How the Legal Regulation of Transgender Bodies Affects Us All

I. Introduction:

The regulation of transgender bodies all over the world is often seen as a problem that only affects the community of transgender people itself. Whereas the law’s treatment of transgender individuals and its strong focus on the medical model is rightly condemned, there is only a limited discussion of the way in which legal rules concerning transgender bodies affect us all. Many people just do not see why they should care about the way the law treats transgender people who are perceived as being very different from the rest of society. After all, they themselves can dress the way they want, have the body they feel comfortable in and do not face discrimination, violence and ridicule because of gender nonconforming behavior.

However, in this paper I will argue that the legal regulation of transgender bodies affects everyone, including gender conforming people. By creating ideals of male and female bodies, masculine and feminine behavior, and sexuality, the law ensures that everyone is held to a strict standard of masculinity and femininity. Moreover, the law reinforces a belief in the “natural” binary of the sexes and enforces the concept of compulsory heterosexuality. It does so by creating strong incentives to comply with predominant standards of male bodies and masculine demeanor or female bodies and feminine demeanor, and by approving only of a certain type of sexuality. Persons who fall outside the scope of accepted appearance or behavior – whether they identify as transgender, gender nonconforming or gender conforming – are all forced to comply with these often very oppressive standards. Whereas transgender or gender nonconforming people face more tangible repercussions in the case of noncompliance, such as the inability to qualify for a sex reassignment surgery or the loss of a job, gender conforming persons are subjected to more subtle,
but equally oppressive rules. The law, by policing the boundaries of sex and gender in transgender cases thus ensures that no one can easily transgress from socially acceptable gender norms.

This paper will take an essentially queer approach\(^1\) and attempt to disrupt the legal regulation of transgender and gender nonconforming bodies: Starting from a critique of the regulation of marginalized groups, in this case transgender persons, the paper will set out to show how the systematic legal regulation of transgender persons affects everyone. By showing that the legally celebrated binary categories of male/female and masculine/feminine are in fact used in an arbitrary, oppressive and restricting way, their damaging effect will be shown and their usefulness and seeming stability can be further interrogated.

I will set out by providing some working definitions for this paper, before I will turn to the current, predominantly medicalized legal regulation of transgender bodies and identity. I will then discuss how this so-called medical model and the requirement of sex reassignment surgery continue to reinforce a strong belief in two binary sexes and in compulsory heterosexuality. Finally, I will conclude this paper by discussing different ways of reforming the current legal regulation of transgender and non-transgender bodies and their implications for gender conforming persons in our society.

II. Definitions:
For the purposes of this paper, the term “transgender” will refer to the broad range of people whose gender identity does not conform to the social expectations for their assigned sex at birth.\(^2\) This group includes, but is not limited to, persons who wish to live permanently in the other sex\(^3\) and who desire to alter their bodies through hormone treatment or surgery in order to be able to do

\(^1\) To me, a queer approach attempts to disrupt widely accepted systems and institutions of power. A queer theory of law, while also focusing on the margins of society, is ultimately concerned with exposing issues of institutionalized oppression and discrimination through the legal system and with changing the distribution of power in a heterosexist society.

\(^2\) Stevie V. Tran/ Elizabeth M. Glazer, Transgenderless, 35 Harv. J.L. & Gender 399 2012, p. 399 footnote 1, quoting Sue Landsittel.

\(^3\) Whereas referring to the “other sex” can be criticized for reinforcing the gender binary, I believe that most transsexuals within the given definition indeed see their transition as one between two distinct sexes.
so. I will refer to the latter group as “transsexuals”. Gender nonconforming people will be defined as individuals who fail to behave in conformity with the cultural expectations associated with that individual’s sex. Contrary to transgender persons, gender nonconforming persons do not experience a nonconformity to their internal sense of gender – instead they “merely” do not conform to their social gender. Finally, gender conforming persons are those individuals that mostly comply with society’s expectations of their sex/Gender – though it should be noted that few persons are truly gender conforming in every part of their lives.

The term “sex” refers to the anatomical or biological distinctions between men and women, which are regarded as constitutive of male- and femaleness in our society. By contrast, the term “gender” refers to the social construct which overlays and interprets these biological distinctions. Whenever I refer to the “natural” binary of the sexes, I am referencing the widespread belief that there are two, and only two sexes, and that these sexes are naturally assigned at birth and remain unalterable throughout one’s life. However, the paper will often refer to sex and gender simultaneously. This is the case because ultimately, in our society, gender is inextricably linked to sex and sex is inextricably linked to gender. Particularly in the context of the legal regulation of transgender rights, the courts often use the concepts of gender and sex interchangeably. Whereas this could be criticized from an academic and theoretical perspective, it is part of their agenda: the legal system only recognizes two distinct “opposite-sex” bodies and then expects those bodies to perform in a certain way. Thus, transgender persons are not only asked to pass as the opposite sex, they are also asked to act like the opposite gender. Similarly, gender nonconforming and gender conforming persons are asked to act in a way that is regarded as natural for their bodies. Since both the issue of sex and the issue of gender is therefore at stake in these cases, the paper will recognize their close relationship in the legal system and refer to both whenever appropriate.

4 Stevie V. Tran/ Elizabeth M. Glazer, Transgenderless, 35 Harv. J.L. & Gender 399 2012, p. 400, footnote 1.
5 Stevie V. Tran/ Elizabeth M. Glazer, Transgenderless, 35 Harv. J.L. & Gender 399 2012, p. 399, footnote 1.
6 Stevie V. Tran/ Elizabeth M. Glazer, Transgenderless, 35 Harv. J.L. & Gender 399 2012, p. 410. There are, of course, also transgender persons who are gender nonconforming at the same time.
7 Stevie V. Tran/ Elizabeth M. Glazer, Transgenderless, 35 Harv. J.L. & Gender 399 2012, p. 399, footnote 1.
III. The Legal Regulation of Transgender Bodies – Sex Reassignment Surgery

Most jurisdictions that recognize transsexuality require some sort of sex reassignment surgery before a transsexual can obtain a change of his sex on official documents. This is the reality all over the world, as well as in most states in the U.S.\(^8\) Both New York State and New York City require extensive sex reassignment surgery, although the requirements do not overlap exactly:\(^9\) whereas New York City demands a phalloplasty or vaginoplasty,\(^10\) New York State requires evidence that the petitioner has undergone penectomy or hysterectomy and mastectomy.\(^11\) Phalloplasty, vaginoplasty, penectomy, hysterectomy and mastectomy are commonly seen as standard examples of sex reassignment surgery, but there are a variety of other procedures that can and, depending on the legal system, have to be undertaken. These procedures include: castration, hormonal treatment, breast implants and facial feminization/masculinization.\(^12\) Additionally, transsexual persons have to provide evidence of psychiatric counseling.\(^13\)

By making these surgeries the prerequisite of an official sex change on important documents, such as the birth certificate, the state effectively ensures that transgender people have to be able to pass as the other gender all the time. Apart from enforcing certain notions about what a “true” man or a “true” woman looks like, these legal rules also prevent many transsexual and transgender people from getting their desired gender acknowledged: sex reassignment surgery is not only extremely expensive – there also exist other obstacles which prevent surgical sex reassignment, such as pre-existing medical conditions.\(^14\) The law thus effectively polices who is eligible for a sex change on official documentation – and it does so by rules that are not only

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\(^10\) Phalloplasty refers to the surgical construction or enlargement of a penis, vaginoplasty to the surgical construction of a vagina.
\(^11\) Penectomy refers to the surgical removal of a penis, hysterectomy to the surgical removal of the uterus and mastectomy to the surgical removal of female breasts.
\(^12\) Saru Matambanazuo, Engendering Sex: Birth Certificates, Biology and the Body in Anglo American Law, 12 Cardozo J.L. & Gender 213, 2005-2006, p. 217.
\(^14\) Dean Spade, Resisting Medicine, Re/modeling Gender, 18 Berkeley Women’s L.J. 15 2003, p. 31.
extremely onerous, but also highly arbitrary: Whereas a wealthy person with no pre-existing medical conditions can undergo sex reassignment surgery and then petition for a sex change on his/her documents, a poor person or a person with a pre-existing medical condition will be denied the same benefit.

Moreover, the focus on gender identity disorder (GID)\textsuperscript{15} as a disease also ensures that transsexuality and even gender nonconformity, which cannot always easily be distinguished by the average person, are seen as deviant behaviors which only affect the mentally ill. Transgenderism is thus recast as a medical problem, which has to be solved.\textsuperscript{16} Diagnoses of GID in childhood also create a fiction of troubled transgender children as opposed to “normal” children, which grow up with little to no gender trouble or exploration.\textsuperscript{17} The law, through its reliance on medicine, thus focuses on transgressive behavior and thereby ends up creating norms for both transgender and nontransgender persons.\textsuperscript{18} By clearly articulating what amounts to a transgression of the norm of natural sex and gender, the norm itself is made more visible to everyone and thereby strengthened and reaffirmed.\textsuperscript{19} The fact that transgressions of the boundaries of sex are dealt with by the medical profession also sends out an important message to the rest of society: Only “true” men and women, who adhere to medically acceptable norms of maleness and femaleness and perform their gender in a normalized way, are regarded as mentally and physically healthy by the law. The law, in complicity with large parts of the medical profession, thereby ensures that there will be little incentive for gender variant behavior or bodily difference – after all, who wants to be labeled as mentally ill or disabled?\textsuperscript{20} This stigma together with the requirement of a diagnosis of GID, which rests on narrow concepts of femaleness and maleness/femininity and masculinity, helps to inscribe and normalize narrow categories of sex and gender for everyone.

\textsuperscript{15} Gender Identity Disorder is the formal diagnosis used by the medical profession to describe a divergence between the sex assigned at birth and the internal sense of gender.


\textsuperscript{17} \textit{Dean Spade}, Resisting Medicine, Re/modeling Gender, 18 Berkeley Women’s L.J. 15 2003, p. 25.

\textsuperscript{18} \textit{Dean Spade}, Resisting Medicine, Re/modeling Gender, 18 Berkeley Women’s L.J. 15 2003, p. 25.

\textsuperscript{19} See \textit{Dean Spade}, Resisting Medicine, Re/modeling Gender, 18 Berkeley Women’s L.J. 15 2003, p. 25.

\textsuperscript{20} Clearly, the question of stigma surrounding mental illnesses and disability is another pressing issue in society and the legal profession.
However, the concept of GID, which has long been challenged by transgender persons and advocates, finally seems to be discarded by the medical profession. In December 2012, the American Psychiatric Association announced that it will drop the term from its newest diagnostic manual (DSM 5).\(^{21}\) Instead, the DSM 5 will include the term “gender dysphoria” – a term that leaves more room for non-pathologized divergent gender identity and expression. Whereas the term “gender identity disorder” implies a mental illness and thus reinforces the conclusion that transgender people are troubled because they do not accept their “natural sex”, the more neutral term of “gender dysphoria” is less stigmatizing. Moreover, by explicitly referring to “dysphoria”, the term “gender dysphoria” also implies that there are transgender people and gender nonconforming people who are not troubled by their different gender expression or identity. Not everyone who refuses to fall within the sex/gender binary is therefore considered as being in the need of medical help.\(^{22}\)

Whereas the switch from gender identity disorder to gender dysphoria can be seen as a positive development towards a more inclusive and liberal understanding of sex and gender, the practical effect of the different terminology remains to be seen. Some transgender advocates even fear that the exclusion of GID will harm transgender rights. Whereas a diagnosis of GID awarded a firm medical and legal basis, a more fluid term such as “gender dysphoria” could lead to less sympathy among the legal and medical profession.\(^{23}\) This, however, should not be a reason for not embracing the term “gender dysphoria” – the benefits of recognizing that sex/gender variance is not pathological and should not be regarded as such, must not be sacrificed for the sake of strategically pleasing a discriminatory legal system.

\(^{21}\) [http://www.guardian.co.uk/world/feedarticle/10554005](http://www.guardian.co.uk/world/feedarticle/10554005) (last accessed 12/15/2012).


In the end, at least for the time being - the law still awards assimilation the best protection. In an analogy to the experience of the LGB movement,\textsuperscript{24} it rewards those transgender people who can successfully claim that they are really not so different from everyone else - they were merely born in the wrong body. By creating two distinct categories of female and male bodies and naming certain prerequisites for belonging to either of these categories, the law, and particularly its administrators, also act as interpreters of gender: Those who have the power to create categories also have the power to exclude certain individuals from these stable categories.\textsuperscript{25} The courts and legislators thus act as the ultimate gatekeepers of gender and sex, sometimes overruling even medical evidence to the contrary.\textsuperscript{26} The act of naming, who legally qualifies as a real woman or a real man, is thereby itself constitutive of these categories.\textsuperscript{27}

But why is the law so adamant about medicalizing and regulating transgender and transsexual bodies and experience? The next sections will set out the most striking reasons for the law’s policing of the categories of sex and gender through the regulation of transgender bodies.

IV. Strengthening the Concept of the Natural Binary of the Sexes

By requiring transgender people to undergo sex reassignment surgery, the law provides protection only for “perfect gender nonconformists”.\textsuperscript{28} Perfect gender nonconformists are those transgender people that can provide medical evidence of GID\textsuperscript{29} and wish to alter their bodies hormonally or surgically. By contrast, “imperfect gender nonconformist” or gender nonconforming people as defined by this paper might act somewhat masculine and somewhat feminine or completely reject

\textsuperscript{24} See Stevie V. Tran/ Elizabeth M. Glazer, Transgenderless, 35 Harv. J.L. & Gender 399 2012, p. 417.
\textsuperscript{25} Elaine Craig, Trans-Phobia and the Relational Production of Gender, 18 Hastings Women’s L.J. 137 2007, p. 157
\textsuperscript{26} Abigail W. Lloyd, Defining the Human: Are Transgender People Strangers to the Law?, 20 Berkeley J. Gender L. & Justice 150, 2005, p. 170. An example of this can be found in the case In Re Estate of Gardiner\textsuperscript{26} where the Kansas Supreme Court refused to accept a more fluid concept of sex, as evidenced by intersex conditions. It simply stated that, in common usage, the terms “male” and “female” are fixed and cannot encompass transgender persons, In Re Estate Gardiner, 42 P.3d. 120 (Kan. 2002), p. 135.
\textsuperscript{27} See Elaine Craig, Trans-Phobia and the Relational Production of Gender, 18 Hastings Women’s L.J. 137 2007, p. 157.
\textsuperscript{28} Term taken from Stevie V. Tran/ Elizabeth M. Glazer, Transgenderless, 35 Harv. J.L. & Gender 399 2012, p. 339.
\textsuperscript{29} Stevie V. Tran/ Elizabeth M. Glazer, Transgenderless, 35 Harv. J.L. & Gender 399 2012, p. 339.
the idea of gender. Society is most troubled by these imperfect gender nonconforming persons because they eschew the rigidity of the gender binary altogether. By not choosing either a typically masculine or typically feminine gender presentation, gender nonconforming people make choices about their gender that society believes are not theirs to make. Since a person’s sex is widely considered as immutable, stable, binary and always linked to a person’s gender, those members of society that exhibit different bodies or perform their gender differently are eyed with suspicion. Most people simply feel more comfortable with persons that can easily be categorized. The ability to create labels puts others at ease and helps society to evade classification anxiety. And every time a person is successfully labeled as “male” or “female”, the very existence of these categories is reaffirmed and strengthened for everyone: gender nonconforming and gender conforming persons.

Most people are thus most comfortable with people and bodies they can easily read and understand: the whole social structure is built on the assumption that there are only two sexes (male and female), that a person can only belong to one of these sexes and that the natural sex of every individual remains immutable. Moreover, gender is seen as flowing naturally from sex. Any behavior that disrupts this natural binary is thus seen as creating instability and is heavily policed. The perceived instability results from the fact that so many social and legal institutions are built on the seemingly natural differences between the sexes. There is a “men’s department” and a “women’s department”, a male soccer club and a female soccer club, “ladies’ night” at nightclubs and gentlemen clubs for men. Gender nonconformity threatens these gendered barriers of everyday life and thereby disrupts the belief in an internal and stable sense of gender. If someone with breasts can look like the typical customer of a men’s club or a person with a penis

30 Stevie V. Tran/ Elizabeth M. Glazer, Transgenderless, 35 Harv. J.L. & Gender 399 2012, p. 401.
31 Stevie V. Tran/ Elizabeth M. Glazer, Transgenderless, 35 Harv. J.L. & Gender 399 2012, p. 401.
34 See Kath Browne, Genderism and the Bathroom Problem: (re)materialising, sexed sites, (re)creating sexed bodies, Gender, Place and Culture Vol. 11, No. 3, September 2004, p. 339.
paints their nails pink, the common belief that men and women are utterly different creatures is shaken and possibly destroyed.

Transgressions are also seen as disruptive because they place other persons in uncomfortable situations: most people simply do not know how to interact with transgender people socially.35 This again places an enormous pressure on transgender people to pass and leads to socially awkward situations in the case of gender nonconforming persons. Our language is simply not well equipped to deal with ambiguity: there is just “he” and “she” and nothing in-between. Therefore, being confronted with a gender nonconforming person makes us search for words, while scrutinizing their bodies and behavior to look for clear signs of their preferred or “natural” sex. Being confronted with gender nonconforming or transgender persons can even lead us to question our own gender identity:36 if other persons can so easily overstep the boundaries of the natural binary – could we do the same? Clear legal rules, requiring transgender people to adhere to narrow standards of male and female/masculinity and femininity thus also discourage the rest of society from questioning its gender. Gender conforming persons should not even begin to question the validity and necessity of the binary and should be afraid of overstepping the boundaries of their “natural” sex and gender. Therefore, adherence to existing sex and gender roles is constantly policed by the legal system and there is some reason to believe that the administrators of the law are also trying to protect their own gender identity,37 as evidenced by their occasional outrage at the suggestion of a permeability of the concept of sex: In Ulane, the 7th Circuit Court of Appeals simply could not fathom that “a woman can be so easily created from what remains of a man.”38

Gender nonconformity is also more closely related to acts than to identity. Acts, such as dressing or behaving in a gender nonconforming way are perceived as more threatening than a “mere identity problem”. Every person could potentially start dressing or behaving differently, but

35 See Elaine Craig, Trans-Phobia and the Relational Production of Gender, 18 Hastings Women’s L.J. 137 2007, p. 139.
36 Elaine Craig, Trans-Phobia and the Relational Production of Gender, 18 Hastings Women’s L.J. 137 2007, p. 139.
37 See Elaine Craig, Trans-Phobia and the Relational Production of Gender, 18 Hastings Women’s L.J. 137 2007, p. 147.
38 Ulane v. Eastern Airlines, Inc, 742 F.2d 1081 (1984), 1086. But wasn’t Eve created from Adam’s rip as well?
only few people would completely change their identity from male to female or vice versa.\(^{39}\)

Therefore, just as with sodomy and homosexual identity, conduct is again regarded as being more subversive and dangerous than a divergent identity. It is thus not surprising that transgender and transsexual persons are required to choose a stable identity. The law encourages and rewards gender conforming behavior and prefers clearly identifiable bodies.

I will now discuss two instances in which the legal system has been particularly concerned with policing the natural binary of the sexes: dress codes and public bathrooms. In this context it should be noted that both dress codes and public bathrooms deal with highly visible signs of sex/gender and are thus perfectly situated to convey a clear message to the rest of society.

1. Dress Codes

Fashion and dress are central to the personal expression of gender nonconforming and gender conforming persons. Dress is a central way through which persons convey and perceive social meaning.\(^{40}\) Being able to choose one’s own dress can bring pleasure and empowerment; however, being forced to conform to mandatory or socially mandated dressing rules can also bring about despair.\(^{41}\) Gender-related dressing has always been regulated: in the past, sumptuary laws required persons to wear at least a certain amount of clothing that was in compliance with their biological sex.\(^{42}\) Even though these laws were repealed, a social consensus about how certain members of a group should dress in order to conform appropriately to the norms associated with memberships in their groups,\(^{43}\) exists until today. That this social consensus is still particularly strong in the case of gender-related fashion and dress codes can be gleaned from two cases that will now be discussed. Interestingly, the law here has less sympathy for gender nonconforming plaintiffs than for transgender plaintiffs. Whereas the latter are trying to move from one category to the next, the

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\(^{39}\) See Stevie V. Tran/ Elizabeth M. Glazer, Transgenderless, 35 Harv. J.L. & Gender 399 2012, p. 415.

\(^{40}\) Gabriel Arkles, Correcting Race and Gender: Prison Regulation of Social Hierarchy through Dress. N.Y.U. L. Rev. 87 2012, p. 862.

\(^{41}\) Gabriel Arkles, Correcting Race and Gender: Prison Regulation of Social Hierarchy through Dress. N.Y.U. L. Rev. 87 2012, p. 862.


\(^{43}\) Jennifer L. Levi, Clothes Don’t Make the Man (or Woman), But Gender Identity Might, 15 Colum. J. Gender & L. 90 2006, p. 92.
former are trying to disrupt the categories of gender altogether and are thus perceived as more threatening.

Transgender plaintiffs might indeed find it easier to evade dress codes based on their biological sex because they “simply” want to change from one category of gender appropriate dress to another category of gender appropriate dress, but they do not wish to challenge the merit of gender appropriate dress altogether. The law, which rewards these perfect gender nonconformists, thus ensures that the illusion of two binary, natural sexes remains unquestioned. That the courts are indeed more comfortable in accommodating transgender persons who base their claim on a diagnosis of GID can be seen in the case of Doe v. Yunits.\textsuperscript{44} Doe, a fifteen year-old high school student had been diagnosed with GID and wanted to dress as a female in school. The court was very sympathetic to her claim, pointing out how forcing her to wear boy’s clothes could potentially endanger her health.\textsuperscript{45}

By contrast, in Jespersen v. Harrah’s Operating Co.,\textsuperscript{46} the plaintiff, a female bartender, had been working for Harrah’s for twenty years when her employer installed a new dress code which required all female employees to style their hair, wear nail polish, and a full facial makeup (face powder, blush, mascara and lip color). Men were forbidden to wear makeup or nail polish and had to cut their hair short. Jespersen, who was a popular and efficient employee, felt unable to comply with the makeup requirement and was therefore terminated by Harrah’s.

The 9\textsuperscript{th} Circuit held that Jespersen could not raise a Title VII claim: even though the dress code stipulated different requirements for men and women, it did not impose an undue burden on Jespersen. Moreover, the majority did not find evidence of an intent to stereotype female bartenders.\textsuperscript{47} The majority judgment clearly shows that the judges felt as if a compliance with gender appropriate dress codes could not amount to an undue burden on a nontransgender employee. The judgment also shows that the uncomfortableness and personal disgust caused by

\textsuperscript{44} Doe v. Yunits, 15. Mass. L. Rptr. 278.
being forced to wear gender appropriate clothing will be closely questioned and that, ultimately, the court will decide on the merits of the plaintiff’s personal outrage.

In contrast to the majority judgment, the dissent emphasized the stereotypical assumptions made and enforced by the dress code: requiring women to wear a full facial makeup forced them to comply with the stereotype that women’s natural faces are not as professional and beautiful as men’s natural faces.

“[…] Harrah’s regarded women as unable to achieve a neat, attractive, and professional appearance without the facial uniform designed by a consultant and required by Harrah’s. The inescapable message is that women’s undoctored faces compare unfavorably to men’s […]” 48

Moreover, the dress code forced women to spend a considerable amount of time each day on putting on their makeup and styling their hair. As the dissent highlights, women not only had to buy the required products, they had to put them on, do touch-ups and use appropriate means of transportation to work in order to ensure that their makeup would stay intact.49 Apart from policing gender, the dress code thus also evidences sexist notions about male and female professionalism and the role of women in the workplace. Whereas men could easily comply with Harrah’s requirements, women had to make sure that they were not only good employees, but also attractive to the male gaze. Moreover, the dress code effectively regulated the private life of the female employees as well: they were forced to spend their private money and time on the purchase and application of makeup products. And for at least some of Harrah’s female employees, such as Jespersen, the enforced “daily ritual” of applying makeup would also have served as a constant reminder of their gender in a still male-centered workforce.

In the end, these cases show that the courts find it easier to empathize with the diagnosis of GID, a perceived disease and disability. By contrast, the courts find it much harder to sympathize with the harms of enforced gender conformity in the case of imperfect gender nonconformists. Feeling “very degraded and demeaned”50 is not enough for the legal system, which values

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objective diagnoses over subjective reactions and feelings – particularly, if the latter are not
deemed believable. Accommodation for transgender persons can therefore be achieved – but only
accommodation within the binary. The law here reinforces the binary by rejecting gender
nonconformity and by celebrating traditional norms of femininity and masculinity. The wish of a
gender nonconforming person to dress differently and act differently is not taken seriously because
gender fluidity and the ability to move between different gender expressions would not only
challenge the medical relevance of GID, but also the seemingly natural flow of gender from sex.
The mere fact that a case like Jespersen can still stand after the decision in Price Waterhouse51
shows the determination of courts (and employers) to regulate the basic expression of gender
through dress.

2. The Dilemma of Public Bathrooms

Using public bathrooms is yet another challenge for transgender and gender nonconforming
persons. Using the bathroom assigned for their birth sex entails not only problems concerning their
gender identity and expression, it also carries with it the danger of being mistaken for the
opposite52 sex and being reprimanded in public. In some cases, using the “wrong” bathroom can
even lead to a termination of one’s employment53 or arrest. But how does the law determine who
gets to use which bathroom? In this instance, the question almost entirely turns on genitalia: a
person with a penis has to use the men’s restroom, whereas a person with a vagina has to use the
women’s restroom. By restricting the question of sex and gender to the state of the genitalia, the
law effectively (again) rewards those transsexual persons who have undergone extensive sex
reassignment surgery including phalloplasty or vaginoplasty. The notion of “true” men and women
is thus once again underscored and reaffirmed. Moreover, anyone, transgender or gender
nonconforming, who does not fall within clearly defined bodily categories with a coherent gender

52 Even though speaking of “opposite” sexes itself reinforces the binary, the terminology will be used here to illustrate
the restrictive social interpretation of transgender bodies.
53 Etsitty v. Utah Transit Authority, 502 F.3d 1215 (10th Cir. 2007).
expression and appropriate anatomy, is seen as dangerous and potentially offensive to other bathroom users.

The case of *Etsitty v. Utah Transit Authority*\(^{54}\) is instructive here. Etsitty, a pre-operative male-to-female transsexual bus driver was terminated because she was using female bathrooms even though she still possessed male genitalia. The 10\(^{th}\) Circuit Court of Appeals, accepting the legal reasoning of the District Court,\(^{55}\) held that her dismissal did not violate Title VII because the Utah Transit Authority had a legitimate, non-discriminatory reason for her dismissal:\(^{56}\) they were justified in fearing that allowing a person with a penis to use the women’s bathroom could lead to potential claims against them. Of course, no one explained why and how other bathroom users should ever happen to see Mrs. Etsitty’s genitalia – apparently the mere presence of a penis in a women’s bathroom, even if undetected, was enough to persuade the judges that liability could be incurred.

This case also aptly exemplifies why the regulation of transgender identity cannot easily be distinguished from the regulation of nontransgender identity. The judges in the District Court expressed extreme concern that a more lenient and understanding approach to transgender cases could have extensive ramifications for everyone and could lead to abuse and fraud by other non-deserving, gender nonconforming persons. They thus rejected the more generous approach in *Smith v. City of Salem*\(^{57}\) with the following words:

> “Taken to the extreme, the theory in the Smith case would mean that if an employer cannot bar a transsexual male from dressing and appearing as a woman (because it would be sex stereotyping under Price Waterhouse), then a non-transsexual male must also be allowed to dress and appear as a woman. In fact, if something as drastic as a man’s attempt to dress and appear as a woman is simply a failure to conform to the male stereotype and nothing more, then there is no social practice or custom associated with a particular sex that is not a stereotype. And if that is the case, then any male employee could dress and appear as a woman, and use the women’s restrooms, showers and locker rooms, and any attempt by the employer to prohibit such behavior would constitute sex stereotyping in violation of Title VII.”\(^{58}\)

This quote shows a deep distrust towards gender nonconforming people who are pictured as predators, fraudulently taking on a different gender identity to spy on the opposite sex in

\(^{54}\) Etsitty v. Utah Transit Authority, 502 F.3d 1215 (10th Cir. 2007).


\(^{56}\) Etsitty v. Utah Transit Authority, 502 F.3d 1215 (10th Cir. 2007), pp. 1226-1227.

\(^{57}\) Smith v. City of Salem, 378 F.3d 566 (6th Cir. 2004).

bathrooms or locker rooms. Hiding one’s “real sex” is simply not permissible in a society obsessed with finding out the true sex of someone. The quote also illustrates a panic about the unraveling of the stable concepts of male and female sex and gender, which are regarded as so vital in our society. The District Court judges in *Etsitty* clearly regarded it as their duty to stop a further dilution of gender and thereby locked everyone back into the binary.

V. Compulsory Heterosexuality

The law’s focus on sex reassignment surgery and the construction of appropriate male and female genitalia also ensures the predominance of (compulsory) heterosexuality. Heterosexuality is enforced by requiring everyone, including transgender persons, to have a strictly female or male body. The focus on genitalia shows that it is really sexuality that is at stake: after all, these parts of the body usually remain hidden. But different genitalia are seen as vital to heterosexual sex, which is defined as the penetration of the vagina by a penis. This definition of sex affects everyone because the focus on vaginal intercourse institutionalizes a narrow concept of heterosexual sex. If transgender persons have only successfully transitioned when they are capable of vaginal intercourse, this means that their “models”, i.e. “ordinary” men and women should engage in vaginal intercourse, too. There is no room for homosexual, non-penetrative or diverse sex.

The focus on genitalia also ensures that stereotypical notions of male and female sexuality are perpetuated through the legal regulation of transgender persons. The bathroom cases are once again instructive. Mrs. Etsitty was not allowed to use a women’s bathroom because the employer feared civil liability if her pre-operative genitalia had been discovered by other bathroom users. But why did the employer fear liability? The only reason for this could be the outrage and fear other patrons could experience if they were confronted with a penis in a women’s bathroom. This outrage and fear is however tied to a very specific cultural understanding of male sexuality as essentially threatening and heterosexual. This construction of male sexuality and male bodies as

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61 *Etsitty v. Utah Transit Authority*, 502 F.3d 1215 (10th Cir. 2007).
predatory is fixed on the penis and thereby affects every man. In contrast, female sexuality is interpreted as weak and vulnerable. Moreover, both sexualities do not exist in a vacuum, but are inherently relational. Male sexuality can only be perceived as threatening because it is heterosexual and fixed on seemingly weaker and vulnerable women.

But male genitalia do not only stand in for a distinct male sexuality, the focus on them also reinforces a view of a natural male sex which is stronger than any internal sense of gender. This is the reason why even pre-operative transgender women are still seen as potentially dangerous. The focus on the penis in cases of transgender women reinstates the predominance of heterosexual sexuality: after all, lesbian and bisexual women can enter women’s bathrooms – though they might be scrutinized if their gender performance is not within the culturally accepted norms. However, because the pre-operative transgender woman still has a penis, her desire and the threat posed by her have to be fixed on other women, not men, thus reinforcing the belief that all persons with a penis are men and all men are only attracted to women.

In this aspect, the hostility often expressed against gender nonconforming persons can also be understood as a sign of homophobia because gender nonconformity is often regarded as related to homosexuality. Inflating homosexuality and gender nonconformity gives heterosexual transgender and nontransgender persons an added incentive to pass as the other gender or to continue to perform their gender in the socially expected ways. This leads to a strong reconstruction of heterosexuality.

By demanding full sex reassignment surgeries, the law also reaffirms the concept of heterosexual marriage, a concept that forms an inherent part of a legal system based on heterosexuality. In many jurisdictions, the courts absolutely want to avoid the notion of two

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63 Kath Browne, Genderism and the Bathroom Problem: (re)materialising, sexed sites, (re)creating sexed bodies, Gender, Place and Culture Vol. 11, No. 3, September 2004, p. 334.
64 I am referring to these marriages as “heterosexual”, even though bisexual different-sex partners can naturally get married too. However, these bisexual couples are rarely mentioned and mostly subsumed under the category of heterosexual marriages. This diminution of bisexual sexuality is unfortunately regarded as necessary in a society obsessed with heterosexuality and clear categories.
persons of the same sex being married. The courts thus focus on the “one penis per union”-rule,\(^{65}\) which requires that a transsexual person always has to have the set of genitalia ordinarily associated with his or her “new” sex before being allowed to enter into a different-sex marriage.\(^{66}\) In the past, the courts have also focused on the post-operative ability of a male-to-female transsexual to be penetrated.\(^{67}\) The focus on heterosexual penetration ensures an understanding of marriage as heterosexual and reproductive. Moreover, rejecting gender fluidity, which threatens the “natural” relationship between the sexes, makes certain that male domination in marriage continues to be regarded as the norm.\(^{68}\) The focus on penetration also sends out a message to everyone else: “real” women can and desire to be penetrated, whereas “real” men desire and enjoy the act of penetrating. The legal insistence on heterosexual vaginal penetration thus discourages sexual experimentation, because experimentation and unusual sexual boundaries could entail the stigma of homosexuality or gender confusion.

However, at least in this context, it remains to be seen whether the increasing legal recognition of same-sex marriages can lead to new developments and eventually undercut the focus on heterosexual marriage and heterosexuality.

VI. Conclusion and Some Suggestions

This paper has shown how the courts and the legal system, through their treatment of transgender persons, enunciate norms that apply to everyone – transgender and nontransgender people alike. By reiterating notions of “natural” sex and heterosexuality, the courts continue to police the boundaries of gender and sexuality. Allowing perfect gender nonconformist to be recognized in their new gender is naturally preferable to no recognition of transgender people at all. However, by focusing on a perfect embodiment of the other sex and often asking transgender persons to


\(^{66}\) This requirement makes it easier for male-to-female transsexuals to marry because it is still easier to surgically construct a neovagina than a neophallus.

\(^{67}\) M.T. v. J.T., 355 A.2d. 204; Elaine Craig, Trans-Phobia and the Relational Production of Gender, 18 Hastings Women’s L.J. 137 2007, p. 169.

overcompensate, the law effectively reinforces the idea of two binary sexes. This narrow concept of sex affects everyone and limits the range of gender expression for every individual in society. It also works to reinforce “true” masculinity and femininity as essential concepts in a state that is still built on a heterosexist and patriarchal power structure that works to police both men and women. It is thus further necessary to “queer” the current power structure and the categories it relies on: the oppressiveness of clear sex and gender categories for everyone has to be exposed and the current system has to be disrupted.

The remainder of this paper will outline some possible developments of the law which could be helpful in achieving more freedom of gender expression for everyone: transgender and non transgender persons alike.

Most importantly, the transgender movement, but also gender justice initiatives, should focus on enabling every individual to do that which bothers society the most: to make unpopular choices regarding their gender and gender presentation.69 The focus should be on the individual and the individual’s need, rather than on broad assumptions about what transgender or gender nonconforming individuals might desire. This definitely entails a move away from the medical model with regards to transgender rights. The current understanding of GID as a medical disease and the insistence on sex reassignment surgery ensures that imperfect gender nonconformists will not be treated with much sympathy by the courts.

There are, however, also positive developments in the law that are worth mentioning. Prowel v. Wise Business Forms70 extended a sex-stereotyping claim under Title VII to a gender nonconforming, homosexual plaintiff who had been cruelly harassed by his co-workers for being an effeminate gay man. This case can be seen as a step in the right direction: the court focused on the gender nonconforming behavior and made clear that sex-stereotyping against gender nonconforming people is not admissible. However, the plaintiff in Prowel v. Wise Business Forms still played a role well known to the courts: that of an effeminate gay man. It remains questionable

69 Stevie V. Tran/ Elizabeth M. Glazer, Transgenderless, 35 Harv. J.L. & Gender 399 2012, p. 402.
whether the courts will be as sympathetic to a gender nonconforming plaintiff who does not embody a socially well-known persona. The dissent in *Rene v. MGM Grand Hotel* shows that judges might have a harder time in dealing with less intelligible plaintiffs - in this case, a gay man who presented himself as more masculine. However, cases such as *Macy* and the inclusion of “gender dysphoria” in the DSM 5 exhibit a greater understanding of transgender issues in the legal and medical profession.

Transgender identity and gender nonconformity are often seen as disruptive because both concepts deconstruct socially accepted understandings of sex and gender. Any reform of the law should thus focus on the value of this disruptive behavior, rather than on a continuous reinforcement of gender and sex categories. Transgender identity should be understood as radical due to its potential to permeate the boundaries of sex and gender, not reactionary. The legal system should thus try to create more nuanced forms of sex and gender and the courts should become more accepting of sex and gender variance. This could be achieved by opening the door to gender self-determination on official documents, by the inclusion of a third gender category or by simply abandoning the requirement of intensive sex reassignment surgery.

Socially, everyone should be encouraged to closely question existing sex and gender stereotypes. This can be done on a highly theoretical, academic level, but everyday interactions should be just as closely scrutinized. Who opens the door for whom? Who pays for what? By questioning the everyday interactions between people of different sexes/genders, everyone could become more comfortable with a wide variety of gender expressions and identity.

The idea of imaginative cross-dressing can also be helpful in this context. Everyone in general and the administrators of law in particular should be asked to try changing their own

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72 Macy v. Holder, Appeal No. 0120120821 (EEOC Apr. 20, 2012). It remains to be seen whether this EEOC decision will be followed by the courts.
75 See *Bennett Capers*, Cross Dressing and the Criminal, 20 Yale Journal of Law & the Humanities 1.
gender identity in their minds or even in reality. This tactic might then quickly show them how foreign and violating a forced gender expression would feel.\textsuperscript{76} This approach would open people’s minds to the importance of a genuine gender expression and make them more understanding of gender nonconforming and transgender persons. However, there is also a slight danger in this approach: it might only work well if the other gender expression is seen as insulting or offensive, such as forcing a man to wear a dress or makeup. There is a risk that requiring a woman to act femininely or a man to act more masculine might be seen as less intrusive or objectionable. Nevertheless, if the focus is simply on “a gender expression that is foreign to oneself” without any further judgment on the merit of that particular gender expression, then I believe that imaginative cross-dressing can be an extremely helpful concept here. That the concept is already at work, at least in the mind of some judges, can be seen in \textit{Jespersen v. Harrah’s Operating Company}\textsuperscript{77} where the dissent dryly remarked: “Imagine, for example, a rule that all judges wear face powder, blush, mascara and lipstick while on the bench.”\textsuperscript{78}

While the focus should thus be shifted to take account of the whole spectrum of transgender identity and gender nonconformity, the law and society also have to be careful not to silence the voices of those that want to transfer from one sex category into the other. No one should be forced to inhibit the borderland between male and female and the state should ensure that the immediate (medical) needs of transsexual persons are being taken care of.

Finally, it can only be hoped that one day, sex reassignment surgery will be regarded as a joyful desire to reaffirm one’s own gender determination\textsuperscript{79} - and that everyone else, whether transgender, gender nonconforming or gender conforming will be at liberty to define one’s own gender expression and identity.

\textsuperscript{76} See \textit{Jennifer L. Levi}, Clothes Don’t Make the Man (or Woman), But Gender Identity Might, 15 Colum. J. Gender & L. 90 2006, p. 112.
\textsuperscript{77} \textit{Jespersen v. Harrah’s Operating Co. Inc.}, 444 F.3d 1104 (2006).
\textsuperscript{79} \textit{Dean Spade}, Resisting Medicine, Re/modeling Gender, 18 Berkeley Women’s L.J. 15 2003, p. 21.