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Shape-Shifters, Masqueraders, & Subversives: An Argument for the Liberation of Transgendered Individuals

Hasan Shafiqullah*

INTRODUCTION

As sex reassignment surgery becomes more commonplace¹ and drag queens run for the U.S. Presidency,² the simple days of labeling gender by unquestioningly assigning blue for boys and pink for girls³ appear to be passing. With increasing stridency, a growing number of people are questioning what it means to be a woman or a man, and whether they want to be exclusively either. As individuals push against the limits of settled understandings around sex and gender, society is responding by pushing people back into simplistic and well-established behavioral and identity categories.⁴

¹ Peter Pallot, Sex-Change Operations Increase by a Third, DAILY TELEGRAPH (London), July 8, 1993, at 5 (noting a three-fold increase in operations in Great Britain over a seven-year period); Sandra Davie, Mount E Stops All Sex-Change Ops, STRAITS TIMES (Sing.), July 6, 1992, at 2 (noting how Singapore has “grown to be one of the world’s major centres [sic] for sex-change operations,” with over 500 having been performed in the country since the first one in 1971).
³ Katherine M. Franke, The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender, 144 U. PA. L. REV. 1, 63 (1995). Note, however, that “[i]n the early years of the twentieth century, before World War I, boys wore pink (‘a stronger, more decided color,’ according to the promotional literature of the time) while girls wore blue (understood to be ‘delicate’ and ‘dainty’). Only after World War II . . . did the present alignment of the two genders with pink and blue come into being,” MARJORIE GARBER, VESTED INTERESTS: CROSS-DRESSING & CULTURAL ANXIETY 1 (1992), quoted in Franke supra, at 63 n.256 [hereinafter GARBER, VESTED INTERESTS].
⁴ Foucault has put this social reaction in perspective:
Do we truly need a true sex? With a persistence that borders on stubbornness, modern Western societies have answered in the affirmative. They have obstinately brought into play this question of a “true sex” in an order of things where one might have imagined that all that counted was the reality of the body and the intensity of its pleasures.
Asserting the arbitrariness of gender as a social construction, this Note will explore and criticize the use of the law to prosecute and persecute people who violate conventional gender roles. Using the emerging concept of a "transgender" identity, I will challenge the validity of gender essentialism and argue for the adoption of variable gender identities.

As a threshold matter, I offer the following definitions and distinctions: *Sex* refers to the biological determination of "male" versus "female;" *gender* refers to the socially constructed identities characterized by "masculinity" and "femininity." For example, while it is a sex distinction that men typically have a larger Adam's apple (thyroid cartilage) than women, it is a gender distinction that most men typically do not wear dresses while many women at times do.

*Transvestites* are generally defined as being "anatomic males who have an episodic, compelling desire to wear women's clothes." They are generally heterosexual, and find women's clothes sexually arousing. *Cross-dressers*, by contrast, are either women dressing in traditionally male clothing or men dressing in traditionally female clothing, without the erotic overtones of transvestitism. *Transsexuals* are considered discontent with the anatomical sex of their birth, and want to live and dress as the other sex. *Intersexed individuals*, or *intersex*, (traditionally known as *hermaphrodites*) have the physical characteristics of both sexes, and may be di-


8. *Id.* Whisner, too, notes that "transvestism" is often used more narrowly to refer only to cross-dressing for the purpose of sexual arousal. Mary Whisner, Note, *Gender-Specific Clothing Regulation: A Study in Patriarchy*, 5 HARV. WOMEN'S L.J. 73, 97 n.137 (1982).


10. Specifically, "transsexualism is 'behaviorally, the act of living and passing in the role of the opposite sex, before or after having attained hormonal, surgical, and legal sex reassignment; psychically, the condition of people who have the conviction that they belong to the opposite sex and are driven by a compulsion to have the body, appearance, and social status of the opposite sex.'" Edward S. David, Note, *The Law and Transsexualism: A Faltering Response to a Conceptual Dilemma*, 7 CONN. L. REV. 288 n.1 (1975) (quoting J. MONEY & A. EHRHARDT, MAN & WOMAN : BOY & GIRL 291 (1972)).

11. David, *supra* note 10, at 291. The term "hermaphrodite" is derived from Greek mythology: "Hermaphroditus, the son of Hermes and Aphrodite, was a beautiful young man, so fetching that the nymph of the fountain of Salmacis fell desperately in love and begged the gods to merge her body with his forever. They granted the nymph her wish, forming a being half-man, half-woman." Natalie Angier, *Hermaphrodites Struggle to Find Identity in Bodies with Ambiguous Genitalia; Newly Formed Group Prefers to be Known as Intersex*, OTTAWA CITIZEN, Feb. 4, 1996, at D8.

Intersexed individuals are now advocating for the descriptive label "intersexual" rather than hermaphrodite. *Id. See also* Anne Fausto-Sterling, *Having It All: The Unruly
vided into three subgroups: those with one testis and one ovary, those with testes and some aspects of female genitalia, but not ovaries, and those with ovaries and some aspects of male genitalia, but no testes.\textsuperscript{12} Androgyny involves a blending of gender traits or signifiers, rather than of sexual organs, to create an ambiguous identity which is not overtly male or female.\textsuperscript{13} Lastly, transgender is an umbrella term that encompasses transvestites, cross-dressers, transsexuals, intersexuals, androgynes,\textsuperscript{14} and those who simply mix and match elements of "male" and "female" sex/gender identities.\textsuperscript{15}

Part I provides a context for the discussion. After a brief excursion into colonial law, I will first address the medical establishment's contribution to the persecution of transgendered people. In particular, I will consider the American Psychiatric Association's determination that deviation from expected gender identity indicates mental pathology. I will then turn to the legal system's treatment of transgendered people, particularly cross-dressers. Part II explores the apparent social need for clear cut boundaries between sexes, and explains the futility of attempting to establish such rigid demarcations. I will survey recent social attacks against transgendered people, and then explore and criticize the medical establishment's role in the determination of sex. I will also consider the relative benefits of having medicine versus the law make the determination of sex. Part III briefly critiques essentialist discussions of sex and gender, and reveals the limitations of even antiessentialist arguments when used in this context. Finally, in Part IV, I will argue that given the instability of sex and the fluidity of gender, laws criminalizing cross-dressing and/or "passing" as the opposite gender are an unjustifiable oppression of transgendered people.

\textit{Bodies of Intersexuals Blur the Great Divide of a Two-Sex Society, Challenging a System that has Trouble Dealing With Even Supposedly "Normal Sex," \textsc{Vancouver Sun}, May 22, 1993, at C10 (noting that "medicine uses the term 'intersex' as a catch-all for three major subgroups with some mixture of male and female characteristics"—hermaphrodites, male pseudo-hermaphrodites, and female pseudo-hermaphrodites). This Note will therefore refer to them as intersexuals.}


\textsuperscript{13} \textit{Id.} at 44.

\textsuperscript{14} \textit{Id.} at 44 n.3.

\textsuperscript{15} The colloquial term "gender-fuck" might best describe this latter construction of identity. "In gender-fuck, people express aspects of both genders at once, like a man in an evening gown cut low so you can see his chest hair . . . , or a woman exposing her cleavage in a tuxedo." \textsc{Dossie Easton & Catherine A. Lizst, The Bottoming Book: Or, How to Get Terrible Things Done to You by Wonderful People} 93 (1995).
I. BACKGROUND-THE PROBLEM IN CONTEXT

A. THE CASE OF THOMAS(INE) HALL-A LESSON FROM THE PAST

Archival minutes of the Council and General Court of Colonial Virginia reveal an interesting case from 1629.\(^\text{16}\) An English-born person, christened Thomasine Hall, had spent childhood dressed as a girl. At age twelve, s/he was sent to an aunt in London, who dressed her/him as a boy, Thomas. S/he served as a soldier for a few years, dressed as a man, after which s/he donned women’s apparel, making bone lace and doing other needlework. When s/he was twenty, Thomas(ine) dressed as a man and came to the Virginia colony, where s/he switched her/his clothing regularly. S/he came to the attention of the authorities after an alleged sexual encounter with a plantation owner’s maid. When queried by the owner about his/her sex, s/he answered that s/he was both a man and a woman. An initial forcible examination by the owner and another man revealed Thomas(ine) to have a penis. At a subsequent examination by a small band of women and men, s/he again asserted that she was both, explaining that “hee had not the use of the mans parte . . . was a peece of fleshe growing at the . . . belly as bigg as the topp of his little finger [an] inch longe . . ." S/he was ordered by the authorities to be put into women’s apparel. Unsatisfied, the band accosted him/her again the following week, and asked “if that were all hee had to which hee answered I have a peece of a hole . . .” Ultimately, the General Court ordered it to be published in the plantation where s/he lived “that hee is a man and a woeman.” It further ordered him/her to dress in men’s clothing, “only his head to bee attired in a Coyfe and Croscloth with an Apron before him . . .”

Hall’s case is significant in its revelation of the judicial system’s initially fluid approach to the question of gender and sex. When confronted by an ambiguous person, the court declared her/him to be both woman and man, decreeing that s/he go about dressed in a mixture of masculine and feminine clothing.\(^\text{17}\) Unfortunately, this alternative seventeenth-century approach has not survived. As will be seen, in modern times both medicine and law appear determined to force individuals into distinct but arbitrary categories.

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\(^{16}\) *Exaicons taken before John Pott Esq gouernor [sic] the 25th day of March A\(^\circ\), in MINUTES OF THE COUNCIL AND GENERAL COURT OF COLONIAL VIRGINIA, 1622-1632, 1670-1676, WITH NOTES AND EXCERPTS FROM ORIGINAL COUNCIL AND GENERAL COURT RECORDS, INTO 1683, NOW LOST 194-95* (H.R. McIlwaine ed., 1924). The rest of this section will refer, without citations, to this text.

\(^{17}\) The decision is not without fault. Problematic elements are discussed *infra* text following note 167.
B. THE MODERN APPROACH: THE PSYCHIATRIC ATTACK

The medical establishment has contributed greatly to the discussion of gender deviance. In fact, it created the very notion that gender nonconformity is a pathology. Although homosexuality was removed by the American Psychiatric Association's (APA) list of behavioral pathologies in 1973, the Association eight years later promulgated a new category called "gender identity dysphoria" (GID). The APA uses this new diagnosis in the same way it had used homosexuality: to pathologize deviance from expected gender or sex norms. Two criteria are used to diagnose GID: 1) a "strong and persistent cross-gender identification (not merely a desire for any perceived cultural advantages of being the other sex)," and 2) a "persistent discomfort about one's assigned sex or a sense of inappropriateness in the gender role of that sex."

The APA's diagnostic manual explains that GID is manifested in girls by a preference for, inter alia, traditional boys' clothing and short hair, powerful male figures such as Batman or Superman as their fantasy heroes, and little interest in feminine dress-up or role-play. In boys, the symptoms are predictably the opposite: playing house, drawing pictures of beautiful girls and princesses, and playing with dolls. Moreover, afflicted boys have little interest in cars and trucks or rough and tumble play, and may insist on sitting to urinate. Adults with GID are typically preoccupied with their wish to live as a member of the opposite sex, and adopt the dress, behavior and mannerisms of that sex. Individuals displaying GID characteristics have been institutionalized.

18. For the analysis of the APA attack, I am indebted to National Center for Lesbian Rights staff attorney Shannon Minter and his unpublished manuscript, From "Homosexuality" to "Gender Identity Disorder": How Psychiatry Pathologizes Lesbian, Gay, Bisexual and Transgender Youth (on file with author).
21. Id. at 85.
22. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, FOURTH EDITION 532-33, 537 (1994) [hereinafter DSM-IV].
23. Id. at 533 .
24. Id.
25. Id.
26. For a discussion of individuals institutionalized in the Midwest and Utah because of their perceived deviance from gender norms, see Carole Rafferty, Homosexuality or "Disorder"? It's a Fine Line that Psychiatrists Cross Too Often, Many Gays Say, CHI. TRIB., Aug. 1, 1995, at Tempo 1. See also Daphne Scholinski, I Was Never Meant to Survive, NCLR NEWSLETTER (Nat'l Ctr. for Lesbian Rts., S.F., Cal.), Spring 1996, at 11 (on
After creating the notion of pathologic gender deviance, the APA states that GID “can be distinguished from simple nonconformity to stereotypical sex role behavior by the extent and pervasiveness of the cross-gender wishes.”

It explains that GID is not meant to describe “tomboyishness” in girls or “sissyish” behavior in boys. Rather, it represents a profound disturbance of the individual’s sense of identity with regard to maleness or femaleness. Behavior in children that merely does not fit the cultural stereotype of masculinity or femininity should not be given the diagnosis unless the full syndrome is present, including marked distress or impairment.

While this may seem to be a laudable distinction, it offers little practical guidance. When does “simple nonconformity to stereotypical sex role behavior” cross over into “a profound disturbance” requiring institutionalization? Is (or should) the shift into pathology be based on community standards of acceptable deviance? Would a person who is psychologically healthy by San Francisco, California, standards be pathologically deviant in Tucson, Arizona?

Discussing institutionalization of the mad/unreasonable, Foucault notes that it might be justified insofar as “[t]he madman’s [sic] body [is] regarded as the visible and solid presence of his [sic] disease.”

MICHEL FOUCAULT, MADNESS AND CIVILIZATION: A HISTORY OF INSANITY IN THE AGE OF REASON 159 (1965) [hereinafter FOUCAULT, MADNESS AND CIVILIZATION]. He traces the interconnections between medicine, morality, and the coercion of those perceived to be unreasonable:

It is important, perhaps decisive for the place madness was to occupy in modern culture, that homo medicus was not called into the world of confinement as an arbiter, to divide what was crime from madness, what was evil from what was illness, but rather as a guardian, to protect others from the vague danger that exuded through the walls of confinement.

Id. at 205. Medicine’s role was thus to police the unreasonable, using its coercive power to cordon off the nominally mad for the safety of the allegedly sane masses.

Foucault asserts elsewhere that “the role of the psychiatrist in penal matters” is “to suggest a prescription for what might be called [the patient’s] ‘medico-juridical treatment.’”


In the present context, institutionalizing the “GID afflicted” blurs the line between medicine and law, letting psychiatrists act as prison wardens in order to administer their draconian “medico-juridical treatment.” It must be kept in mind that, ultimately, “[c]onfinement, that massive phenomenon, . . . is a ‘police’ matter.” FOUCAULT, MADNESS AND CIVILIZATION, at 46. Policing the sick is arguably a troubling notion at best.

27. DSM-IV, supra note 22, at 536 (emphasis in original).
28. Id.
29. It would be frightening to have sanity/mental health contingent on community standards. One moral philosopher, discussing “the tension between individual moral responsibility and obedience to collective norms,” suggests that [w]e must . . . understand the meaning of “wrong,” “inadequate,” and “irrational” in the context of an ethical community defined by certain values, values that are intersubjective because they are held by the members of that community. If you are member of that community, fellow members can denounce your values as deviant and, conversely, you can defend your
This discussion is not meant to suggest that the concept of GID is problematic per se, or that the GID diagnosis should be removed from the DSM-IV. There are individuals, such as pre-operative transsexuals, who truly are gender dysphoric: biological women who believe they are men (or vice versa), and who wish to undergo hormone therapy and perhaps even sex reassignment surgery to resolve the dissonance between their gender identity and sexual anatomy.30 Without the diagnosis, hormones or sex reassignment surgery would be difficult to obtain, for insurance coverage would be unlikely.31 Rather than protecting transgendered individuals who do not suffer from gender identity dysphoria by completely eliminating the GID diagnosis, a more reasonable approach would be to simply hold the medical establishment accountable for its (mis)use of its diagnostic power.

Ultimately, the question “What constitutes (true) gender deviance?” raised by the GID diagnosis is overshadowed by the threshold questions “What is gender?” and “What is biological sex?” After a survey of the legal system’s response to gender deviance, the discussion will turn to these fundamental questions.

C. THE MODERN APPROACH: THE LEGAL ATTACK

1. Cross-Dressing - Generally

The psychiatric establishment is not alone in its discomfort with those who do not or cannot act in ways thought to be appropriate for their sex. Thousands of years ago, the patriarchal authors of the Old Testament decreed that “[a] woman shall not wear anything that pertains to a man, nor shall a man put on a woman’s garment; for whoever does these things is an abomination to the Lord your God.”32 The legal system in this country has generally adhered to the spirit of this decree. Among the oldest of the modern cases on point are two New York cases from the nineteen-sixties: People v. Archibald33 and People v. Gillespie.34 Both involved convictions of male cross-dressers under a now-

values, all under community standards.

Rob Atkinson, Beyond the New Role Morality for Lawyers, 51 Md. L. Rev. 853, 961 (1992) (emphasis added). In the GID context, there is arguably an inherent danger in basing psychiatric diagnoses on community standards. Conservatives could, for example, simply “clean up” their communities by relegating sexual progressives or gender dissidents to mental institutions.

30. See, e.g., G.B. v. Lackner, 145 Cal. Rptr. 555, 556 (1978) (recognizing that transsexualism “is a serious problem of gender role disorientation,” and that the plaintiff’s sex reassignment surgery could not be characterized as mere cosmetic surgery).

31. See, e.g., Pinneke v. Preisser, 623 F.2d 546, 548 (8th Cir. 1980) (holding that state cannot deny Medicaid coverage for sex reassignment surgery, given that surgery is the only medical treatment available to solve the problems of a true transsexual).

32. Deuteronomy, 22:5 (Revised Standard).

33. 296 N.Y.S.2d 834 (1968).

34. 202 N.E.2d 565, 254 N.Y.S.2d 121 (1964). Given that Gillespie is a very terse opinion, I will not attempt a detailed discussion of its jurisprudence.
superseded statute banning vagrancy.35 The statute considered a vagrant any person whose face was “painted, discolored, covered or concealed, or being otherwise disguised, in a manner calculated to prevent his [sic] being identified.”36 The law originally was enacted in 1845 in response to murders of law enforcement agents by Hudson Valley farmers, who killed the agents as they attempted to serve writs on the farmers. As part of their guerrilla strategies during these so-called Anti-Rent Riots, the farmers had concealed their identities by disguising themselves as Indian women, wearing calico dresses.37 Far from being the sort of dangerous writ-evading farmer whose behavior the statute had been enacted to regulate, defendant Archibald was merely standing in drag on a New York City subway platform, on his way home from a masquerade party, when he was arrested for cross-dressing.38

Elizabeth Kennedy and Madeline Davis, in their history of a lesbian community in 1940s and '50s Buffalo, N.Y., note that many women reported being harassed under a quasi-legal requirement that women at all times wear two or three articles of female clothing.39 One interviewee described at length her harassment for gender deviance:

I’ve had police walk up to me and say, “Get out of the car.” I’m drivin.’ They say get out of the car; and I get out. And they say, “What kind of shoes you got on? You got on men’s shoes?” And I say, “No, I got on women’s shoes.” I got on some basket-weave women’s shoes. And he say, “Well, you damn lucky.” ‘Cause everything else I had on were men’s—shirts, pants. At that time when they pick you up, if you didn’t have two garments that belong to a woman you could go to jail . . . and the same thing with a man . . . . They call it male impersonation or female impersonation and they’d take you downtown. It would really just be an inconvenience . . . . It would give them the opportunity to whack the shit out of you.40

35. N.Y. CODE CRIM. PROC. § 887(7) (vagrancy) (1845), superseded by N.Y. PENAL LAW § 240.35 (loitering) (McKinney 1967).
36. N.Y. CODE CRIM. PROC. § 887(7) (1845).
37. 296 N.Y.S.2d at 837 (Markowitz, J., dissenting).
38. Id. In response to Archibald and Gillespie, the NY ordinance was modified to exclude masqueraders. See N.Y. PENAL LAW § 240.35 (McKinney 1967).
39. ELIZABETH LAPOVSKY KENNEDY & MADELINE D. DAVIS, BOOTS OF LEATHER, SLIPPERS OF GOLD: THE HISTORY OF A LESBIAN COMMUNITY 180 (1993). Kennedy and Davis admit they have been unable to find such a New York State law, aside from the outdated vagrancy statute cited in Archibald and Gillespie. Id. at 411 n.29. They submit that, “[a]ccording to Professor Nan Hunter of the Brooklyn College of Law School, no such law exists (personal communication, January 1992). It is her guess that a judge in a particular case made a ruling that two or three pieces of clothing of the ‘correct’ sex negated male or female impersonation and that set a precedent used by law enforcement agencies.” Id.
40. Id. at 180 (emphasis added).
The homophobic harassment of cross-dressing women by law enforcement officers is not merely a relic of times past. As recently as twenty years ago, a Texas court found female cross-dressing to be relevant evidence of, among other things, a murderous motive. In *Perez v. State of Texas*, a woman appealed a conviction for murdering her alleged lesbian lover.41 The *Perez* Court considered whether evidence of the existence of an "illicit relationship" between two women could be introduced as part of the relevant facts and circumstances surrounding the killing.42 This evidence included testimony by the deceased’s brother-in-law that the defendant, Maria Perez, had short hair and dressed like a man, and that "she always takes a man’s place."43 He further opined that Perez and his sister-in-law had lived together "like a man and woman would."44

As part of her defense, Perez denied being a lesbian, and explained that, as a truck farmer, her choice of male clothing was better suited for her work.45 Nonetheless, the court found the clothing testimony relevant to the existence of a relationship between the two women.46 It also held the photo "clearly admissible . . . as it shows motive as well as being additional proof that the appellant, through the years, did not dress and look as she did at the time of trial."47 It noted that Perez wore women’s clothing and had long hair during the trial.48

Notably absent from the decision was an explanation of why short hair and pants would be probative of a relationship between Perez and the deceased. The unspoken assumption here is that lesbians wear pants and have short hair. Such an assumption is underinclusive, as heterosexual women also wear pants49 and may have short hair.50 These traits are therefore not definitive indicia of sexual orientation.51 Like the *Perez* court, the police in

42. *Id.* at 673.
43. *Id.*
44. *Id.*
45. *Id.* at 675.
46. *Id.*
47. *Id.* (emphasis added).
48. *Id.* at 675 n.1.
50. "'Long hair doesn’t have a style,' said [Joseph] Kendell, recently rated the No. 1 hair stylist in Los Angeles. ‘Long hair is just long hair and it can take attention away from your clothes.’” Valli Herman, *Hair Today, Gone Tomorrow - But That’s the Style*, L.A. DAILY NEWS, Aug. 29, 1991, at L7. Moreover, “[s]ome of the world’s sexiest women have short hair, and look better with it. Can you imagine Jamie Lee Curtis, Dolores O’Riordan (The Cranberries), Isabella Rossellini, Linda Evangelista or the Princess of Wales with long hair?” Melanie Rickey, *Try Me*, INDEPENDENT (London) June 4, 1996, at 13.
51. Long hair and skirts are not the exclusive province of heterosexual women. According to one account of lesbians in Buffalo, N.Y., in the 1940s and 1950s, “fems”, or femi-
Buffalo endorsed these erroneous gendered clothing norms in their harassment of lesbians for failure to wear two or three items of "feminine" clothing.

Gay male sex workers dressing as women have at times found themselves targeted by statutes banning cross-dressing generally. In *City of Cincinnati v. Adams*, for example, the court addressed the following municipal code provision:

No person within the city of Cincinnati shall appear in a dress or costume not customarily worn by his or her sex, or in a disguise when such dress, apparel, or disguise is worn with the intent of committing any indecent or immoral act or of violating any ordinance of the city of Cincinnati or law of the state of Ohio.

The sex worker defendant, Adams, argued that his cross-dressing was protected expression under the First Amendment. The court rejected this argument, finding no evidence that his choice of attire represented a philosophy or ideal. Although noting that cross-dressing can be regulated "when it is associated with criminal misconduct and bears a reasonable relation to the public health, safety, morals, and welfare," the court ultimately found the ordinance unconstitutionally vague and violative of Adams' Fourteenth Amendment rights.

Nine lesbians, wore skirts in the 1940s, with only some pants coming into fashion for fems in the 1950s. *Kennedy & Davis*, supra note 39, at 156, 162. Even in the 1950s, however, African-American fems wore almost exclusively skirts and dresses. *Id.* at 164. Short hair was certainly not a fem trait: one fem related that "I had long hair but I wore it up. . . . It was usually up in a bun or a French twist or just with a ribbon." *Id.* at 156.

The targeted effect on both gay men and lesbians is not accidental: "Law enforcement authorities often devote great attention to the enforcement of public sex and loitering laws against same-sex sexual conduct and solicitation. Gay men and lesbians also have been subjected to unprovoked violence by police officers, as well as other forms of police harassment." Note, *Developments in the Law: Sexual Orientation and the Law*, 102 HARV. L. REV. 1508, 1542 (1989).

Such legal and illegal use of state force to regulate morality is deeply implicated in the legal control of gender deviance. In the sex work context, the moral issue of Judeo-Christian condemnation of prostitution ("Do not profane your daughter by making her a harlot, lest the land fall into harlotry and the land become full of wickedness." *Leviticus*, 19:29 (Revised Standard)) is obvious; in the more "innocent" case of high schoolers cross dressing at a prom, discussed infra note 58 and accompanying text, the moral connection is more tenuous, hence the affront arguably more readily recognizable. Discussing the coercive regulation of morality, Foucault notes that "we see inscribed in the institutions of absolute monarchy . . . the . . . idea that virtue, too, is an affair of the state, that decrees can be published to make it flourish, that an authority can be established to make sure it is respected." *Foucault, Madness & Civilization*, supra note 26, at 61.


54. *Cincinnati, Ohio, Mun. Code § 909-5* (emphasis added). The focus on indecency and immorality sets this code apart from the ordinances in *Wilson and McConn*, infra notes 71, 73 and accompanying text, which were amoral, blanket prohibitions against gender role deviance.

55. *330 N.E.2d. at 464.*

56. *Id.* at 465.
Amendment right to due process.\textsuperscript{57}  

In a case involving a more innocuous type of cross dressing than the charged issues of gay male sex work or lesbian murder, an Ohio high school refused to allow two of its students to cross-dress at their prom.\textsuperscript{58} The boy appeared wearing a dress, a fur cape, earrings, stockings, and high heels; his sister wore a black tuxedo and men’s shoes.\textsuperscript{59} Upon refusing the principal’s request to leave, they were escorted from the ballroom by police.\textsuperscript{60} In court, the students asserted that the school’s refusal to allow their cross-dressing violated the Equal Protection Clause, since female students were permitted to wear dresses and male students to wear tuxedos. Granting summary judgment against the students’ civil rights action, the district court found both that the school’s dress code was “reasonably related to the valid educational purposes of teaching community values and maintaining school discipline,” and that the school’s actions did not violate any rights the students might have under the First Amendment.\textsuperscript{61} In terms of the Equal Protection challenge, the court decreed that “[t]he school dress code does not differentiate based on sex. [It] requires all students to dress in conformity with the accepted standards of the community.”\textsuperscript{62} In so holding, the court refused to question the oppressively gendered nature of the community standards.

The court’s decision in Harper did not occur in a historical vacuum. Fourteen years earlier, the Idaho Supreme Court invalidated an Idaho school district’s dress code that barred female students from wearing pants.\textsuperscript{63} The regulation declared that “[a]ny type of clothing or attire which attracts undue attention to the wearer and thus causes a disturbance in the school or in the classroom is not acceptable. Girls are expected to wear dresses or skirts which are not more than two inches above the knee . . . .”\textsuperscript{64} The school Board of Trustees construed the “dresses or skirts” section to mean only those items were allowed, which in effect barred female students from wearing pants.\textsuperscript{65}

In justifying this restriction, the school board alleged that “the wearing of culottes, slacks or pantsuits by female students” results in

\begin{enumerate}
\item a detrimental effect on the morals of the students attending the
\end{enumerate}

\textsuperscript{57} Id. (emphasis added). The court held unconstitutionally vague both the phrase “not customarily worn,” and the statutory element of intent to commit any “indecent” or “immoral” act. \textit{Id.} at 465-66.
\textsuperscript{59} \textit{Id.} at 1354.
\textsuperscript{60} \textit{Id.}
\textsuperscript{61} \textit{Id.} at 1355 (emphasis added). The court also rejected the argument that the students’ removal by police had violated their right to due process. \textit{Id.}
\textsuperscript{62} \textit{Id.} at 1356.
\textsuperscript{64} \textit{Id.}
\textsuperscript{65} \textit{Id.}
school and upon the educational process;

(2) unsafe conditions and safety hazards at the schools;

(3) insubordination, rebelliousness and lack of respect for authority;

(4) loss of respect for, and damage to, school property;

(5) a detrimental effect upon the general attitude of the students;

(6) an increased amount of physical contact and familiarity between boys and girls in school surroundings;

(7) loss of standards of conduct; and

(8) a detrimental effect on emotional makeup and problems in the school district. 66

Given the Board’s failure to substantiate any of these outlandish claims, the court upheld the trial court’s finding that female students in pants had not disrupted the school’s discipline or instructional effectiveness, and did not have a detrimental effect on the safety or morals of their fellow students. 67 The record is silent on the Board’s justification for its stated fear—it provided no examples of pants creating unsafe conditions or safety hazards, or causing loss of respect for, or damage to, school property. Whisner notes that “gender differentiation was obviously important to this school district. It sensed social chaos resulting from a breakdown in gender distinction by dress; girls in pants were threatening.” 68 It is unclear why the Board thought that women in anything but skirts or dresses would undermine the very fabric (so to speak) of school society. What is clear is the perceived threat to the all-male 69 Board in response to women wearing clothing traditionally worn only by men. 70

66. Id. at 548.
67. Id.
68. Whisner, supra note 8, at 103.
69. During the 1971-72 school year, the Board was comprised of Jack Draney (chair), Vance Barnett, Dale Jolley, Eugene Humphries, and Bob Kirkham. Letter to author from Trish Dixon, Secretary to Charles J. Shackett, Superintendent of Schools, Shelley Jt. School District No. 60 (July 22, 1996) (on file with author).
70. One commentator notes that [1] in a patriarchal, sexist society, power is controlled by men, and women are considered biologically and socially inferior. This rigid social order is reflected in sex specific rules for gender behavior. Gender expectations in contemporary American society include an implicit value assumption: whatever males do is “masculine,” normal, and therefore good, whatever women do is “feminine” and intrinsically inferior.
Meredith Gould, Sex, Gender, and the Need for Legal Clarity: The Case for Transsexual-
2. Cross Dressing - Transsexuals

The preceding cases reveal the legal system's general aversion to and discomfort with cross-dressers. Courts have, however, allowed some individuals to cross-dress so long as they were undergoing therapy in preparation for sex reassignment surgery. One such case, City of Chicago v. Wilson,\(^71\) concerned a statute prohibiting any person from appearing "in a public place . . . in a dress not belonging to his or her sex, with intent to conceal his or her sex."\(^72\) The court held that, as applied to the defendants, preoperative transsexuals under a doctor's care, the ordinance was an unconstitutional infringement of their liberty interests.\(^73\) In the course of its analysis, the court considered Chicago's arguments for the total ban on cross-dressing in public:

1) to protect citizens from being misled or defrauded;

2) to aid in the description and detection of criminals;

3) to prevent crimes in washrooms; and

4) to prevent inherently antisocial conduct which is contrary to the accepted norms of our society.\(^74\)

The first and fourth criteria are particularly interesting. The combined notion that anyone not conforming to the accepted gender norms of society must be perpetrating an actionable fraud is telling of society's fear of and discomfort with the disruption of rigid behavioral categories. Furthermore, it reveals the normative nature of the strict male/female sexual binary within which the conventional gender discourse is set. This sexual binarism will be addressed more fully below.

Although at times magnanimously allowing cross-dressing by transsexuals, courts have fallen far short of actually protecting such behavior from discrimination. Both the Seventh and Ninth Circuits have held that Title VII does not protect transsexuals from employment discrimination. In

\(^{ism, 13 Val. U. L. Rev. 423, 431 (1979).} \) Given that men control this society (implicitly at the expense of women's empowerment), it stands to reason that men would jealously guard not only their power but the cultural signifiers of that power. Pants being traditionally "male," it is not surprising that the male legal establishment would try to take steps to ensure that pants would be socially off-limits to women.

\(^{71.} \) 389 N.E.2d 522, 523 (Ill. 1978).

\(^{72.} \) CHICAGO, ILL., MUN. CODE § 192-8 (emphasis added).

\(^{73.} \) 389 N.E.2d at 525. In Doe I v. McConn, 489 F.Supp. 76, 79 (S.D. Tex. 1980), a federal court presented with a statute similar to the one in Wilson, followed Wilson in holding the statute unconstitutional as applied to the defendants. The statute in McConn, HOUSTON, TEX., CODE ORDINANCES § 28-42.4 (1972), read: "It shall be unlawful for any person to appear on any public street, sidewalk, alley, or other public thoroughfare dressed with the designed intent to disguise his or her true sex as that of the opposite sex." \(id.\)

\(^{74.} \) 389 N.E.2d at 524 (emphasis added).
Ulane v. Eastern Airlines, an airline pilot who joined Eastern Airlines as a biological man subsequently underwent sex reassignment surgery; she was then fired for "no reason other than the fact that she ceased being a male and became a female." Finding no statutory support in Title VII for transsexuals, the Seventh Circuit overturned a progressive district court decision holding that the statute's remedial purposes should be construed liberally enough to encompass sexual identity. In reaching that decision, District Court Judge Grady had determined, inter alia, that "it is a question of one's own self-perception. How does one perceive oneself in terms of maleness or femaleness? It is also a social matter: How does society perceive the individual?" While sympathetic to the obvious justice of Judge Grady's decision, the Seventh Circuit overturned his ruling on jurisdictional grounds. In doing so, it was following a Ninth Circuit decision, Holloway v. Arthur Andersen and Co.

In Holloway, the court addressed the firing of a pre-operative male-to-female transsexual soon after she announced her intention to undergo sex reassignment surgery. Noting that the district court had not reached the merits of the case, the appellate court limited itself to the question of whether Title VII allowed an employee to be discharged for initiating the process of sex transformation. Reading the statute narrowly, the court

75. 742 F.2d 1081, 1082-83 (7th Cir. 1984), cert. denied, 471 U.S. 1017 (1985) (quoting the opening argument of Ulane's counsel). Ulane's qualifications were not disputed: she had "a record of combat missions in Vietnam for which [she] received an Air Medal with eight clusters." Id. at 1082. At Eastern, she "progressed from Second to First Officer, and also served as flight instructor, logging over 8,000 flight hours." Id. at 1082-83. Both the appellate and lower court opinions are discussed in D. Douglas Cotton, Note, Ulane v. Eastern Airlines: Title VII and Transsexualism, 80 NW. U. L. REV. 1037 (1986).


78. The court stated that "[w]hile we do not condone discrimination in any form, we are constrained to hold that Title VII does not protect transsexuals, and that the district court's order on this count therefore must be reversed for lack of jurisdiction." 742 F.2d at 1084 (footnote omitted).

79. 566 F.2d 659 (9th Cir. 1977), cited in Ulane, 581 F. Supp. 821, passim.

80. Id. at 661.

81. Id. In terms of the merits, the court stated that the supervisor's affidavit detailed many of the personnel problems created by appellant's transitional appearance (red lipstick and nail polish, hairstyle, jewelry and clothing), his [sic] use of the men's room and his [sic] behavior at social functions. We note that the district court failed to consider the facts when making its determination, even though [the supervisor] stated that Holloway was not terminated because of transsexualism, "but because the dress, appearance and manner he [sic] was affecting were such that it was very disruptive and embarrassing to all concerned."

Id. at 661 n.1 (quoting an affidavit by Holloway's supervisor, Marion Passard) (emphasis added). The termination was thus in effect a "heckler's veto": coercion of the individual to accommodate the discomfort of intolerant others.
found “sex” to not encompass transsexualism. The dissenting opinion opted for a less restrictive reading of the law. Conceding that Congress had “probably never contemplated that Title VII would apply to transsexuals,” the dissenting judge nonetheless asserted that he “would not limit the right to claim discrimination to those who were born into the victim class . . . . The relevant fact is that she was, on the day she was fired, a purported female.”

While praiseworthy for recognizing and respecting Holloway’s temporally shifting sexual identity, the dissent implicitly raised a deceptively simple question that underlies every transsexual case and many transgendered cases generally: How do we determine what sex a person is at any given point in time? The following section will address this question.

II. THE “NEED” FOR GENDER CLARITY

A. (ANTI)SOCIAL REACTION AND HOSTILITY

my spirit is too ancient to understand the separation of soul & gender/ my love is too delicate to have thrown back on my face

The medical and legal establishments’ intolerance of gender deviance has not persisted in a vacuum. Individual members of society have been forthcoming in their own violent expressions of fear and hatred of those who blur gender boundaries. Discussing the social control of erotic sexuality, Gayle Rubin notes that “[s]ex law is not a perfect reflection of the prevailing moral evaluations of sexual conduct. Erotic sexual variation per se is more specifically policed by mental-health professionals, popular ideology, and extra-legal social practice.” The same applies to gender variation. A handful of recent cases, reflecting popular gender ideology and the extra-legal social practices used to punish gender deviants, reveal the “degree of anger and social opprobrium that can be unleashed when a gender outlaw’s fraud is revealed to the public.”

82. Id. at 663 (Goodwin, J., dissenting).
83. Id. at 664. The dissent further stated, a bit glibly, that “this is a case of a person completing surgically that part of nature’s handiwork which apparently was left incomplete somewhere along the line.” Id.
86. Franke, supra note 3, at 22. Foucault notes:

if nature, through its fantasies or accidents, might “deceive” the observer and hide the true sex for a time, individuals might also very well be suspected of dissembling their inmost knowledge of their true sex and of
In 1995, Debbie Forte, a Massachusetts pre-operative transsexual, was stabbed to death by a new lover who flew into a murderous rage upon discovering that Forte was biologically male. Two years earlier, a 21-year-old Nebraskan known as Brandon Teena (or Teena Brandon), who identified as a male although biologically female, suffered a similar fate. Two of his friends, suspicious of the truth of his biological sexual identity, accosted him during a Christmas Eve party: pinning his arms behind him in a bathroom, they pulled down his pants and forced his girlfriend to look and verify that he had a vagina. After the party, the two erstwhile friends savagely beat him, forced him into a car, and drove him to a deserted parking lot outside of town, where they took turns raping him. A week later, they drove to his home, an isolated farmhouse, and shot and stabbed him to death before shooting and killing the two witnesses. Only the infant son of one of the witnesses was spared. These cases reveal the visceral, violent reaction some people have against those who fail to conform to traditional sex/gender roles and appearances. Others have reacted less violently but no less offensively. Sean O’Neill (born Sharon Clark), a biological female identifying as male, had numerous underage girlfriends during his late teens. In 1995, after the girlfriends’ parents suspected that he had a vagina rather than a penis, he was charged with eleven felony counts of sexual assault, criminal impersonation of the opposite gender, and sexual assault on a child. He later pled guilty to a single count of sexual assault. This case “may be the first

profiting from certain anatomical oddities in order to make use of their bodies as if they belonged to the other sex. In short, the phantasmagorias of nature might be of service to licentious behavior, hence the moral interest that inhered in the medical diagnosis of the true sex.”

FOUCAULT, HERCULE BARBIN, supra note 4, at ix. Perhaps it is “moral” outrage at the gender deception that explains the violence of the cases discussed immediately below.


89. One of the murderers testified at trial that, soon after the rape, the two had planned to murder Brandon, with part of the plan involving “chopping off his hands and head to avoid identification.” They had “carried an axe, rope and change of clothing” to the victim’s town, but were unable to find him for several days. Id.

90. One of the murderers received three consecutive life sentences, the other was sentenced to death. Dawn Fallik, Man Gets Death in Slaying of Cross Dresser and 2 Others, DAYTON DAILY NEWS, Feb. 22, 1996, at 11A.

91. Id. One of the murderers testified at trial that, soon after the rape, the two had planned to murder Brandon, with part of the plan involving “chopping off his hands and head to avoid identification.” They had “carried an axe, rope and change of clothing” to the victim’s town, but were unable to find him for several days. Id.


93. Id.

94. James Green, Predator? Last Week 20-year-old Sean O’Neill Got Sent to Prison as a Rapist and Sex Offender Because He Slept With His 15-year-old Girlfriend Back When He Was 17. His Real Crime: He Was Born in a Woman’s Body, BAY TIMES (San Francisco), Feb. 22, 1996, at 2, 29 [hereinafter J. Green, Predator?]. O’Neill was sentenced to
time law enforcement has treated gender deception as something tantamount to rape."95

It also represents perhaps the most egregious example of the law's discomfort with gender elasticity. Prosecutors, anxious to determine the defendant's sex before proceeding with their case, managed to convince a judge to sign "a court order to haul Sean into a hospital emergency room to have a doctor determine his gender [sic] once and for all."96

B. DETERMINING SEX/GENDER

There is nothing concealed that will not be revealed, or hidden that will not be known.

Therefore whatever you have said in the dark shall be heard in the light, and whatever you have whispered in private rooms shall be proclaimed on the housetops."97

By resorting to a warrant to determine the sex of the youth before pursuing the case, the prosecutor opted for what might have seemed the easiest option: looking at genitals to establish biological sex. In so doing, the district attorney was acting consistently with legal and medical tradition.98 In City of Chicago v. Wilson, for example, the cross-dressing defendants were hauled into the police station and were forced to "pose for pictures in various states of undress."99 Similarly, suspects under the ordinance at issue in Doe I v. McConn were required to disrobe to help officers determine whether the suspects truly were dressing as the opposite sex.100

Similar "look tests" for determining biological sex are used regularly in obstetric wards to name a child as a "boy" or "girl." This original naming based on visual inspection of the body is given great weight:101

Once the body is read, two things happen: text is subordinated to

"90 days in the county jail, deferred until accommodations could be made so that Sean will not have to be housed with women or men, in consideration of his transgender status." Id.

95. Minkowitz, supra note 92, at 100. The sentencing judge proclaimed, "This case is not about pedophilia, not about homosexuality, not about love or trust. This case is about deceit and consistency." J. Green, Predator?, supra note 94, at 29 (emphasis added).

96. Minkowitz, supra note 92, at 142.


98. Mary C. Dunlap, The Constitutional Rights of Sexual Minorities: A Crisis of the Male/Female Dichotomy, 30 Hastings L.J. 1131 (1979). Dunlap argues that "[t]he law defines every person as either male or female by reference to the genital anatomy of that person." Id. at 1132.

99. City of Chicago v. Wilson, 389 N.E.2d 522 (Ill. 1978). See also supra note 71 and accompanying text. The strip search revealed that "[b]oth defendants were wearing brassieres and garter belts; both had male genitals." Id.


101. David, supra note 10, at 292 ("In short, a doctor or even a lay attendant says, 'It's a boy' or 'It's a girl.' This perfunctory determination has enduring legal significance.").
interpretation, and later re-readings are not permitted—narrative
time suddenly stops. As such, the birth attendant's declaration of
the baby's sex is performative rather than descriptive, creating
rather than describing the child's sex.102

These traditions notwithstanding, biological sex is not as easily ascer-
tainable as one might assume. Intersexuals, particularly those with ambigu­
ous genitals or with the external genitals of one sex but the gonads of an­
other, demonstrate that even the "look test" can at times be of little use.103
A person with a genital tubercle poses even greater challenges, since s/he
could be said to have either a large clitoris or a small penis.104

In fact, external genitalia are but one of a number of factors used by
medical professionals to determine sex. Relevant indicia include:

1. sex chromosome constitution;
2. gonadal sex;
3. sex hormonal pattern;
4. internal sex organs other than gonads (e.g., uterus or sperm
ducts);
5. external genitalia;
6. secondary sexual characteristics (e.g., facial hair);
7. sex of rearing (usually the sex assigned at birth); and

102. Franke, supra note 3, at 53, drawing from Judith Butler, Bodies That Matter 237 (1993). Butler herself notes that "[t]he 'naming' of sex is an act of domination and compulsion, an institutionalized performative that both creates and legislates social reality by requiring the discursive/perceptual construction of bodies in accord with principles of sexual difference." Judith Butler, Gender Trouble: Feminism and the Subversion of Identity 115 (1990) [hereinafter Butler, Gender Trouble].


104. This organ [the genital tubercule] has an open gutter underneath it instead of a covered urethral tube. The urinary orifice [sic] is at its root or base, more or less in the female position. The opening at the base may be small and lead directly to the bladder; or it may be a quite large urogenital sinus from the interior of which can be traced both the urethral and vaginal pas­sages. The latter may either connect with the cervix of the uterus or end blindly. Outside and below the opening, it will be ambiguous whether there is a scrotum with incomplete fusion or labia majora more fused than they should have been.

8. assumed or psychological sex, also called "gender identity."  

While somewhat helpful, these indicia are ultimately inadequate. Intersexuals could be classified as males by one test and as females by another. Moreover, there are cases in which single factors alone would still fail to render unambiguous results. The sex chromosome test, the most medically "precise" of the eight indicia, is exemplary in this regard.

1. Sex Chromosome Test

The appeal of the sex chromosome test lies in the fact that, of the forty-six pairs of chromosomes in the "normal" human, males have one XY pair, while females have an XX pair. Theoretically, the routine detection of either an XY or XX pair would allow the test subject to be neatly placed in one of the two traditional sex categories. Those with genetic "defects," however, complicate the easy binary. Turner's syndrome (XO pattern, with "O" being lack of a chromosome), Klinefelter's syndrome (XXY pattern), and "meta-female" (XXX pattern) all defy an easy categorization.

Since 1968, the sex chromosome test has been used in the Olympics to verify the "gender" of all female athletes. The test was instituted as a regular practice after one female athlete who won medals in the 1964

105. Limbo, supra note 104, at 236 n.10. See also David, supra note 10, at 290-91; Smith, supra note 103, at 965.
106. David, supra note 10, at 291.
107. Id.
108. Id. at 291 n.8; see also Wayne Scott Cole, Comment, Transsexuals in Search of Legal Acceptance: The Constitutionality of the Chromosome Test, 15 SAN DIEGO L. REV. 331, 333 n.9 (1978).
109. David, supra note 10, at n.8. The import of these categories is dismissed by some: "I personally am inclined to see slicing sex that finely as either trivial and irrelevant (given the minuscule number of people in other than the two generally recognized sexes) . . . ." Mary Ann C. Case, Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence, 105 YALE L.J. 1, n.35 (1995) (discussing "intermediate hermaphroditic sexes").

The actual numbers, however, are not "miniscule." One source places the number of babies born with ambiguous external genitalia at approximately one in 2,000. Angier, supra note 11, at D8. Such babies are generally subjected to "corrective" surgery, by which their genitals are mutilated to approximate exclusively male or female genitalia. Id. Case's trivialization reveals a mistaken underestimation of the radical destabilizing effect of atypical sexual categories. The destabilization is revealed by the medical reaction to intersexed individuals. "When an infant is born with ambiguous genitals, a hospital will instantly rally its experts into a huddle-----surgeons, geneticists, endocrinologists, psychiatrists-----with the goal of deciding, is this really a girl or really a boy?" Id.

Intersexed individuals have at times suffered fates worse than merely being defined as medically abnormal. As Foucault notes, "[f]or a long time hermaphrodites were criminals, or crime's offspring, since their anatomical disposition, their very being, confounded the law that distinguished the sexes and prescribed their union." MICHEL FOUCAULT, THE HISTORY OF SEXUALITY: VOLUME I: AN INTRODUCTION 38 (1978).
Olympics was later discovered to be a “man” when testing revealed the presence of the Y (male) chromosome.\textsuperscript{111}

This testing practice has been criticized as being over- and underinclusive: it identifies women with genetic defects who have no muscular advantage, while missing those who do have such an advantage.\textsuperscript{112} Moreover, genetically abnormal “males,” such as XXY and XX males, would pass the test, and would have to be allowed to compete as women, in spite of the fact that they “may have a normal male body build, male muscle strength, and a male psychological and social orientation.”\textsuperscript{113}

In addition to its predictive inaccuracy, the test presents constitutional concerns in some contexts. In the case of a transsexual marrying or modifying her/his birth certificate, using the test may violate her/his right to equal protection, since “[t]here is no rational relation between the chromosome test and any state interest in these two contexts.”\textsuperscript{114} A thorough exploration of this particular issue is beyond the scope of this Note.\textsuperscript{115}

2. The Eight Factors

Rather than using the sex chromosome test, many commentators advocate using a mixture of the eight indicia, with an emphasis on psychology and gender self-identity. Smith argues that “the psychological sex of an individual should be the single most important standard used to judge his [sic] legal sex.”\textsuperscript{116} Others concur, using somewhat synonymous terms: “the eighth factor, gender identity, is arguably the most important;”\textsuperscript{117} “[t]he essential criterion is gender or sexual identity, namely whether the person considers himself or herself to be a male or a female.”\textsuperscript{118} Franke cautions that “[t]o conceptualize both sexual identity and sex discrimination in terms of biology at all is to ignore the role that gender stereotypes play in the construction of sexual difference.”\textsuperscript{119}

\textsuperscript{111} Id. at 939. There have been no “impostors” since. Id. at 940. Nonetheless, the testing continues. In fact, the International Olympic Committee is even considering switching to the more straightforward visual examination. Karen Rosen, \textit{Visual Inspection for Gender Replacing Chromosome Test}, ATLANTA J. \& CONST., Dec. 5, 1991, at F6.
\textsuperscript{112} Fastiff, \textit{supra} note 110, at 944.
\textsuperscript{113} Id. at 944-45.
\textsuperscript{114} Cole, \textit{supra} note 108, at 355. Cole considers and rejects several possible state interests that might justify sex chromosome testing under rational basis review pursuant to the Equal Protection clause: the state interest in same sex marriage; in the ability to consummate the marriage; in discouraging homosexual conduct; in procreation; in administrative convenience; in accuracy of public records; in preventing fraud; in using public records to aid the psychologically ill; and in birth certificates reflecting facts at the time of birth. \textit{Id.} at 345-54.
\textsuperscript{115} For a general discussion, see Cole, \textit{supra} note 108.
\textsuperscript{116} Smith, \textit{supra} note 103, at 969.
\textsuperscript{117} David, \textit{supra} note 10, at 292.
\textsuperscript{118} Green, \textit{supra} note 7, at 126.
\textsuperscript{119} Franke, \textit{supra} note 3, at 39. She argues for the “cultural genital,” which is a metaphor for both the physical genital that is not presently in view but
Another group of commentators calls for a balancing of the various factors. Cole suggests that "courts should . . . reject the chromosome test and instead adopt the gender-anatomy test of sex."\(^{120}\) A concurring Note posits that "[j]udicial fairness requires that society determine sex on the basis of psychological identity and anatomical appearance."\(^{121}\) Fastiff, on the other hand, would "take into consideration not only a person's chromosomes, but her external appearance and her own gender identity."\(^{122}\) This latter approach was adopted by Judge Grady in the overturned lower court decision extending Title VII protection to transsexuals.\(^{123}\)

C. LAW VERSUS MEDICINE

With eight factors to balance and choose between, the question arises: who should do the balancing? There has been much debate in legal scholarship about whether law or medicine should determine what constitutes sexual identity. Some assert that law should not decide questions of sex, but should instead "accept medical decisions in this area and give them the legal effect that is in the best interests of the individual or society."\(^{124}\) This argument assumes that courts must defer to the expertise of doctors, "for at its base, sex determination is an extra-legal matter, becoming legal only under certain conditions."\(^{125}\)

Other commentators, however, point out that medicine is merely descriptive, while the law is normative.\(^{126}\) Franke argues that "the law's relationship to sexual identity" can be understood by comparing

the difference between judicial statements that describe a state of affairs and judicial statements that bring about a state of affairs . . . . These two types of juridical speech acts are imbued with two different kinds of normativity . . . . In the first case, the aspiration is that the judge's words fit the world, whereas in the second case the

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\(^{120}\) Cole, \textit{supra} note 108, at 355.
\(^{121}\) Limbo, \textit{supra} note 104, at 254.
\(^{122}\) Fastiff, \textit{supra} note 110, at 961.
\(^{123}\) \textit{Ulaine}, 581 F. Supp. at 825 (recognizing the chromosome test, self-perception and social perception as all informing the determination of sex). \textit{See also supra} notes 76-77 and accompanying text.
\(^{124}\) Smith, \textit{supra} note 103, at 972.
\(^{125}\) Gould, \textit{supra} note 70, at 432.
\(^{126}\) David, \textit{supra} note 10, at 338. Moreover, "[a]dopting a medical model has . . . serious and severe limitations because it shifts the locus of responsibility from society to the individual." Gould, \textit{supra} note 70, at 441.
world is changed to fit the judge’s words.\textsuperscript{127}

The transgender cases reveal that judges are exercising the latter type of juridical speech—changing the world through their words. The Seventh Circuit’s decision in \textit{Ulane} is a prime example of judicial construction of sexual identity:

Ulane is entitled to any personal belief about her sexual identity she desires. After the surgery, hormones, appearance changes, and a new Illinois birth certificate and FAA pilot’s certificate, it may be that society, as the trial judge found, considers Ulane to be female. But even if one believes that a woman can be so easily created from what remains of a man, that does not decide this case.\textsuperscript{128}

The tone of the opinion suggests that the original sexual declaration ("It’s a boy!") by a long-forgotten birth attendant who could not have possibly known that the infant Kenneth/Karen’s gender did not match his/her physical sex, was still controlling for the \textit{Ulane} court. By denying her claim of sex discrimination, the court implicitly derogated Karen’s claim that she was truly female. By invalidating her expressed sexual/gender identity, the court’s opinion inevitably helped to shape and color society’s shared understanding of sexual reality. Thus the holding in Ulane quietly proclaimed that even sex reassignment will not necessarily ensure social recognition of one’s self-perceived gender identity.

Through its transgender jurisprudence, the legal system creates our shared social reality. Legislators and judges should be careful to craft gender policy based on a totality of the social and individual factors.

David has argued for placing the locus of determinative weight with either the executive or legislature, according to medicine’s explanatory ability. He suggests that administrative agencies can make the determination in easy cases, meaning for those individuals for whom medicine can provide precise and easily understood tests. If simple tests would not suffice, as they would not for an XXY male with an outwardly female appearance, or for an intersexual, the legislature should make the determination.\textsuperscript{129} His argument concerning the hard cases is interesting. Were society’s elected representatives to pass laws defining sex, we would return to the judicial approach of the seventeenth century Virginia General Court’s decision in \textit{Thomas(ine) Hall}. This may or may not be the best answer, but it is safe to say at least that the

\textsuperscript{127} Franke, \textit{supra} note 3, at 51 (emphasis added).

\textsuperscript{128} \textit{Ulane}, 742 F.2d at 1987 (emphasis added).

\textsuperscript{129} David, \textit{supra} note 10, at 338. One Note suggests a “joint undertaking” by both the medical and legal communities, involving an “interprofessional recognition and advancement of the idea that individuals have more social utility and economic capacity if they are psychologically and anatomically congruent.” Jeannine S. Haag & Tami L. Sullinger, \textit{Is He or Isn’t She? Transsexualism: Legal Impediments to Integrating a Product of Medical Definition and Technology}, 21 \textit{WASHBURN L.J.} 342, 371 (1982).
courts' reliance on medical knowledge alone "might be considered at best myopic."\textsuperscript{130}

If law is to be the institution making the decision,\textsuperscript{131} one commentator suggests that "[b]ecause the law is primarily concerned with human relationships, only those biological factors which influence person-to-person interactions should be criteria used in determining a person's legal sex."\textsuperscript{132} This offers little practical guidance, however, not least because of the arguable cultural relativity of the social perception of biological traits.\textsuperscript{133}

Ultimately, the key to resolving this problem lies in recognizing that the legal field is an unstable "interpretive field of practice where identifications may be shifted and reformed."\textsuperscript{134} When the discussion moves beyond established identities, when "nonidentities" are formulated, a powerful "dialectical engagement between subject positions and juridical fields of power" is revealed.\textsuperscript{135} In practice, the transgendered subject is interacting with and being shaped by the interpretive fields of both medicine and law. On a more theoretical level, s/he is faced with one of the "juridical fields of power" most inimical to a positive and fluid transgender identity: the field of legal theory known as essentialism, particularly sex/gender essentialism.

III. TRADITIONAL SEX/GENDER ESSENTIALISM

A. ESSENTIALISM

Essentialism can be defined as "a belief in true essence—that which is most irreducible, unchanging, and therefore constitutive of a given person or thing."\textsuperscript{136} In the present context, essentialism would posit that women and men "are identified as such on the basis of transhistorical, eternal, immutable essences."\textsuperscript{137} There would be, in other words, something in each that was inherently woman or inherently man. Given that each had a different essence, comparisons between the two would be pointless, even problematic:

\begin{itemize}
  \item \textsuperscript{130} Gould, \textit{supra} note 70, at 432.
  \item \textsuperscript{131} Use of the law is not without severe limitations. Patricia Williams notes, in a discussion of the law and race, that "the constitutional foreground of rights was shaped by whites, parcelled out to blacks in pieces, ordained from on high in small favors, random insulting gratuities." \textit{Patricia Williams, Alchemy of Race and Rights: Diary of a Law Professor} 164 (1991). Similar problems plague each disempowered group in its pursuit of rights: begging for crumbs of legitimacy from the mainstream masters. The transgendered are certainly not excepted.
  \item \textsuperscript{132} \textit{Limbo}, \textit{supra} note 104, at 241.
  \item \textsuperscript{133} Gould, \textit{supra} note 70, at 430 ("Social standards for femininity and masculinity will alter as cultural determinants shift . . . . Thus what constitutes 'masculinity' in one epoch might well constitute 'femininity' in another.").
  \item \textsuperscript{135} \textit{Id.} at 1015.
  \item \textsuperscript{136} \textit{Diana Fuss, Essentially Speaking: Feminism, Nature & Difference} 2 (1989).
  \item \textsuperscript{137} \textit{Id.} at xi.
\end{itemize}
better to take each on its own terms, and judge the sexes by their own standards. In classical legal terms, essentialism calls for an analysis of women *sui generis*: in a class by themselves, outside the scope of a traditionally patriarchal legal structure which has consistently devalued them.

History reveals, however, that consideration *sui generis* has done little to advance the cause of women's struggle for independence and liberation. Over a century ago, in the course of upholding a law denying women the right to practice law, the U.S. Supreme Court used essentialist language in explaining that

> [t]he natural and proper timidity and delicacy which belongs to the female sex evidently unfit it for many of the occupations of civil life . . . . The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator.

These views are unfortunately not merely the curious artifacts of nineteenth century jurisprudence. Less than twenty years ago, the Supreme Court drew on essentialist notions in holding that a "woman's relative ability to maintain order in a male, maximum-security, unclassified penitentiary . . . could be directly reduced by her womanhood."

In the present context, an essentialist would resist accepting the notion of a transgender identity. If men and women have immutable essences, how could a manly essence be housed in a woman, or vice versa? For those who mix and match elements of either gender (e.g., those engaging in genderfuck *drag*), the either/or categories are patently unusable. A radical dyke wearing, for instance, a tuxedo with a strap-on dildo protruding prominently through the fabric over the crotch of her pants is arguably not adhering to a universal female essence. Of course, if the concept of female essence were more expansive, such variation could be included in its definition. But recognition of such variation would necessarily debase the strict purity required by the essentialist project.

### B. ANTI-ESSENTIALISM/SOCIAL CONSTRUCTION

Standing in staunch opposition to essentialist thought are the construc-

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138. Essentialism should not be confused with difference feminism. Some advocates of the difference feminism, such as Carol Gilligan, argue that not only do women and men have distinct and mutually exclusive traits, but gender alone actually determines an individual's perspective on legal and moral issues. *See generally* CAROL GILLIGAN, *IN A DIFFERENT VOICE* (1982). Essentialism, on the other hand, "is typically defined in opposition to difference; the doctrine of essence is viewed as precisely that which seeks to deny or to annul the very radicality of difference." Fuss, *supra* note 136, at xii.


141. Defined *supra* note 15.
tionists, who argue that "essence" itself is historically constructed. These anti-essentialists argue for "interrogating the intricate and interlacing processes which work together to produce all seemingly 'natural' or 'given' objects." At heart, they are concerned "with the production and organization of differences, and they therefore reject the idea that any essential or natural givens precede the processes of social determination."144

Some of the more critical anti-essentialists have gone even further, charging that the supposedly universal essence of women championed by the essentialists has actually been defined (or socially determined) by only the experiences of white, middle class women.145 In the place of this false singularity, some antiessentialists use the notion of "multiple consciousness" to recognize that various facets of identity subject to oppression, such as gender, race, class, sexual orientation, age and ability, are all interconnected in "inextricable webs."146

Although commendable for challenging the assumptions underlying both essentialist and much mainstream feminist discussions of the similarity/difference between the sexes/genders, the social constructionists/anti-essentialists nonetheless fail in their discussions of women and men to question a more fundamental assumption: that the two genders are themselves stable, discrete bases for identity. As the discussion of the sex chromosome test and genital look test has indicated, the poles of the biological male/female sexual binary have proven to be far from dependable or predictable, or even neatly ascertainable. Applying the binary to the social construction of gender offers no greater promise of conceptual stability.147

Drawing heavily on the work of Judith Butler, it is my contention that the attempt at pinpointing a permanent identity along the continuum between the sex/gender binary poles will be sufficiently precarious and problematic to justify, even necessitate, a laissez-faire approach by the courts to the question of gender identity.148

143. Id.
144. Id. at 2-3.
145. See generally Angela P. Harris, Race and Essentialism in Feminist Legal Theory, 42 STAN. L. REV. 581 (1990).
146. Id. at 587.
147. This social constructionist approach has been counterattacked by some staunch binarists. See, e.g., John Money, Sex Errors of the Body and Related Syndromes: A Guide to Counseling Children, Adolescents, and Their Families 6 (1994) ("It simply does not make sense to talk of a third sex, or of a fourth or fifth, when the phylogenetic scheme of things is two sexes. Those who are genitally neither male nor female but incomplete are not a third sex. They are a mixed sex or an in-between sex. To advocate medical nonintervention is irresponsible.").
148. Dunlap suggests replacing the two-sex assumption with a situationally variable identity: a person "could make different determinations as to sex identification for various purposes, such as education, marriage, living arrangements, or personal physical appearance." Dunlap, supra note 98, at 1138. This appears to be the approach taken by Tho-
IV. TOWARD A MORE ENLIGHTENED APPROACH

There are many ways to describe people who have mixed their sexual identity and gender identity: transsexual, transvestite, intersexual, and androgyne. Nonetheless, the law has been steadfast in classifying individuals within a bipolar model of sex and gender.\(^{149}\) One commentator, recognizing that transsexuals have proven that biological sex is not necessarily fixed to the sex of birth, and that the medical establishment itself has demonstrated the difficulty in pinpointing an individual's sex, argues that this has provoked a renewed interest in asserting the male/female binary. In her words:

> The resurrection of the male/female binary is motivated both by medico-juridical definitions of successful transsexuality and by the juridical need to reaffirm the meanings of male and female that have been paradoxically unsettled by a medical discourse objectively affirming the instability of "sex" as an anatomical or biological category.\(^{150}\)

Although presented with the possibility that there might be more than two discrete sexes, courts have been firm in their refusal to seriously consider the inclusion of new identities.\(^{151}\) There is of course the danger of generating multiple subcategories. Mary Ann Case analogizes to the harmful splintering of racial identities into fine gradations based on the relative fraction of racial composition.\(^{152}\) In light of the potential for the fragmentation of identity for transgendered individuals, both rigid dichotomies and elaborate taxonomies must be resisted. A fluid continuum between the poles of the male/female binary could accommodate variation while avoiding the danger of splintering. By using a more malleable model for sex/gender

\(^{149}\) Colker, *supra* note 12, at 65.

\(^{150}\) Bower, *supra* note 134, at 1024.


Martha Minow notes the danger of multiple subcategories in her discussion of the social construction of race in America in the 1920s. Finding that the tripartite white/"Negro"/"Indian" schema apparently had no room for people of Mexican or Asian descent, the Supreme Court treated them as the functional equivalent of "Indians"—more than slaves but less than free whites. "In retrospect, these results seem arbitrary. The legal authorities betrayed a striking inability to reshape their own categories for people who did not fit." Martha Minow, Foreword, The Supreme Court 1986 Term, *Justice Engendered*, 101 Harv. L. Rev. 10, 70-71 (1987) (referring to Ozawa v. United States, 260 U.S. 178, 195 (1922) (emphasis added)).

\(^{152}\) Case offers this interesting cautionary criticism:

> I personally am inclined to see slicing sex that finely as ... more troubling than liberating (risking the reinforcement of hierarchies such as the ever finer slicing of racial classifications from Black and White to quadroon and octofoam in antebellum Louisiana, or the distinction between Black, White, and Colored in South African apartheid law).

Case, *supra* note 109, at 15 n.35.
identity, transgendered individuals can “articulate the convergence of multiple sexual discourses at the site of 'identity' in order to render that category, in whatever form, permanently problematic.”

It is noteworthy that transsexuals have at times unfortunately been accused of reaffirming the stability of the male/female binary. One Note has argued that “[t]he transsexual is distinguishable from the homosexual in the eyes of the law by her renaturalizing of rigid gender categories and by her ability to pass. The state affords her benefits that it denies to gays and lesbians because she can be read as reinforcing rather than subverting the boundary between masculinity and femininity.”

This critique arises from the fact that a transsexual who has successfully undergone sex reassignment surgery “could fit at one of the poles rather than at the middle.” Along these lines, a writer for a major national gay and lesbian magazine mischaracterizes transsexuals and gays/lesbians as engaged in “fundamentally different struggles.” Specifically, she aligns transsexuals with sexual essentialists, and gays/lesbians with social constructionists.

By arguing for exclusively fluid identities, and denigrating fixed identities, these critics ignore the radical impact of biological sex reassignment on our notions of gender identity. While one critic does acknowledge that “transsexuality may be more destabilizing than homosexuality,” s/he characterizes his/her analysis as having “deconstructed the illness trope and introduced the idea of passing.” To dismiss true gender dysphoria and praise the post-operative transsexual as nothing more complicated than the epitome of “passing” is to profoundly misunderstand and mischaracterize the reality and symbolism of transsexuality. Dismissing the transsexual’s desire to make biology conform at last to her/his gender identity misses the radically performative nature of even biological sex. The notion of sex/gender-as-performance will be discussed more fully below.

The attempt at ordering fluid gender identities above those that are fixed is misguided and even dangerous. In the analogous context of sexuality, Gayle Rubin warns against the implications of such privileging and vilifica-

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153. Butler, Gender Trouble, supra note 102, at 28.
155. Colker, supra note 12, at 44. Colker does not make this characterization. She notes that “[w]hether the postoperative transsexual fits into a pole depends on whether he or she ‘passes.’ The postoperative transsexual who does not pass is left in the indeterminate middle category (for example, with respect to sex-segregated bathrooms) with neither men nor women wanting to claim him or her as their own.” Id. (footnote omitted).
156. Minkowitz, supra note 92, at 146. Bisexuals, and of course transgenders, are conspicuously absent from both the magazine’s title (Out Magazine: America’s Bestselling Gay and Lesbian Magazine) and from most of its commentary.
157. Id.
158. Patriarchy Is Such a Drag, supra note 154, at 1993.
tion. She notes that in the traditional social schema, married, reproductive heterosexuals occupy the highest social strata, monogamous homosexuals and bisexuals fall in the middle, and toward the bottom are found the dregs of society, including transsexuals, transvestites, sadomasochists, and sex workers (e.g., prostitutes, porn models, erotic dancers). Rubin argues that such hierarchies are far from innocuous: "As sexual behaviors or occupations fall lower on the scale, the individuals who practice them are subjected to a presumption of mental illness, disreputability, criminality, restricted social and physical mobility, loss of institutional support, and economic sanctions."160

This privileging and vilification was demonstrated in 1988 by Texas State District Court Judge Jack Hampton, who refused a life sentence for a defendant convicted of killing two gay men.161 Hampton explained that "I put prostitutes and gays at about the same level and I’d be hard put to give somebody life for killing a prostitute."162 A similar disregard for the worth of transgendered people has already been noted: the institutionalization of the "GID afflicted," the arrest of cross-dressers, and the murder of transsexuals.

A. AMBIGUITY

"The body can no longer be seen as a biological given which emits its own meaning. It must be understood instead as an ensemble of potentialities which are given meaning only in society."163

If gender is not tied to sex, either causally or expressively, then gender is a kind of action that can potentially proliferate beyond the binary limits imposed by the apparent binary of sex. . . . But how would such a project become culturally conceivable and avoid the fate of an impossible and vain utopian project?164

As discussed above, the General Court of Virginia in Thomas(ine) Hall took a comparatively unusual stance toward gender/sex ambiguity in the

159. Rubin, supra note 85, at 267.
160. Id.
162. Id. Hampton further stated that if the victims "had not been out there spreading AIDS around, they’d still be alive today." Id.
164. BUTLER, GENDER TROUBLE, supra note 102, at 112.
middle seventeenth century.\textsuperscript{165} It is unclear from the record whether Hall was an intersexual, whether s/he had a genital tubercle or other genital anomaly, or whether s/he was an androgynous male with a small penis and undescended testicles or an androgynous female with a large clitoris. Regardless of what s/he technically was, the case is noteworthy for how the legal system resolved the dilemma. Recognizing the impossibility of working within the sexual binary, the court transcended established categories and proclaimed the defendant to be both woman and man. This case is thus a prime example of how "[b]iological sex is revealed to have no inevitable natural meaning, but only the social meaning attached to it on the basis of gender identity."\textsuperscript{166} By ordering the publication of this determination in Hall’s community, that all might "know" what s/he was, the court explicitly revealed the blatant social construction not only of gender, but of the understanding of biological sex itself.\textsuperscript{167}

\textit{Thomas(ine) Hall} is nonetheless problematic in some respects. Although the court recognized that the categories of "woman" and "man" are not fixed in stone, it was unwilling to allow Hall the true freedom to either move fluidly between masculine and feminine appearance and identity, or to live for periods as a man or a woman or both according to whim, as in fact s/he had done for most of her/his life. Instead of allowing Hall unfettered discretion in her/his personal appearance and identity, the court reimposed the male/female binary in gross caricature: by forcing Hall to wear both women’s and men’s clothing, the court forced her/him into stylistic admixture, a liminal no-person’s-land of outfits doomed to be perceived as freakish. In terms of dress, s/he would no longer fit into either world.

Hall was not alone in being treated as an oddity. Transgendered individuals exhibiting ambiguous identities have long been reduced to circus freaks.\textsuperscript{168} Such delegitimization allows the kind of disregard for transgendered lives evidenced by the various attacks on transgendered people discussed above—most notably the slayings of Debbie Forte and Brandon Teena, and the criminal proceedings against Sean O’Neill. The medical and legal establishments must be held accountable for the oppressive norms they generate.

\textsuperscript{165} See \textit{supra} note 16 and accompanying text.\textsuperscript{166} \textit{Patriarchy Is Such a Drag}, \textit{supra} note 154, at 1993.\textsuperscript{167} This is not to suggest that there existed a “neutral” body prior to (re)namning. The complex interplay of sex and social construction will be discussed below.\textsuperscript{168} “When there were circus side-shows, people gawked at the ‘famous bearded lady’ or the ‘incredible man-woman.’ After the freak shows, there were the movies—most notably Fellini’s \textit{Satyricon}, in which a pale, feeble hermaphrodite youth is disrobed and shown to have both a penis and breasts.” (citation omitted). Angier, \textit{supra} note 11, at D8.
B. CROSSING INTO THE THEORETICAL FRONTIER

_is there a "physical" body prior to the perceptually perceived body? An impossible question to decide._169

Joined, our bodies have passage into one/without merging

* * *

And while the we conspires/to make secret its two eyes
we search the other shore/for some crossing home._170

Esther Newton, in a famous anthropological study of female impersonators, noted that while it seems obvious that “men” have to artificially create the image of “women,” women themselves have to create it through artifice._171_ Listing the items used by impersonators—“long hair, ‘feminine’ make-up and dress, ‘feminine’ jewelry, bosom (false or hormone-induced), and high-heeled shoes,”—she points out that “the only item listed that is intrinsically more ‘faked’ for a male is the bosom. But what of padded bras?”_172_

Judith Butler argues that “three contingent dimensions of significant corporeality” are involved in this discussion: anatomical sex, gender identity, and gender performance._173_ Both male and female cross-dressing involve all three in complex interplay. She suggests that cross-dressing, by imitating settled notions of a gender not considered by society to be one’s own (due to expectations based on anatomy), “implicitly reveals the imitative structure of gender itself—as well as its contingency.”_174_ This suggests that there exists

_a radical contingency in the relation between sex and gender in the_
face of cultural configurations of causal unities that are regularly assumed to be natural and necessary.

We see sex and gender denaturalized by means of a performance which avows their distinctness and dramatizes the cultural mechanism of their fabricated unity.

Kennedy and Davis, in their account of a lesbian community in Buffalo, N.Y., offer a good case in point: "Butch and fem mannerisms [in the 1940’s] were modeled on male-female behavior as portrayed in the Hollywood movies of the period. They included all the little details of presenting one’s self—manner of walking, sitting, holding a drink, tone of voice." If both women and men have to create the illusion of “woman” or “man,” whether dressing or cross-dressing, the costume of womanhood/manhood is revealed to be a gendered interpretation of what it means to be a “woman” or a “man.” Yet the interpretation is not expressive of any a priori identity, but rather a performance of cultural expectations.

Moving to a deeper level, Butler asks, “[a]re there ever humans who are not, as it were, always already gendered?” She argues that there are not, since the crucial naming of a child as “boy” or “girl” marks its moment of humanization. Her answer is unfortunate insofar as it appears to confuse sex with gender: is the boy/girl label not indicative of biological sex rather than gender identity? Nonetheless, given that, by her definition, no human is pregender, the question arises: “If gender is always there, delimiting in advance what qualifies as the human, how can we speak of a human who becomes its gender, as if gender were a postscript or a cultural afterthought?”

The question is rhetorical, for the Butlerian position appears to be that one does not become a gender as much as one behaves in a gendered manner. In other words, gender is not so much who one is, but rather what one does. The implication is that “[i]f gender attributes . . . are not expressive but performative, then these attributes effectively constitute the identity they are said to express or reveal.”

If all gender is a performance, a “dramatic and contingent construction of meaning,” from where do the norms that are played with and challenged arise? In the case of the lesbians in Buffalo, from where did Hollywood derive the male-female behavioral patterns on which the women based their performance? Butler answers with the paradox that “gender is a kind of imitation for which there is no original; in fact, it is a kind of imitation

175. Id. (emphasis added).
176. KENNEDY & DAVIS, supra note 39, at 157.
177. BUTLER, GENDER TROUBLE, supra note 102, at 111.
178. Id.
179. Id. (emphasis added).
180. Id. at 141.
181. Id. at 139.
that produces the very notion of the original as an effect and consequence of the imitation itself."

Stated differently, "the original" is revealed to be a copy, and an inevitably failed one, an ideal that no one can embody. If no one can actually embody original gender, the use of the law to punish so-called gender deviance raises troubling questions.

C. IMPLICATIONS FOR THE LAW

Given the radical contingency of gender, the offensiveness of using the legal system to punish transgendered individuals becomes clear. The prosecution of Sean O'Neill for "criminal impersonation of the opposite gender," for instance, is a frightening indication of the extent to which the state will go to enforce arbitrary gender-related behavioral roles. The vagrancy statute in both Archibald and Gillespie was used to punish the male defendants not for disguising themselves "in some basic anatomical sense, but for donning artifacts socially associated with women." Both cases reflect a similar abuse of the state’s power to coerce adherence to gendered clothing norms. Police harassment of butch lesbians for failure to wear at least two items of feminine clothing is revealed to be nothing less than homophobic depredation by the state’s uniformed thugs. And the Perez court’s consideration of female cross-dressing as relevant evidence of motive for murder strains belief.

As these cases reveal, the law’s need for set, predictable rules for behavior “necessarily flounders when faced with variations of gender related behavior where, in fact, it is futile to establish a ‘norm.’” Transgendered individuals simply defy the medical and legal attempts to construct normative categories around dress, behavior, identity, and even biology. Karl Klare argues that

[n]onconforming appearance choices can be highly subversive of the

182. Judith Butler, Imitation and Gender Insubordination, in INSIDE/OUT: LESBIAN THEORIES, GAY THEORIES 21 (Diana Fuss ed., 1991). Butler explains that “[i]f gender is drag, and if it is an imitation that regularly produces the ideal it attempts to approximate, then gender is a performance that produces the illusion of an inner sex or essence or psychic gender core; it produces on the skin, through the gesture, the move, the gait (that array of corporeal theatrics understood as gender presentation), the illusion of an inner depth.” Id. at 28.

183. BUTLER, GENDER TROUBLE, supra note 102, at 139.
184. See generally Minkowitz, supra note 92 and accompanying text.
187. Whisner, supra note 8, at 100.
188. KENNEDY & DAVIS, supra note 39 and accompanying text.
190. Gould, supra note 70, at 432.
191. Butler argues that “[t]here are no direct expressive or causal lines between sex, gender, gender presentation, sexual practice, fantasy, or sexuality. None of these terms captures or determines the rest.” Butler, supra note 182, at 25.
status quo and therefore particularly in need of legal protection. Appearance practices sometimes disrupt and shake-up settled understandings and roles, and they may dramatically suggest ("dramatically," in both senses) the need for new discursive possibilities and altered power relationships.¹⁹²

Ultimately, revealing gender to be nothing more than a ""performance,"" a ""masquerade,"" would force not only a reevaluation of gender as a stable binary, but would actually "call into question the system of 'masculine hegemony and heterosexist power' that underwrites them."¹⁹³ It is therefore not surprising to find that the society has been resolute in meting out punishment, both legal and extra-legal, for those who would dare to challenge settled understandings of the meanings of gender.

CONCLUSION

Although the issue of a transgender identity might appear to mainstream society to involve no more than the trials and tribulations of bizarre people on the fringes of society, the interest in being able to cross gender and sex lines is actually far from de minimis. The legal persecution of transgendered people has chilling Orwellian overtones: "The more comprehensive the government’s authority to enforce the law’s two-sex presumption [and its concomitant gender role expectations], and to punish departures from it, via probes into the mental and psychological makeup of the individual [as well as by dramatic emergency room inspections of genitalia], the more worthless is the individual’s right to privacy."¹⁹⁴

As we have seen, even medicine cannot substantiate the essentialist claim that the poles of the biological sex binary are absolute. Gendered identities based on (at times) unstable sex identities are more hopelessly complicated than the established medico-legal models allow. Given such a heavily problematized juridical discourse, using the law to persecute transgendered individuals, who unavoidably chafe against society’s arbitrary limits for acceptable identity, is unconscionable.

¹⁹³ Bower, supra note 134, at 1027 (quoting BUTLER, GENDER TROUBLE, supra note 100, at 33).
¹⁹⁴ Dunlap, supra 98, at 1141.