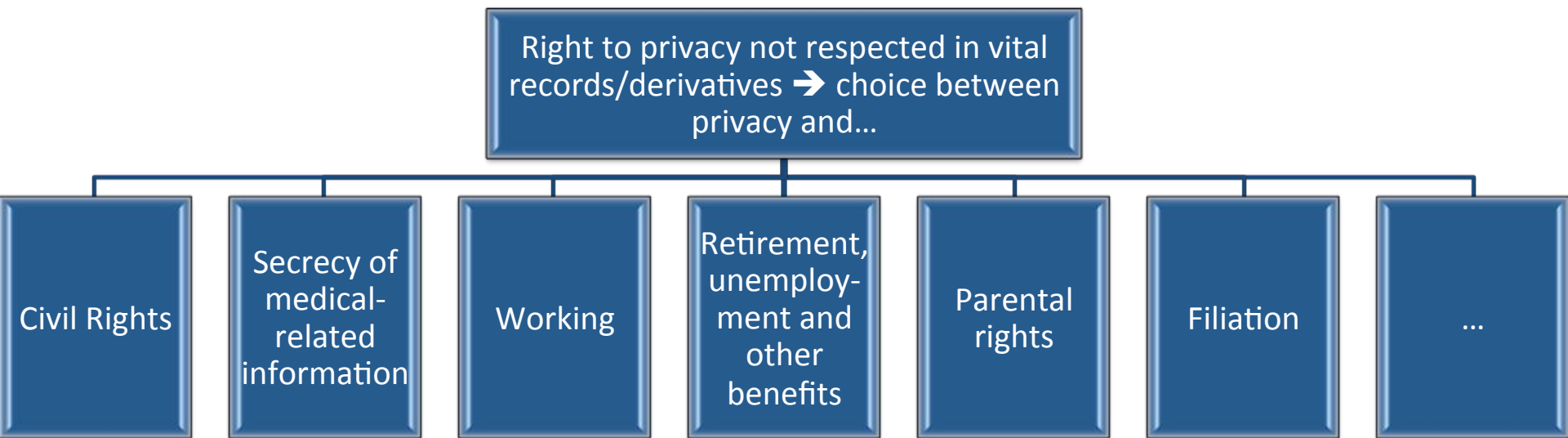
What are the issues?

The five major issues for the people involved (4)



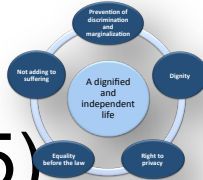
Equality before the law

Many fundamental rights are lost the day the transition starts. Some are recovered after 3 to 9 years, but others are lost forever.



What are the issues?

The five major issues for the people involved (5)



Suffering

Average suicide attempt rate:

20% to 40%,
depending on
studies

Examples of co-factors
that increase the
average suicide attempt
rate*:

25% above the
average rate in case
of job loss due to
bias

26% of people

50% above the
average rate in case
of physical assault

26% of people

52% above the
average rate in case
of sexual assault as
adult

9% of people

85% above the
average rate in case
of sexual assault in
K-12

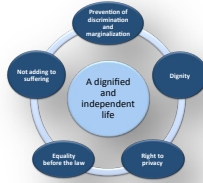
12% of those who came
out in K-12

*Source : National Transgender Discrimination Survey, 2011
Data excludes prison/jail assaults

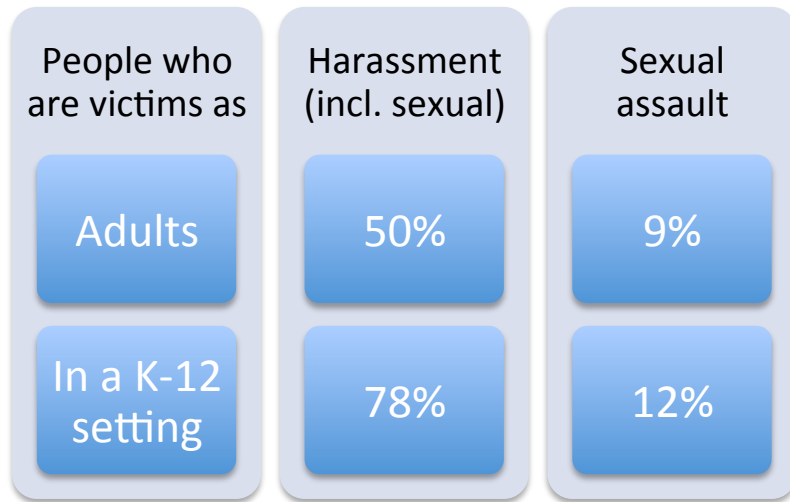
What are the issues?

The five major issues for the people involved

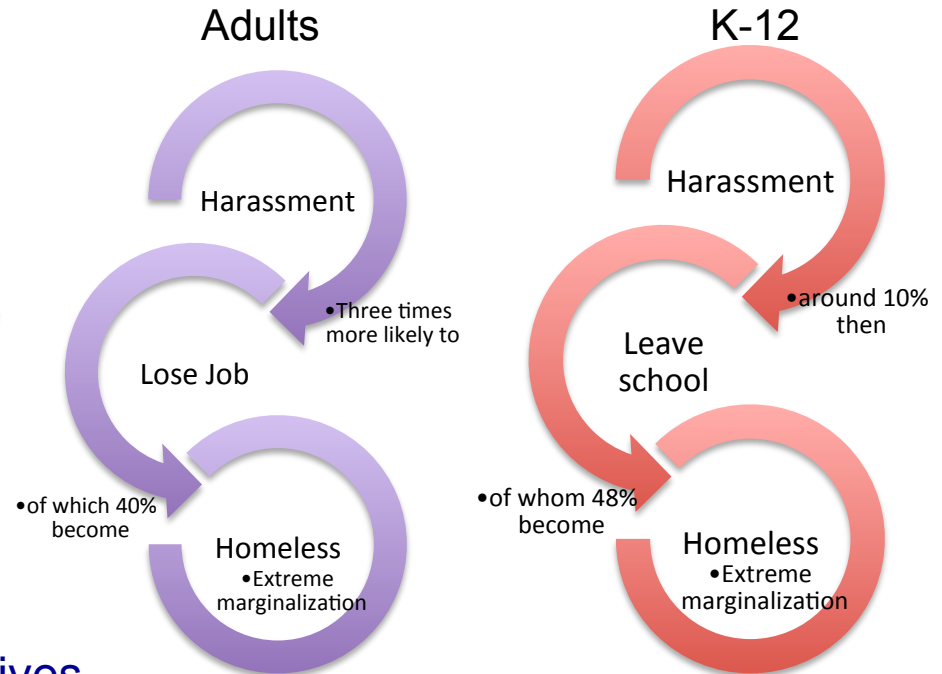
The sexual harassment disaster



An extremely high rate



A direct link to marginalization



A significant risk factor for people's lives

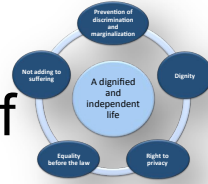
(example of increased suicide attempts versus "trans" people who have not so been victims)

Harassment	Sexual Assault	Job loss due to bias
<ul style="list-style-type: none"> Rate is 74% higher 	<ul style="list-style-type: none"> Rate is 52% higher for adults Rate is 85 % higher for those who experienced in a K-12 setting 	<ul style="list-style-type: none"> Rate is 45% higher

Sources : National Transgender Discrimination Survey, CGT and MAG-HES studies

What are the issues?

The condemnation of France in 1992 by the European Court of Human Rights



...the applicant, as a result of the frequent necessity of disclosing information concerning her private life to third parties, suffered distress which was too serious to be justified on the ground of respect for the rights of others... Consequently, even having regard to the State's margin of appreciation, the fair balance which has to be struck between the general interest and the interests of the individual ... has not been attained, and there has thus been a violation of Article 8.*

European Court of Human Rights, Case of B. v. France, 25 March 1992, 13343/87

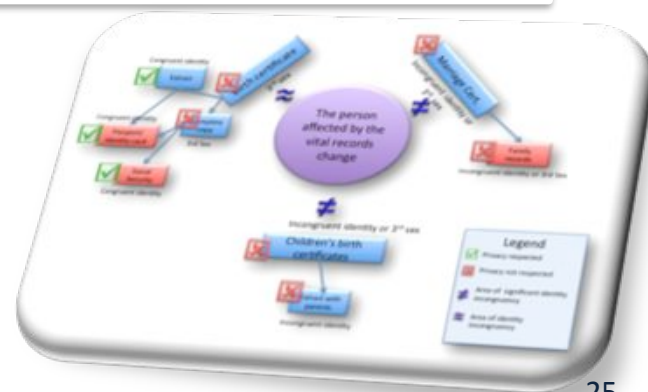
* Article 8 of the European Convention on Human Rights: Respect of private and family life

What are the issues?

The about-face by the French Supreme Court nine months later that did not resolve the issues



... However, given that when, after following a therapeutically-motivated medical and surgical course of treatment, a person with a transsexual syndrome no longer has the characteristics of his or her original sex and has taken on a physical appearance similar to that of the other sex, with corresponding social behavior, the principle of respect for private life justifies that his or her vital records should indicate the sex that he or she appears to be; that the principle of inalienability of the status of individuals is not an obstacle to such a change; therefore, in ruling as it did, the Court of Appeals violated the abovementioned laws and principle. »
French Supreme Court, December 11, 1992, , Case 91-12.373

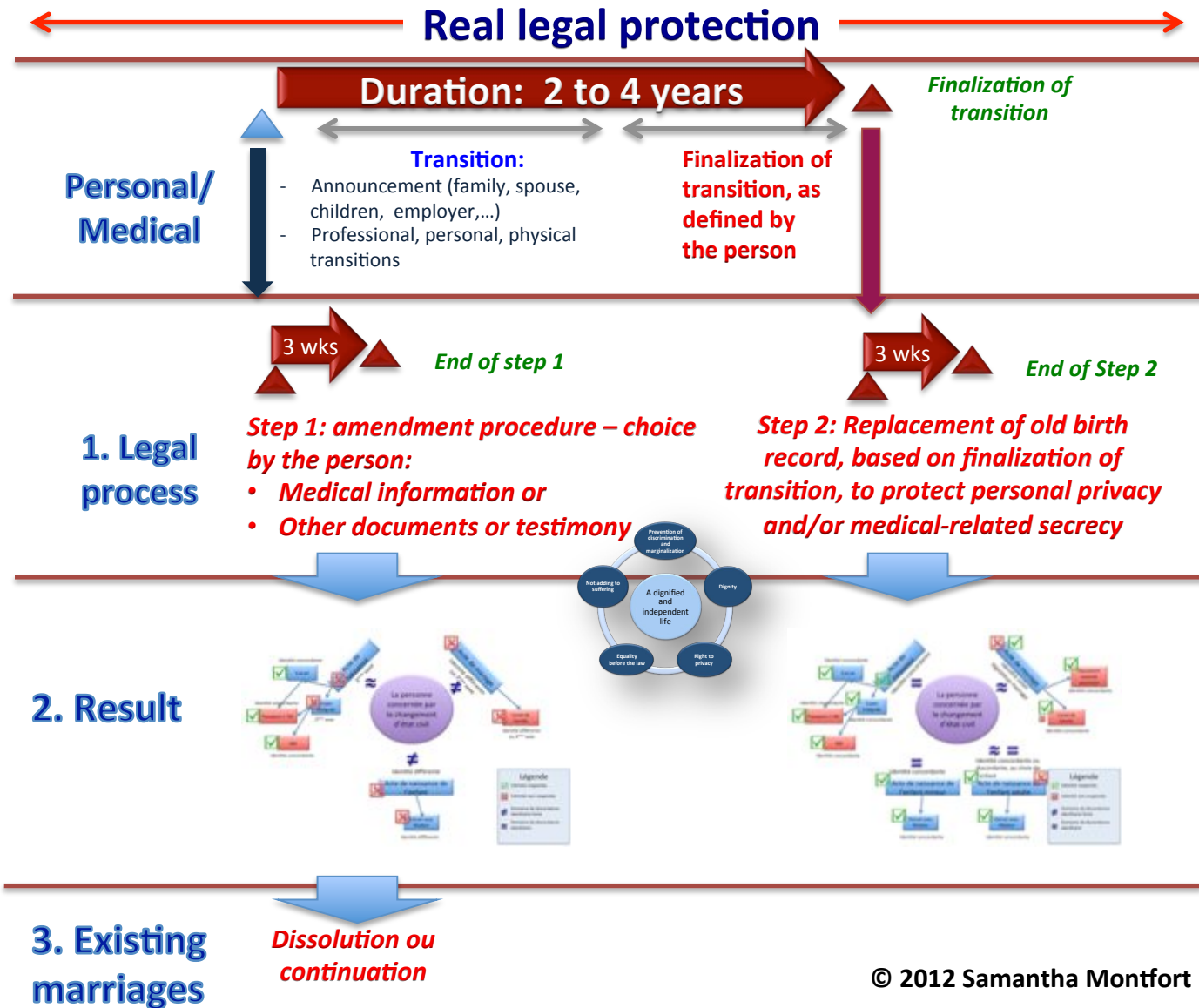


Conclusion

That this kind of change is often incomprehensible for others and can give rise to moral or religious disapproval, to negative gut reactions and to expressions of prejudice seems fairly obvious.

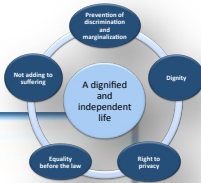
This in no way justifies the current situation of legal ostracism, of daily “outing”, of exposure to discrimination and harassment, of marginalization, of fragilization, of deep offense to the people involved, of humiliation, of violation of the right to privacy, of absence of equality before the law and of attacks on the people’s other fundamental rights and on their dignity.

Recommendations Summary (1 to 3)



Recommendations

4. Discrimination and harassment laws



Main types of discrimination	Needs	Proposed solutions
<p>Work: illegal dismissal, hiring discrimination</p> <p>Housing: loss of housing, discrimination in finding a new place to live</p> <p>Physical custody of children: refusal based only on the change</p> <p>Note: the indirect discrimination caused by the vital records themselves will be eliminated with the other proposed solutions</p>	<p>Explicit inclusion of the population in protected categories, or the very least that information on them being included be brought to their attention</p> <p>Reinforcement of the measures taken to make them truly effective: penalties, evidence, role of the ant-discrimination authorities</p> <p>Stopping of public defamation of the population</p>	<p>Modification of the anti-discrimination law to explicitly include the population (or official and widely available clarification about this) <input checked="" type="checkbox"/></p> <p>Change the burden of proof</p> <p>Reinforce monetary and other sanctions</p> <p>Include the population in groups covered by anti-defamation legislation <input checked="" type="checkbox"/></p> <p>Inclusion of this information on the list of « sensitive » data as defined in Article 8 of the French Data Privacy Act, as well as in Article 1110-4 of the Public Health Code. <input checked="" type="checkbox"/></p>



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