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THE GREAT MAINE BATHROOM CASE:
CONTESTING SEX SEGREGATION AND GENDER REGULATION IN AMERICA

A Dissertation in American Studies by

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Abstract

The Great Maine Bathroom case is the fictional name I assigned to a series of lawsuits and appeals that were contested in the state of Maine from 2008 through 2014. They were brought by a young elementary school child who was blocked from using the girl's bathroom because she was a transgender girl. For all social intents and purposes the plaintiff was a girl, but her pre-pubescent genital anatomy, if examined, was contradictory. When the case reached the state's Supreme Court it marked the first time that any high court in the nation was asked to decide whether gender, or sex, was to be the determinant for admission to a sex-segregated space. Among the many issues the case opened for interrogation was the long history and practice of sex-segregation in (post-discovery) America and its reflexive function in shaping the nation's socio-political ideology. I use a narrative of the case to provide intellectual portals into this and other problems related to the ways the sex/gender system operates to provide and maintain hierarchical advantage in America's liberal democracy.

Throughout the dissertation I focus on how those who cross gender—those whom we call “transgender” today—have served to disrupt and destabilize not only the man/woman dualism, but also the gender/sex and mind/body dualisms. Inasmuch as these individuals provoke categorical crises in a Western culture that relies upon such a framework to maintain order, they have been vigorously persecuted. Examining two figures from the 19th century, I argue that the gender-crosser's subversive existence has also offered a beneficial mode of influence in and through its ability to mediate and transcend seemingly oppositional dichotomies. However, as this accomplishment has

been less than welcomed in today's neo-liberal political ideology, I note the current juridical-medical effort to fit this unruly group into traditional, manageable categories. This is possible because contemporary technology has allowed the sexed body to be transformed to match the gendered brain, potentially offering a resolution to the mind/body conflict. I argue that this solution serves the capitalistic state well, but that it does so by denying the possibility of an equitable, gender-egalitarian society. I show how the current "transgender agenda" to accept and assimilate transgender students—that is so vigorously attacked by social conservatives—actually serves to reify and maintain the traditional sex/gender system. I conclude by positing that the transcendent, mediatory figure of the uncategorizable gender-crosser offers our divided, dogmatic society an ideal *deus ex machina*.¹

¹ "Deus ex machina" is translated from Latin literally as "god from the machine." Aristotle was the first to use the plot device *deus ex machina* as a means of resolving problematic conflicts in Greek tragedies. Typically done at the end of a play when the situation was at its most dire, a character playing the part of a god was lowered onto the stage by a machine and suddenly solved and put right the problem.

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Timeline for The Great Maine Bathroom Case

- October 7, 1997: Wyatt (Nicole) Maines is born.
- September, 2003: Nicole enters first grade at Asa Adams Elementary School.
- September, 2007: Shortly after beginning her fifth grade year, Nicole is harassed by a fifth grade boy whose grandfather wants to prohibit her from using the girl's bathroom. As a result of the notoriety caused by these incidents, the school bars Nicole from the girl's room.
- April 10, 2008: While a student in 5th grade at Asa Adams, Nicole (as "Jane Doe") files a complaint with the Maine Human Rights Commission alleging that the superintendent and her school district entities violated the MHRA by excluding Susan from the communal girls' bathroom.
- March, 2009: Under the care of Dr. Norman Spack, Nicole begins taking the drug Lupron to block the onset of male puberty.
- June 5, 2009: The Maine Human Rights Commission unanimously finds reasonable grounds to believe discrimination occurred.
- September 23, 2009: Wayne and Kelley Maines ("The Does"), as parents and next friends of Nicole ("Susan"), and the Commission file a complaint in the Superior Court asserting claims for unlawful discrimination in education (Count I) and unlawful discrimination in a place of public accommodation (Count II) on the basis of sexual orientation.
- Spring, 2010: Nicole begins an estrogen feminization program under Dr. Spack's guidance.
- May 11, 2011: After the Superior Court denied the defendants' motion to dismiss all counts pursuant to M.R. Civ. P. 12(b)(6), the Maines ("The Does") and the Commission filed an amended complaint, adding facts to Counts I and II based on Nicole's exclusion from the girls' bathroom at Orono Middle School.
- November 20, 2012: In a setback for Nicole, the Superior Court grants RSU 26's motion for summary judgment on all counts.
- The Maines and the Commission appeal the Superior Court's entry of summary judgment on Counts I and II.
- June 12, 2013: Jennifer Levi, Esq., argues the appeal before the Maine Supreme Judicial Court.
- January 30, 2014: The Maine Supreme Judicial Court decides in Nicole's favor.
- July 28, 2015: Nicole undergoes GRS.

Introduction

The title of this dissertation pays homage to Linda Gordon's award-winning 1999 monograph, *The Great Arizona Orphan Abduction*. Gordon's examination of race, gender and family in the West at the dawn of the twentieth century is structured around the narrative of the kidnapping of forty Irish orphans at a remote Arizona mining town. In the preface Gordon writes, "The stories that stay with us, often the simplest in their narrative line, tell us about persecution and triumph, order and disorder, cowardice and bravery, and the strongest of passions, including particularly those between parents and children" (2001, ix.). Similarly, *The Great Maine Bathroom Case* chronicles the story of a girl in the twenty-first century. This dissertation positions itself thematically around the narrative of Nicole Maines who, though born a boy, embarked on a quest to claim her identity as a girl. Her odyssey as the plaintiff in the *Doe v. Clenchy* case ultimately culminated in a decision in her favor by the Maine Supreme Court in February, 2014. The story of her persecution, bravery, love of family and triumphant struggle for equality is riveting, and it provides a vehicle for critically engaging with many of the trenchant issues fueling the current confrontational crisis that lies at the intersection of gender, culture and public policy in America today. Today, in mid-2016, we find ourselves embroiled in a nationwide debate around access to sex-segregated spaces, ignited by a new law in the State of North Carolina that seeks to enforce the dichotomy of the sex/gender system. In response to the question over which restrooms transgender people should use, North Carolina's legislature stipulated that one's biological sex at birth was the determinant for access, and not one's gender identity or expression. The

Federal Government filed a lawsuit against North Carolina in early May, 2016, and the state countersued within days; the issue contended is now on its way to the United States Supreme Court for resolution. This dissertation examines a court case, albeit in a remote, sparsely populated Northeastern state, that was tasked with deciding the same issue over two years ago.

The seed for this project was planted two days after Christmas in 2013. That day I received an email from a University of Maine address that began, “My name is Wayne M. Maines. My family lives in Maine and we have been involved in the first transgender discrimination case in the nation to go to a State Supreme Court.” Dr. Maines, who is director of security at the University, wrote me to ask if I would invite him to be the keynote speaker at the 2014 Keystone Conference.² As co-chair of the annual event I was responsible for selecting its speakers and seeing that the content of their talks fit themes and issues that favorably impact the lives of transgender Americans. As the President of TransCentralPA, I knew firsthand of the prevalent discrimination against transgender people and the dearth of protections available for them.³ I was aware of the Maines case and continued to read the rest of Wayne’s email with keen interest. “When the Christian Right attacked our babies, we decided to fight back and speak out,” he wrote. “In 2007 we decided to take action to make it stop, and unfortunately our legal battles still continue.” He had attached his *curriculum vitae* to the email and, upon reading it, I saw that his profile fit that of an individual right of center—ex-military, avid deer hunter,

² The *Keystone Conference: A Celebration of Gender Diversity* is an annual, three-day educational conference that focuses on transgender education, health and public policy. It has been the second largest such conference in America since 2013.

³ TransCentralPA is a 501 (c) 3 non-profit association providing support, advocacy and education for Pennsylvania’s transgender population. TransCentralPA provides monthly support group meetings to hear the adverse issues confronted by its members and guests and to offer advice, assistance and professional counselling to those in need.

sports enthusiast, and a career in law-enforcement. What had changed in Wayne's life to make him, as he described himself, become an "ex-Republican?" Why was he now campaigning for the civil and human rights of transgender children and people? And, more critically, why were social conservatives and those of the Christian right attacking transgender school children like his young daughter?

Wayne's email revealed his gut-wrenching worries that his family might lose their lawsuit. He acknowledged that were that to occur, he would not know how to explain to his children how unjust, how mean spirited, how cruel and heartless people can be. "I will be angry, sad and scared," he wrote, not only for failing to protect his children but also for all those other transgender children and adults who daily feel the sting of bullying and discrimination for somehow failing to abide by the rules of our culture's gender norms. His desire to deliver the keynote address at the Keystone Conference 2014 was but one step in his crusade to avenge and prevent the continuation of this damaging ideology that targeted what he felt was an innocent, fragile minority. "Speaking out will help others know how wrong it can be," Wayne explained. Adding "I am on a mission to help people who fear the unknown," he indicated his sincere belief that people's fear and loathing of those who are transgender is driven by ignorance and misconceptions. Wayne was rapidly becoming the nation's leading activist for the acceptance of transgender children. His sense of rightful conviction was rooted in America's traditional, pro-child family ethic.

The underlying causes for the marginalization of transgender people are not simply accounted for. From my academic research I was well aware that gender-variant people had been persecuted in America since conquistadores and colonists first

encountered the country's indigenous peoples— and that oppression against such people had not abated in the ensuing four centuries. The United States of America's first laws established and maintained a strict, dichotomous and hierarchical sex/gender system that brooked no challenge then and continues in only slightly abated influence today.⁴ If, as Wayne suggests, the ongoing persecution against gender-transgressors is rooted in fear of those who don't neatly fit into (and remain in) the binary categories male/female and man/woman, we are prompted to ask why these categories are vested with such significance and what danger is implicated in their transgression.

Who exactly is the girl who is the subject of the Great Maine Bathroom Case? Wayne's daughter Nicole—one of a pair of identical twins— had been assigned the sex of male at birth by the medical doctor who examined her genitals. They named her “Wyatt” then, and raised her culturally as a boy.⁵ From the earliest expressions of her identity, though, Nicole identified as and behaved like a girl. Even as she grew older and her conviction that she was a girl became more evident, Wayne resisted grappling with the growing contradiction his child was manifesting. At the same time his wife Kelly began to accept that Nicole was indeed a girl. By the time Nicole entered elementary school Kelly was fully behind her daughter's gender identity, working diligently to smooth out

⁴ Eighteenth century America's laws were modeled on English common law which held that a married woman did not have a legal identity separate from her husband's. She was known as a *feme covert*, a French word that literally means “covered woman.” In his *Commentaries on the Laws of England* that influenced much of American law English jurist Sir William Blackstone (1723-1780) stated that, “the notion of an unity of person between the husband and wife; it being held that they are one person in law ... the very being and existence of the woman is suspended during the coverture, or entirely merged and incorporated in that of the husband.” While coverture was removed from U.S. law in the late nineteenth century, the Equal Rights Amendment, which guarantees women all the rights of men, has yet to be ratified and made law. Strict sex segregation of many spaces, most often bathrooms and locker rooms, is mandated by law across the nation today.

⁵ The child now known legally as the female Nicole Maines has been variously referred to as “Wyatt Maines” (the name given at birth to the child who then bore male genitalia) and “Susan Doe” (the name assigned by the Court to the child in order to protect her minor status and anonymity). I will use the name Nicole Maines exclusively except where the context is better served otherwise.

any bumps she might encounter from those who might question whether she were “really” a girl. Wayne remained aloof and distant from the issue until a series of events occurred when Nicole entered fifth grade that led to the legal case to which the title of this dissertation refers. At that point Wayne was all in, and the journey that he and his family endured over the course of the ensuing several years transformed his entire world view.⁶ Nicole’s right to use the girl’s bathroom at her school had been challenged, and then denied. No longer able to fit in among her classmates, she was singled out as an “Other,” a person who was not normal. Seeing the deleterious effect this had upon her and her brother by extension, Wayne and his wife Kelly fought hard through a series of law suits to restore Nicole’s right to choose her place both in her school and in our gender-polarized society.

The question at stake in the case that came before the Maine Supreme Judicial Court was unequivocal and carried tremendous and far-reaching significance: which criterion is prioritized when a transgender person needs to enter a sex-segregated space—their sex or their gender?⁷ While that was the legal question to be decided, many related questions were raised by the case and beckon the scholar. How did the concept of gender come to part ways with the perception of sex? Why is there so much tension inherent in differentiating between the two sexes and separating them? Why is the sex/gender system so polarized? How did we come to have laws that mandated sex-segregated spaces? Why are people who do not adequately conform to (or worse,

⁶ The 2016 book *Becoming Nicole: the Transformation of an American Family* by Amy Nutt documents in detail the movement of Wayne Maines from a reserved, socially conservative, registered Republican to an activist for transgender rights.

⁷ In such cases, sex is usually interpreted as one’s biological, assigned sex at birth and gender as one’s gender identity (their own innate sense of their gendered self), or—and this is where it gets complicated—one’s gender attribution. This is examined in detail in Chapter One.

transgress, as Nicole did) gender norms stigmatized and marginalized? Why do those who reject the concept and legitimacy of gender so frequently cite “God” or science as the source of authority? How, and to what extent, have church and state used sex difference to affect access to wealth and power in America? This project seeks to answer these problems through examining the cultural history of America that has shaped and been shaped by attitudes, practices, ideologies, politics and laws related to gender— and by those gender-crossers who have troubled it.

American socio-political ideologies have long been under the thrall of the binary categorical bent of Cartesian dualistic thinking. Today’s gender-versus-sex “bathroom battles,” as exemplified by The Great Maine Bathroom case that I examine in this dissertation, are reducible to that classic mind-versus-body dichotomy. I will show how “gender” evolved as a useful means to explain questions which “sex” alone cannot, and at the same time how it also called into question the hierarchical arrangement of the male-versus-female binary. And in arguing that gender, while constituting one-half an oppositional dualism, also troubles that structure by revealing the mutability of its borders of distinction, I will reveal how those people who cross and change genders destabilize and deny the “versus” part of the gender-versus-sex binary and the male-versus-female binary. One of this dissertation’s central theses is that the backlash against transgender people is prompted by their subversive action in erasing the borders that categorically define individuals according to sex/gender. Those who argue from a materialistic, monistic position are quick to claim that the physical body reveals the verity of “sex,” so that when cultural effects are stripped away the categories “man” or “woman” become clearly evident. However, science has complicated and obfuscated that

diagnosis: with new technology in medicine and surgery, people are able to change the appearance and function of their physical sex. Given this development, the mind/body, male/female dualisms are both resolved and more greatly complicated at once. Science also places the laws that regulate gender/sex and male/female categorization in question. Predominate among them is whether transgender people must be forced to undergo procedures to change their material bodies in order to be classified as either man or woman. This is not only a legal but an ethical dilemma because the requirement of such procedures imposes grave danger, extreme pain and extensive monetary expense on the subject and most usually renders him or her sterile. The law then, operating in service of the maintenance of binaries, becomes a Procrustean bed through its forcing transgender people to fit neatly within the narrow boundaries that define and separate the two categories “man” and “woman”.

This dissertation focuses on those who cross gender from male to female. While current data suggests as many people cross gender in the other direction and history reveals a time-proven tradition of female-to-male gender-crossers, I do not dwell on this group because they are not widely regarded by the American public as posing the same degree of threat to our institutionalized sex/gender system as do women born with penises. Essentially the acceptance of transgender men—or at least the general disregard of them—is reducible to simple sexism: because men are the “natural,” favored gender, for people to desire and to take measures to become assimilated into that privileged class is assumed logical because of its obvious beneficiality.

I have also chosen to omit a discussion of how the institution of marriage and its recent legal revision to include same-sex couples works to support America’s sex/gender

hegemony and to regulate, control and polarize the population (for a lucid and at times whimsical treatment of this, see Halberstam, 2012). While this problem is worthy of probing as a dissertation subject, my inquiry of those who cross-gender reveals they accomplish a more profound degree of both bridging and also transcending the male/female, man/woman dichotomy than does the seemingly unifying act of marriage. As Halberstam argues, marriage—whether between opposite sex or same-sex people—serves to further solidify neo-liberal political ideology and to maintain the State’s regulatory agenda. In this dissertation I will show how gender-crossing works oppositionally to the established socio-political framework by questioning and destabilizing the gender categories that are deemed necessary for the hierarchical sex/gender system to function as it does.

In anticipation of possible confusion, I wish to comment on my use of gendered pronouns in this dissertation. Generally I defer to and respect the pronouns that people apply to themselves or that are generally accepted through customary usage. For those people who have transitioned gender in a seemingly permanent direction such as from male to female, I might use the pronouns “she” and “her” consistently, although often such a person might prefer—especially if, as in the case of Bruce Jenner, they were public figures who were popularly established as “he” before they became “she”—to use one pronoun to identify the gender they lived before transition and the other to identify as the gender they live post-transition. I also use the uncustomary pronouns “s/he” and “hir” when writing about some gender-crossers and transgender people in order to stress their embodiment of *both* male *and* female, man and woman, rather than *either* male *or* female, man or woman. This usage supports one of this dissertation’s claims:

that gender-crossers and transgender people are unique (and thus feared by some and respected by others) because they continually expose the mutability of the cultural distinctions that define the two genders/sexes.

This dissertation utilizes an American Studies-based integrative methodology that takes its cues predominantly from feminist methods in gender studies. As such it is interdisciplinary in its approach, drawing on and being informed by the fields of literature, history, medicine, the social and physical sciences, the law, philosophy, religion and mythology. I utilize rhetorical analyses of both primary sources (such as oral histories, movies, news stories and columns, juridical documents, ethnographies, fairy tales and media advertisements) and secondary sources (such as scholarly articles and books, news and journal op-ed pieces) to frame, develop and support my argument. Historiographical reviews of literature ground the subject contextually and position it theoretically; rhetorical analyses of popular culture and media releases locate the debate contemporaneously; and examination of polls, surveys and jurisprudence further inform the problem and illuminate my argument.

The various chapters are positioned thematically around the narrative of the *Doe v. Clenchy* case that was ultimately decided by the Maine Supreme Judicial Court in February, 2014. This narrative, assembled from newspaper articles, TV news video clips, articles and books, is augmented by first-hand interviews with the two principal figures involved, the plaintiff Nicole Maines and her father Wayne. Approval for their participation was granted by the Institutional Review Board of the Pennsylvania State University and also that of Mt. Holyoke College's IRB, where I received a year-long fellowship to work on this project.

As befits the nature of the subject matter, the structure of this dissertation departs from the norm. I use vignettes from the stories of Nicole and Wayne Maines as an organizational device to provide portals into different intellectual journeys. While distinct chapters develop various aspects of the thesis, each is introduced by a portion of the narrative of The Great Maine Bathroom Case. Various issues raised by the Maines story are revealed to illustrate and thematically preface the chapter that follows.⁸ I begin the dissertation with the story at its end, with the Maine Supreme Judicial Court's decision on the lawsuit that was brought by Nicole and her parents. Here, the majority opinion grapples with and renders a decision on the problem of choosing whether a person's sex, or their gender, should be the qualifying determinant for admission to a space restricted to one sex/gender. With this first narrative section titled "Susan is a Girl," I throw Pandora's Box wide open by probing one of this dissertation's key problems: why do the categories established by the sex/gender system, that have segregated and discriminated against half of America's population throughout its history, remain so entrenched in our culture?⁹

Chapter 1 examines the emergence of the concept of gender. "When Sex Became Gender" tells the history of how a word that was for centuries synonymous with the noun "sex" took on a life and purpose of its own in the second half of the twentieth century. Gender was first employed by psychiatrists as a means to help them work with patients whose biological sex and mental sense of self were at odds. Dr. Robert Stoller's declaration in 1968 that gender is socially constructed and not merely a correlative to

⁸ While Nicole's mother Kelly and her brother Jonas certainly played vitally important roles in the saga, I chose to focus almost exclusively on Nicole and her father, both whom I interviewed for this project.

⁹ Here I use as a metaphor the ancient Greek myth of Pandora opening the mythical box, spilling out the troubles of the world that brought blame upon her— and, by implication and intent, all those others of her sex and gender—and were used to justify the subordination and punishment of all women.

biological sex ignited a revolution that has flared off and on since (its most recent hot spot has exploded in North Carolina in the debate around transgender access to sex segregated spaces). Feminist scholars soon appropriated the notion of gender, recognizing it provided the key that could unlock the shackles of essentialist arguments used to hold women in subordination for centuries. Here I examine how Suzanne Kessler and Wendy McKenna, Judith Butler, Sandra Bem and Anne Fausto-Sterling together developed a practice-based theory of gender that not only served the feminist cause but also helped site and bring into common usage such psycho-social processes and concepts as gender attribution, gender assignment, gender roles and gender identity.

Nicole's narrative next moves to look at her childhood in the section titled "I'm a Boy-Girl." Assigned male at birth and named Wyatt, she always felt—rather, she *knew*—that she was a girl, despite biology and social convention. As the reader develops an understanding of her experience, they will come to fathom the concept of gender identity as seen through a transgender lens.

Chapter 2, "Crossing Gender," offers a cultural history of gender in America. Specifically I focus on those who cross between the categories "man" and "woman" and by doing so challenge the authority and stability of the nation's hegemonic sex/gender system. Beside the larger cultural confrontation I look at the more intimate details of how people like Osh-Tisch in the 19th century and Christine Jorgensen in the twentieth have managed their gender changes and how the materiality of their bodies relates to, expresses, troubles and is imprinted by cultural norms.

“Nicole’s Story: Fifth Grade” investigates the details of the events and the issues that triggered them which prompted the Maines’ lawsuit. The essential questions to be considered and decided upon by the Supreme Court judges are framed here, both in terms of the Maines family’s plight and also in the nation’s cultural debate.

The third chapter examines the creation, function and management of sex segregated spaces in America. Here I show that from the construction of the architectural spaces of public restrooms to the construction of the social spaces of separate spheres, the separation of people by the sex/gender system, whether through hegemonic coercion or policed laws, serves to maintain power in the hands of an elite, androcentric few. I argue that through focusing on the small and largely misunderstood group of transgender people and casting them as predators that threaten women and children’s safety, this group of leaders manages to keep public attention diverted from larger economic problems that adversely affect the population.

“People Who Fear the Unknown” moves the narrative to Nicole’s father Wayne. With their quest for justice achieved in court, Wayne began to campaign tirelessly for the civil rights of transgender children. Frustrated that so many people discriminate against transgender people like his daughter, he seeks to understand why people can believe that a little girl-boy (as Nicole described herself as soon as she could speak) could pose a threat to anyone or anything. Confronted with the mounting backlash against transgender people in mid-2016, Wayne wants to find and assuage their source of fear.

The final chapter examines how the regulation and segregation of gender has historically been an integral part of America’s democratic ideology and political system.

I begin in the ante-bellum period by understanding how Alexis de Tocqueville and Catherine Beecher framed women's submissive role as vital to the success of America's liberal democracy, and the significant influence they believed women's relationship with religion had upon it. Moving to the end of the nineteenth century I explore Matilda Joselyn Gage's rejection of the "Cult of Separate Spheres" and her denunciation of the ways in which church and state collaborated to subjugate and oppress women. Noting how and why Gage held up the matriarchal, egalitarian societies of Native Americans as the ideal our nation should aspire to, we examine the oppositional approaches to and practices of property ownership and concepts of wealth and power held by them and the Euro-Americans who displaced them. I follow with close readings from Gage's son-in-law L. Frank Baum's *The Land of Oz*, seeing how he made her vision of a matriarchate provocatively palatable to young American readers and subtly revealed the critical role gender-crossers perform in mediating contests of gender and power. The chapter closes by recognizing the gender-crosser, the transsexual and the shamanic gender-journeyer as figures that constantly mediate between the male/female divide, blurring its borders and rendering essentialist-based arguments for power privilege groundless and moot.

The final narrative section deals with Wayne Maines' growing awareness of the political implications of discriminatory practices against transgender people. He responds with disgust at the action by the Governor of Maine to join in a lawsuit seeking to defeat a case brought by a transgender child in Virginia who, like Wayne's daughter Nicole, was blocked from using the bathroom that matched his gender identity.

The conclusion begins by reviewing previous sketches of four Americans who crossed from male to female gender. Osh-Tisch, Tip/Ozma, Christine Jorgensen and

Nicole Maines were separated from one another by time intervals of about fifty years, and each contextually reflects the cultural and political contentions of gender of their era. Through examining the ways in which these figures transcended, transgressed and yet also conformed to and supported normative gender roles, I reveal how they so often operate in a disruptive manner. I find that it is this potentiality towards resolution and revolution that the gender-crosser offers—or threatens—that gives rise to the fear and loathing many people have for them.

This dissertation will show that the controversy over transgender people's access to sex-segregated spaces has long roots. The debate about sex and gender that has been focused upon by the Great Maine Bathroom Case, the Great Virginia Bathroom Case and the series of lawsuits between the United States Departments of Justice and Education and the Governors of twelve states traces back to the Republic's liberal, democratic beginnings and is reducible to that of the classic Cartesian mind/body dualism. My thesis is that the gender-crosser is the incarnation of dualism, the living manifestation of contradiction and resolution at once. S/he is a gift to all who are torn by the need to choose between the materiality of "sex" and the consciousness of "gender," would they only recognize hir potential. My argument, which I now repeat, is that through hir continual demonstration of the malleability of gender and sex, the gender-crosser upends any justification for androcentric privilege or for an hierarchical configuration of gender. This is because s/he cannot be forced into an either/or categorization. S/he is *both sex and gender, both male and female, both man and woman, both mind and body* and s/he is both god and goddess. As such I offer hir as the *deus ex machina* who is best

suited to resolve some of the primary dualisms that divide us and to restore justice and balance to our society.

Nicole's Story:

Susan is a girl.

“A civilized society protects its citizens from discrimination that is based on petty prejudices and mean-spirited exclusionary practices” -Mead, J., dissenting in *Doe v. Clenchy* 2014

“The law is the public conscience,” declared Thomas Hobbes in 1651; without it, he warned that life would be “solitary, poor, nasty, brutish and short.” While people agree to give up some of their rights in order to enter into a social contract and form civil societies, they are always entitled to civil rights, which according to Thomas Jefferson are “derived from the laws of nature.” Often entire groups of people are denied civil rights on discriminatory grounds. United States’ legal and cultural history reveals that half its population was routinely denied their civil rights on the basis of sex for centuries. The law, operating reflexively as it does with society, has gradually evolved to include “sex” and “gender” as categories that may not be discriminated against in all fifty states and at the Federal level. This evolution of jurisprudence has come at a price, including loss of life. While some laws change because of legislative action, many do because challenges to them have resulted in courts making revisions. Recently the categories of sex and gender have been expanded to include those of “sexual orientation” and “gender identity.” Included in the former is the right to enter into a legal marriage contract with someone of the same sex, which was only made Federal law in 2015 after a lawsuit persuaded the United States Supreme Court to do so.¹⁰ Yet, fewer than half the states at this time prohibit discrimination—in the workplace, in education, in access to healthcare and in public accommodations—against people because of their sexual orientation, and fewer yet protect gender identity or expression.¹¹ Gender identity

¹⁰ *Obergefell v. Hodges*, 576 U.S. ____ (June 26, 2015), is a landmark United States Supreme Court case in which the Court held that the fundamental right to marry is guaranteed to same-sex couples by both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

¹¹ The Connecticut legislature offers the definition of “gender identity or expression” as “a person’s gender-related identity, appearance, or behavior, whether or not that identity, appearance, or behavior differs from that traditionally associated with the person’s physiology or assigned sex at birth”.

recognizes that some people's innate sense of gender may differ from their assigned sex at birth.

The Great Maine Bathroom Case was a lawsuit a little fifth-grade girl brought against her school when its administrators denied her use of the girl's bathroom.¹² Nicole (named "Susan Doe" in court documents) had known she was a girl all her short life, even though she had been proclaimed a boy at birth because of her genital anatomy. She had been accepted and treated as a girl at school, by her family and by her friends. The question facing the judges in the case was to decide whether Susan's gender or her sex was to be the criteria used to determine her access to the sex-segregated school bathroom.¹³ Put simply, they were to decide whether the binary category "sex," determined by one's reproductive anatomy at birth being male or female, or the binary category "gender," determined by one's appearance, behavior and mannerisms being either masculine or feminine, was to be the primary legal identifier of a person. When Susan needed to go to the bathroom she had to enter either the door that was signed "Girls" or the one signed "Boys." Which was she legally meant, and therefore allowed, to enter?

Lawsuits are essentially scholarly arguments which, by means of their validity and craft, are meant to persuade the persons hearing them to accede to the request

¹² The Great Maine Bathroom Case (the author's descriptive but fictive name for the law suit) was actually composed of a pair of lawsuits. As with most suits, had the plaintiffs been granted the justice they sought in the first instance, they would not have appealed. It is a testament to their conviction of being on the right side of the law and their unwavering tenacity that they endured. They first filed a complaint in May, 2011 in Penobscot Superior Court, and received the victorious verdict they sought in January, 2014 at the Supreme Judicial Court in Portland, Maine.

"Susan Doe" was the name assigned by the court to Nicole Maines, the plaintiff in the case, due to her young age and in an effort to protect her anonymity. Her parents, Wayne and Kelly Maines, were likewise referred to as "John and Jane Doe."

¹³ Here I refer to the judges at the Maine Supreme Judicial Court in January, 2014. The first iteration of the lawsuit, heard in Penobscot, Maine, was not so clearly focused on the sex versus gender dilemma.

being made and supported. The request being made on Susan Doe’s behalf by her attorneys was for the Court “to clarify the scope of Maine law and, in particular, confirm that a transgender girl must be given access to the girls’ restroom in schools” (O’Meara, 2013, 4). The arguments employed to support the request are known as briefs, and often *amicus curiae* briefs are presented by entities who have a deep interest in the issues involved in the lawsuit.¹⁴ Briefs represent some of the most rigorous academic research performed, and the language used in them is often crystal clear in its descriptive and definitive function. In this case, many briefs were filed that sought to clarify such terms and concepts as “sex,” “sexual identity,” “gender,” “gender identity,” and “transgender.” Their authors knew that it was imperative that the judges hearing their request be thoroughly informed with the most unquestionable and contemporary understanding of these terms in order to be open to what was being requested of them.

One pre-trial brief filed with the Court by the Maines’s attorneys sought to establish a legal understanding of the difference between “sex” and “gender”:

Courts now consistently recognize that the term “sex” also encompasses gender—the socially meaningful norms associated with a person’s sex. The term “sex” as used in the law does not exclusively refer to the biological distinctions between men and women but refers to socially conceived and meaningful differences as well. This now well established view should not be rejected or reversed in this case. Since 1989...federal courts have consistently rejected a limited reading of

¹⁴A brief is a written legal argument, usually in a format prescribed by the courts, stating the legal reasons for the suit based on statutes, regulations, case precedents, legal texts, and reasoning applied to facts in the particular situation. A brief is submitted to lay out the argument for various petitions and motions before the court (sometimes called “points and authorities”), to counter the arguments of opposing lawyers, and to provide the judge or judges with reasons to rule in favor of the party represented by the brief writer.

Amicus Curiae is Latin for “friend of the court.” Frequently, a person or group who is not a party to a lawsuit, but has a strong interest in the matter, will petition the court for permission to submit a brief in the action with the intent of influencing the court’s decision (The People’s Law Dictionary, 2002).

the word “sex,” finding that while it may include biological sex, it also includes non-biological gendered characteristics that make up the social determinations of whether someone is a man or a woman (Doe v. Clenchy, 13 March, 2013, p.29).

The brief’s authors pointed out to the Maine Supreme Court that it was appropriate to cite cases heard in Federal courts that had established these precedents. This is because the civil rights issues they are concerned with are broader than just an individual state’s jurisdiction.

Another brief was filed by an attorney for the Maine Human Rights Commission in which he argued that gender identity was more definitive of a woman’s social status in the community than was her biological sex:¹⁵

In the case of sex discrimination, the prejudices and stereotypes that [we are] concerned with are directed at women based on their status as women, which is usually determined by identity and perception, not biology. A company that refused to hire a woman as its president because she is female does not check her chromosomes first. In the context of bathrooms, the meaning of the term ‘sex’ should be no different... [people] of the same gender share a common identity (Harrison, 2013).

Both paragraphs above argue that there is clearly established legal precedent for not using only biological criteria to determine whether a person is a man or a woman; rather, the law has consistently recognized that one’s “sex” is socially determined, too.

One of the richest documents in the case was an *amicus curiae* brief written by a consortium that included the American Academy of Pediatrics, the Maine Psychological Association, the National Association of Social Workers-Maine Chapter, GLSEN

¹⁵ The Maine Human Rights Commission (“MHRC”) was a co-plaintiff in “John Doe et al. v. Regional School Unit 26,” the lawsuit heard by the Maine Supreme Judicial Court.

Downeast Chapter, GLSEN Southern Maine, Trans Youth Equality Foundation, and the Maine Women's Lobby.¹⁶ Perhaps the most profound point they made was just how critical it is for a person—in this case, a young child—to claim and be claimed by a gender. This is where the inherent power of binaries is evident: you are either in, or out; right, or wrong; accepted, or rejected; weird, or normal; successful, or a failure. For a child like Nicole, who had no doubt of her gender, to be denied access to a room that was marked as that gender was to mark her as belonging to the negative side of all these oppositional binaries. To enter the door that said “Girls” was to be identified as a girl. The amicus brief stated, “The contemporary scientific understanding of sexual identity recognizes that a person’s gender identity (regardless of whether that identity matches other components such as external sex characteristics) is either innate or fixed at an early age, is not subject to voluntary control, and cannot be changed by therapy or other means” (O’Meara, 2013, 6). This makes it clear that to disavow a person’s gender identity was to disavow their very existence. Instead, they stressed that “normal psychological development and educational growth, including the critical ability to form peer relationships, requires that they integrate their gender identity into their lived experience” (8). An essential component of this critical integration was for a person to use the bathroom that confirmed their gender identity.

What hurt Nicole most deeply was the reversal she was forced to suffer in this regard. She had been accommodated as a girl by her school, and her peers all accepted

¹⁶ GLSEN (Gay, Lesbian & Straight Education Network) is the leading national education organization focused on ensuring safe schools for all students. Its website states that “At GLSEN, we want every student, in every school, to be valued and treated with respect, regardless of their sexual orientation, gender identity or gender expression. We believe that all students deserve a safe and affirming school environment where they can learn and grow.”

and treated her as one, and she used the girl's bathroom just like any other girl.¹⁷ This was the customary state of affairs until she was part way into her fifth grade year, when the school abruptly reversed its practice and refused her use of the girl's bathroom. "[The school's] decision to ban Susan from the girls' bathroom [was] based not on a determination that there had been some change in Susan's status but on others' complaints about the school's well-considered decision," reads the majority decision in the case. "The controversy generated significant media coverage," notes presiding Judge Silver, and as a result "the school came under intense public scrutiny... which caused it to...ultimately reverse course" (7). School administrators had bowed to the negative pressure of those who complained about Nicole's use of the girl's room. What, then, was the basis of those complaints, and why were they made? How was Nicole causing harm to anyone else by using the girl's bathroom?

The complaint that ignited the controversy was brought by the grandfather of a boy in Nicole's class. As the appellate brief relates the incident, "The grandfather disagreed with the sexual orientation antidiscrimination law," and told his grandson that Nicole "was really a boy and shouldn't be allowed to use the female restroom" (*Doe v. Clenchy*, 2013).¹⁸ Specifically, the grandfather refused to accept that Maine's law prioritized gender over sex. For him, sex was material, God-given and immutable; gender was necessarily synonymous with sex and inseparable from it. For him, to suggest that a person—in this case, a little child—could decide to be identified as a gender that was opposite their birth sex was preposterous, and this was exactly what the

¹⁷ Nicole attended Asa Adams School, an elementary school that was part of Regional School Unit 26 in Orono, Maine.

¹⁸ An appellate brief consists of the persuasive arguments filed (as a brief) by an unsuccessful party in a lawsuit (thus, an "appeal") to a superior court empowered to review a final decision on the ground that it was based upon an erroneous application of law (*The People's Law Dictionary*, 2002).

Maine Human Rights Act had made the law. He felt the law was defying God's truth and scientific reality, and he wanted it changed. His path to changing it was to call out Nicole as an imposter who was violating the superior laws of God and nature.¹⁹ He evidently spoke and acted for many others who shared his convictions. Soon enough pressure was brought on the school administration that they decided to go against the law and deny Nicole entry into the girl's bathroom. This action was in clear violation of Maine's statute that prohibits discrimination, where discrimination is defined as "to segregate or separate" (Maine Revised Statutes, 2013). Because this illegal act had such a deleterious effect on Nicole, she and her parents filed a lawsuit against the school administrators.

Discrimination on the basis of sex or gender—or both, when the terms have been considered equivalent—has a long history in American culture and law. Chapter 1 will examine this, focusing on how gender became distinctly separate from sex in support of the effort to end discrimination against half of America's population. It will do so by examining how feminist scholars reappropriated gender from the scientists and medical men who essentially invented it for very different purposes.

¹⁹ Paul Melanson, the boy's grandfather, was not alone in his conviction and soon had many allies that helped turn his protest into the media storm it soon became; the story is told in detail here in Chapter Three.

Chapter 1

When Sex Became Gender

Gender, noun; 1.) The state of being male or female (typically used with reference to social and cultural differences rather than biological ones). —Oxford English Dictionary

In its most recent usage, "gender" seems to have first appeared among American feminists who wanted to insist on the fundamentally social quality of distinctions based on sex. —Joan Scott, 1986

Where there are dichotomies it is difficult to avoid evaluating one in relation to the other, a firm foundation for discrimination and oppression. Unless and until gender, in all of its manifestations including the physical, is seen as a social construction, action that will radically change our incorrigible propositions cannot occur. —Suzanne Kessler & Wendy McKenna, 1978

Although gender is socially constructed, the experiences of it are very real.
—Maurianne Adams, 2007

As the Presidential primary election cycle in America neared its end in the late spring of 2016, the hottest single word in print and on people's tongues was "transgender." It entered into the arguments and platforms of every candidate, it drew almost weekly commentary from our sitting President, it was at the core of numerous legal cases, it had the entire world focused on the state and Governor of North Carolina for a hastily passed law, it was the subject of many TV shows and movies, it was found daily in most newspapers across the nation and it was being encountered and debated in every school district from Maine to California. Transgender is a simple word: it means to cross (trans) gender. It is currently defined as "(denoting or relating to) a person whose sense of personal identity and gender does not correspond with their birth sex."²⁰ This definition clearly implies that gender and sex are two different means by which we categorize people—and yet many people feel they are synonymous and inextricably linked together. Some, like the grandfather in Nicole's case, insist that God made gender and sex inseparable and synonymous. Once, they were interchangeable words and concepts. When and why did sex yield its claim to gender? In what follows I will explain the cultural and historical evolution of gender as another means of categorizing people.

Though adapted into the English language from its Greek roots centuries earlier, the word "gender" was first used to refer to issues related to the male/female sex in the early fifteenth century.²¹ Its modern usage as a referent to the social attributes of sex as

²⁰ *Oxford American English Dictionary*, online at www.oxforddictionaries.com/us/definition/american_english/transgender. The word "transgender" first appeared in 1965 in *Sexual Hygiene and Pathology* by psychologist John Oliven.

²¹ The etymology of the noun "gender" derives about 1300, "kind, sort, class," from the Old French *gendre*, *genre* "kind, species; character; gender" (12th century, Modern French *genre*), from the stem of the Latin *genus* (genitive *generis*) "race, stock, family; kind, rank, order; species," also "(male or female) sex," from the Proto-Indo-European root *gene-* (see *genus*) and from the Latin translation of Aristotle's Greek grammatical term *genos*. Its grammatical usage in English is attested from the late 14th century.

differentiated from its biological physicality began to appear in the medical discourse in the mid-1960s. It appeared in that context on the cover of the 1968 book *Gender and Sex*, where psychiatrist author Robert Stoller used it to describe the psychological phenomena associated with masculinity and femininity. He argued that one could talk about gender with no reference or connection to sexual anatomy or physiology. In studying patients with notable aberrations in their masculinity and femininity and those with biological sexual abnormalities, Stoller stated that “the two realms (sex and gender) are not at all inevitably bound in anything like a one-to-one relationship, but each may go in its quite independent way” (p. vii).²²

Stoller’s fascination with sexual and gender abnormalities was part of a long history of the medicalization and management of the sexed body. Growing out of the Enlightenment-era imperative to categorize all forms of life to serve both epistemological and political ends, the fascination of the medical discourse with sex approached near obsession by the end of the nineteenth century. This was almost completely due to the great rift that lay between the ideological foundations of liberal democracy and the exclusion and subordination of half the population on the basis of their sex. The newly emerging fields of science and medicine were enlisted to provide evidence that the hierarchical social structure which privileged men and subordinated women was justified because of “natural” and profound biological differences that

The “male-or-female sex” use of “gender” in English is attested from the early 15th century. In the 20th century gender came to be used colloquially in English for “the sex of a human being.” Its use in feminist writing with reference to social attributes as distinguished from biological qualities was first attested in 1963.

²² Stoller’s book consisted of three parts. The first related cases involving patients who were primarily intersexed, who he considered to have physical/biological “abnormalities;” the second, cases concerning patients who were homosexuals, transsexuals and transvestites (cross-dressers), that is, issues concerning their masculinity or femininity; and the third offered treatment protocols for each of those categories plus a long chapter on the “moral” considerations inherent with such treatments. Stoller was especially troubled with how “sex change” surgery was sinful according to the Catholic Church.

proved the inferiority of the female sex.²³ The point of this effort was to assist the establishment of hegemonic norms that would effectively stabilize the citizenry so that it would better serve the state.²⁴ The method utilized by the burgeoning numbers of biologists, sexologists, psychiatrists, and other men of science and medicine was to first establish physical and cultural norms for the population, then to pathologize all people who deviated from them, and finally to provide cures (or confinement) for those so diagnosed.

Especially vexing to the medical men of this era were the bodies that were unable to be assigned into either of the two sex categories and which blurred its definitional borders—those bodies with ambiguous genitalia.²⁵ Anatomical hermaphrodites challenged what it meant to be either male or female, forcing medical and scientific men to better define acceptable requirements for the categories “man” and “woman” in order to more effectively police their borders. Intersex scholar Alice Domurat Dreger calls the period 1870-1915 the “Age of Gonads” because the intense scrutiny of hermaphrodites by medical and scientific men resulted in their determination that the only reliable

²³ While I acknowledge that the same methods and practices were utilized to justify racism at this time, and while I absolutely acknowledge the intersectionality of gender and race, here I focus on gender as a category of analysis, inclusive of all races and classes.

²⁴ The ideologies of “Republican Motherhood” (Kerber, 1980) and the “Cult of Domesticity” (Welter, 1966) also referred to as “The Doctrine of Separate Spheres,” were manifested in Revolutionary America, reached their zenith for most of the population in the ante bellum period and held influence for middle and upper class whites through the Victorian period. It may be argued that their vestiges remain fully in effect today. These ideologies held that a woman’s “nature” (i.e., her weak, inferior body and mind) suited her for domestic tasks only: bearing, raising and educating children, serving her husband and tending to the religious and moral needs of her family. Thus, her “sphere” was the private one of the home, while her husband (or father were she an unmarried girl) inhabited the public sphere of commerce, business, governance and the law.

²⁵ In the nineteenth century all those with any degree of ambiguous genitalia—exhibiting genital anatomy of both sexes rather than clearly one or the other—were referred to as hermaphrodites, taken from Hermaphroditus, the mythological ancient Greek child of the gods Hermes and Aphrodite, who possessed both female and male anatomy. S/he is depicted in Greco-Roman art as a full-breasted woman with a penis. The term “Intersex” came to replace hermaphrodite in the twentieth century, largely because of finding that of the numerous people displaying ambiguous genitalia (reported by biologist Anne Fausto-Sterling to be as high as 1.7 per 100- see *Sexing the Body*, 2000, p. 53) “true” hermaphrodites were quite scarce (Fausto-Sterling reports their frequency at .0012/100, or about 1 in 100,000).

marker of a person's "true" sex was the makeup of their genital tissue: it was either ovarian or testicular. (Dreger, 2003).

Amidst the social upheaval of the second half of the nineteenth century, first-wave feminists like Matilda Joslyn Gage, Susan B. Anthony, Lucretia Mott and Elizabeth Cady Stanton rose up to challenge the legal and social inequalities suffered by women.²⁶ They demanded the right to vote, to receive higher education, to own property, to speak in public, to practice law and to dress as they chose—even if that meant wearing pants. The feminist challenge they instigated so threatened the social order that medical and scientific men felt called upon to intensify their theorizing about the essential, biological inferiority of women. In the period from 1870 till about 1920, social biologists like Edward Clarke, G. Stanley Hall and Herbert Spencer conscripted science to serve extant cultural ideologies. Clarke's theorized that education endangered women's reproductive systems, and therefore because it harmed her and by extension the state, no women should be allowed such a privilege. Hall expanded on this to argue that educating women amounted to race suicide, for only middle and upper class white women sought it and their resulting lack of offspring would yield a world populated by inferior immigrants and blacks. Spencer twisted Charles Darwin's theory of evolution to suit his own conservative socio-political program. The movement called "Social Darwinism" was driven by Spencer's theory, known to this day by the colloquial phrase "survival of the fittest," which held that hierarchical divisions of class and sex in labor and society are

²⁶ Referred to as the "first wave" of feminism, the women's rights movement rose out of the abolition movement. Recognizing the similarities between enslavement, servitude and oppression based on race and that based on sex, women who were campaigning to end slavery assembled together for the first Women's Rights Convention at Seneca Falls, NY, in 1848 to address the injustices that women suffered. With the end of the Civil War came freedom for black slaves and suffrage for black men, prompting Gage, Anthony and Stanton to form the Women's Suffrage Association in 1869.

biologically established. According to Spencer, because biology made men strong and competitive and women weak and nurturant, women were unfit to vote, to engage in legal discourse and to otherwise be involved in any matters of consequence.

Because social norms are always reflected in the law, one needs only to examine the laws of any given period to understand the hegemonic fabric of its culture. Higher court decisions often provide articulate descriptions and arguments in their discussion of decisions reached on the cases that reach their chambers. Most cases heard ultimately involve challenges to social conventions. In 1869 Myra Bradwell was proclaimed well qualified and sufficiently schooled by the federal judge who recommended her for admission to the bar to practice law in the state of Illinois. The Illinois State Supreme Court refused to grant her a license because she was a woman. Bradwell appealed that decision, lost, appealed again and eventually her case was heard by the United States Supreme Court. In its 1873 decision on *Bradwell v. Illinois* the nation's highest court upheld the Illinois statute that prohibited women from practicing law. The majority opinion argued that "The civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The paramount destiny and mission of woman is to fulfill the noble and benign offices of wife and mother." The naturalizing of sexual inequality on the basis of biological essentialism was evidently firmly established in American social and legal practice.

Booming urbanization occurring in the late nineteenth century allowed for the emergence and rise of another long marginalized group, those whom we today call

homosexuals (see esp. Chauncey, 1994).²⁷ They, like hermaphrodites and feminists, also challenged the boundaries that were meant to naturally separate the two sexes and the norms that sought to regulate their behavior. The first English medical textbook to examine the physical and mental components of same-sex desire, then to pathologize and treat it, was written in 1897 by sexologist Havelock Ellis. In *Sexual Inversion*, Ellis postulated that those deviant people who were erotically attracted to their own sex suffered from an innate sense that they were themselves the other sex. What we now call a lesbian was then considered a female invert: she was a man trapped inside a woman's body. Therefore her heterosexual instincts were considered normal and healthy, and her disease lay in her inverted sex assignment. Ellis' colleague Richard Kraft-Ebbing described female sexual inversion as "the masculine soul, heaving in the female bosom" (Taylor, 1998). Here we can see how essentialism— the ability of science to account for natural phenomena on the basis of mechanistic causation— clearly shaped medical theorizing on disorders of sexuality as being innate or biologically driven: the two-sex, heterosexual model was necessarily supported and maintained.²⁸ However, as with feminists, inverts really couldn't be biologically explained or materially categorized—their deviance from norms began to be seen as completely behavioral.

With its mantra of "born in the wrong (sexed) body," the turn-of-the-twentieth century theory of inversion sounds remarkably identical to many accounts of

²⁷ The term "homosexual" was first used in 1869 by German psychologist Karoly-Maria Benkert in a pamphlet advocating the repeal of Prussia's sodomy laws (Pickett, 2015).

²⁸ It is interesting to note that Iran evidently subscribes to the theory of inversion today: homosexuality is illegal and punishable by imprisonment and sometimes death, but the state offers a cure—gender reassignment surgery. Thus, a gay man is considered to be a woman "trapped in the wrong body," and the state will pay for surgery to give him a female body.

transsexuality one hundred years later.²⁹ Psychiatrist Robert Stoller clearly thought so, and his extensive research on transsexuals in the 1950s and 60s led to his pioneering theories on gender, gender identity and gender roles. His research interest was no doubt piqued by the blurring of distinctions raised by the previous work done on hermaphrodites and invert, for many of the people having ambiguous sex characteristics desired to live in the world presenting as a gender that did not seem to align with their body. Stoller was compelled to create a clearer method of categorization between the corporeal and psychological aspects of “sex.” “I prefer to restrict the term sex to a biological connotation,” he wrote. “Thus, with few exceptions, there are two sexes, male and female. To determine sex, one must assay the following physical conditions: chromosomes, external genitalia, internal genitalia (e.g., uterus, prostate), gonads, hormonal states, and secondary sex characteristics” (1968, 9).

Stoller then boldly proclaimed that “Gender is a term that has psychological or cultural rather than biological connotations. If the proper terms for sex are “male” and “female,” the corresponding terms for gender are “masculine” and “feminine”; these latter may be quite independent of (biological) sex” (ibid). Extrapolating from his definition of gender and drawing upon Freud’s and Money’s work, Stoller then proposed that “gender identity” be the term used to describe “the knowledge and awareness,

²⁹ While the word “transgender” is (arguably) considered an umbrella term that encompasses a range of cross-gender expression (i.e., from cross-dressers to transsexuals), “transsexual” is defined as “a person who strongly identifies with the opposite sex and may seek to live as a member of this sex especially by undergoing surgery and hormone therapy to obtain the necessary physical appearance (as by changing the external sex organs)” (Merriam-Webster Dictionary). The word first appeared in a medical textbook written by Magnus Hirschfeld in 1923. The term “transsexual” has largely fallen out of favor at the time of this writing, as it implies sexuality; additionally, its usage has led to controversy over hierarchies in the transgender population predicated on the notion that unless a person has undergone complete hormonal and surgical procedures to change their body to match their gender identity, they aren’t “really” the man or woman they purport to be.

whether conscious or unconscious, that one belongs to one sex and not the other” (10).³⁰ Related but differing from gender identity, he offered the term “gender role” to describe the “overt behavior one displays in society, the role which he plays, especially with other people, to establish his position with them insofar as his and their evaluation of his gender is concerned” (ibid). The precise definition of these terms—central even today in any discussion of sex and gender— was necessary for Stoller to support his thesis, which has been, in hindsight, a bombshell in terms of its lasting effect on our culture: he claimed that “gender [is] primarily culturally determined...this cultural process springs from one's society” (xi). With that proclamation Stoller (no doubt unintentionally) not only threw the gauntlet down at the feet of the essentialists, but also set them up for their coup-de-grace at the hands of those women whom they had long held subservient. Feminist scholars moved in to claim that, because gender is culturally constructed, there is no “natural” reason for the justification of a hierarchical gender binary that privileges men and subordinates women.

Suzanne Kessler and Wendy McKenna appropriated and re-theorized gender to advance second-wave feminist goals in their pivotal 1978 book, *Gender: An Ethnomethodological Approach*. The two psychologists set out to answer the question: How is a social reality where there are two, and only two, genders constructed? Of equal

³⁰ Stoller credits Sigmund Freud's *The Interpretation of Dreams* (1899) and *Three Essays on Sexuality* (1905) for forcing “the world to recognize that much of what was called sexuality was determined by one's life experiences from infancy on and was not simply a matter of inheritance, biochemistry, and other organic factors” (1968, vii). John Money's thesis that thesis “that sex and gender are not necessarily in a one-to-one relationship” derived from his (in)famous experimental work with children who came to him with problematic genital issues, or as Stoller described it, “in which the variables of sex and gender have been manipulated” (viii). Money sought to solve the “nature v. nurture” question by proving that nurture, or the cultural environment, was responsible for one's gender identity. He is best known for the tragic David Reimer case where he supervised the upbringing as a girl—including genital surgery and hormonal treatment—of a boy whose penis was accidentally destroyed when he was an infant (told in the book *As Nature Made Him: The Boy Who Was Raised as a Girl* (2001)).

weight, they also asked, how do we “do” the gender attributions that render gender a reality (5)? Their ensuing argument leads to the notion that gender is perhaps a chimera—that its reality lies in the eye of the beholder because of the process of gender attribution. Let me explain their thoughts.

Every time we see a new person we attribute a gender to them: we decide, based on sensory signals, whether they are male or female. These are based on cues we associate with either gender, such as beard stubble, deep voices and an arms-akimbo gait with men, and long hair, breasts and a melodic voice with women. It may also be associated with their actions, such as whether they enter the men’s or the lady’s room, or whether they carry a gun or paint their nails. Gender attribution is an interactive and complex process between actor and observer, where the process results in the fact of the actor being judged male or female. Kessler and McKenna argue that these cues are socially scripted according to rules within a given culture; for instance, “I knew he was a man because he had a beard” works in today’s Western culture, whereas “I knew he was a man because he carried a bow” worked in the American Indian culture centuries ago. The systematic repetition of these attributes constructs and maintains the reality of the conference of gender; thus, gender only exists through its being “done.” Gender is an accomplishment, a product of daily social practices and behaviors which codify and manifest masculinity /“maleness” and femininity /“femaleness” (West and Zimmermann, 1987). Gender attributions are never guesses, for in our quotidian reality people are *always*, not probably, male or female: there is no middle ground. This process of gender attribution, then, is the method everyone uses to construct gender (Kessler and McKenna, 18).

Gender identity is the self-attribution of gender. A person's own feeling of whether they are a woman or man, girl or boy is primary and persists regardless of the gender attribution other people might make of them. Conflict arises when and because people usually attribute gender to a person without asking them how they identify. The only way to know someone's gender identity is to ask them—but in asking, “Are you a man or a woman?” one is querying both, “What is your gender identity?” and “What gender do people categorize you as?” (ibid, 9)

Gender assignment, on the other hand, is a special, one-time-only (in most cases) case of gender attribution. It occurs at birth when a person deemed to have appropriate authority (usually a medical doctor) categorizes the infant as either a girl or a boy based on an inspection of the infant's genitals. The term “gender reassignment”—commonly used today coupled with the word “surgery”, such that the acronym “GRS” popularly refers to Gender Reassignment Surgery—refers to those relatively few cases where gender identity and gender assignment do not match.³¹ It is traditionally accomplished by surgically and medically re-constructing the person's genitals (and secondary sex characteristics) so that they appear to match those associated with the gender category the person identifies as. Kessler and McKenna point out the inherent fallacy (I might coin the word “phallacy” to use in this case) of the term “reassignment;” they suggest “reconstruction” is more accurate, for evidently the person in question was unable to announce their gender identity (at birth), and further, it is not gender that is being newly assigned, but genitals being re-constructed to satisfy the eye of the gender assigner/attributor (8). I have long argued that “GRS” best represents “Genital

³¹ A June 2016 survey by the Williams Institute estimates that about 0.6% of the United States population identifies as transgender.

Reconstruction (or, Reconfiguration) Surgery” as that is what in fact is occurring. Given this viewpoint and physicality, why can we not acknowledge that we are actually reconstructing the individual’s sex, as sex is what we see and gender is what we think?

Alarms often sound when self-attribution and attribution by others do not match. This almost always arises because the person in question is not satisfactorily performing the gender role that matches their gender identity. A person’s gender role is the set of expectations about what behaviors are appropriate for the gender category (boy/girl, man/woman) they occupy. Our culture holds traditional beliefs that one is obligated to perform the gender role associated with the category they are born into (yes, per gender assigned at birth) and the scripts for those roles are clearly written as masculine and feminine. The obligatory function is enforced through sanctions against transgressing or violating accepted roles and the use of stereotypes to further cast aspersion on those whose role performance is outside the norms. Dress codes are an example of how sanctions operate, and even serve to prop up stereotypes. A London-based financial company recently fired one of its receptionists because she refused to wear high-heeled shoes; their dress code sought to project and maintain traditional images in accordance with gender role stereotypes that harken to the “*Mad Men*” heyday.³²

If “gender” is meant to designate the psychological, social and cultural aspects of maleness and femaleness, and “sex” is meant to designate the biological components of the same, what do we make of their seeming common ground? Based on a study they

³² Nicola Thorp was dismissed without pay from her job as a receptionist at a finance company because she showed up for work wearing flats. Her employer had told her she would need to wear shoes with 2- to 4-inch heels “(Woman fired from temp job on first day for not wearing high heels,” *NY Times*, May 12, 2016). *Mad Men* was the TV series show (2007-2015) that portrayed how sexism and patriarchal entitlement shaped gender roles, lives, careers and social interactions in the 1960s New York City advertising business world.

conducted that utilized pictorial overlays of typical gender attributes (long hair, beard, breasts, pants, skirt, and so on) that also included genitals (penis and vagina), Kessler and McKenna confirmed that gender attribution is essentially genital attribution (153).³³ Noting that acclaimed sociologist Howard Garfinkel made a distinction between the possession of a penis or vagina as a biological event and the possession of either genital a cultural event, they conceived the concept of the “cultural genital” as that which is assumed to exist and is believed should naturally be there because gender attribution has already been made (154).³⁴ Thus, “cultural genitals” are attributed and play an essential and reflexive role in the gender attribution process. Critically, Kessler and McKenna also concluded that the only cultural genital is the penis, because in America’s androcentric society “male is the primary construction” (159).³⁵

The essentialist stance taken by many members of our society holds that gender is grounded in scientific, biological characteristics which they regard as ultimate truths, while many others see “God” as the source of supreme truth. Springing forward from Stoller’s ground, Kessler and McKenna argue that rather than biology or deity being the determinant of who is really a man or a woman, it is instead “our seeing of two genders [that] leads to the ‘discovery’ of biological, psychological and social differences” (163).

Therefore, the social construction of gender and the categories of “male/man” and

³³ Kessler’s and McKenna’s overlay study highlights the role that genitals play in gender attribution and gender assignment; the distinction here lies in their visibility.

³⁴ Garfinkel, creator of the sociological field of ethnomethodology, is best known in gender studies circles for his involvement with Stoller in the case of Agnes, a young apparently intersexed girl who sought their approval in order to obtain GRS. Five years after the surgery she confessed that she was a transgender person who had fooled them (her female sex characteristics were the result of her consuming estrogen pills that belonged to her mother).

³⁵ This statement reflects dominant Western thought from Aristotle (“the male is by nature superior and the female inferior, the male ruler and the female subject,” *Politics*, 1.1245b) to Freud (“You may take it as an instance of male injustice if I assert that envy and jealousy play an even greater part in the mental life of women than of men. It is not that I think these characteristics are absent in men or that I think they have no other roots in women than envy for the penis; but I am inclined to attribute their greater amount in women to this latter influence,” *New Introductory Lectures on Psycho-Analysis*, 1933).

“female/woman” that are grounded in the gender attribution process create and sustain the dichotomous and androcentric “reality” we participate in (164). All dichotomies and binaries operate to privilege one in opposition to the other, resulting all too often in discrimination and oppression. While science offers endless evidence of biological continuums, our society seems to crave distinct categories (especially those that are dichotomous and can be reduced to good/bad, yes/no binaries) and feels compelled to pursue legislation that will insure their legacy.³⁶ We need only look at laws that harshly discriminated against Jews in Nazi Germany and Native Americans, Blacks and Hispanics in the United States to see horrific examples of this social tyranny gone wrong. In all these cases biology was conscripted as “natural” evidence to designate these groups as “others” and to justify their marginalization and oppression.

As impenetrable as her writing may be to some, no discussion of the evolution of gender can be had without including philosopher Judith Butler. Her chef d'oeuvre, *Gender Trouble: Feminism and the Subversion of Identity* (1990) continued the feminist rebuttal against essentialist arguments that maintained the polarized sex/gender system. Believing that a feminist politics that is biologically grounded in the category “woman” only perpetuates injustice and oppression, Butler called for the conflict seen as between man and woman to be refocused and to be seen instead as between oppressor and oppressed. Butler realized that the hierarchical sex/gender system had to be deconstructed in order to arrive at such a vantage point to allow such a

³⁶ Stanford University evolutionary biologist Joan Roughgarden's *Evolution's Rainbow: Diversity, Gender, and Sexuality in Nature and People* (2004), critiques Darwin's theory of sexual selection by citing numerous instances in which animals do not follow traditional sex roles. She argues that principal elements of Darwinian sexual selection theory are false and suggests a new theory that emphasizes social inclusion and control of access to resources and mating opportunity. She disputes a range of scientific and medical concepts, including Wilson's genetic determinism of behavior, evolutionary psychology, the existence of a gay gene, the role of parenting in determining gender identity, and Dawkins's "selfish gene" as the driver of natural selection (Publisher).

view. Her principal thesis is that gender, and perhaps biological sex itself, is not an expression of what or who one is, but rather a performance. One's gender is constituted through a "stylized repetition of acts" that include gesturing, dressing, speaking—in other familiar words, the doing of gender. These acts create the fiction that there is something enduring in one that is called "masculinity" or "femininity." Butler wants us to understand that there is no true or "core" gender—rather, it is produced (or in her words, becomes a "sedimented effect") through one's repetitive behavior performances. This production is regulated and scripted by cultural norms, and each gender can only produce and define itself in and through its opposition to the other.

Butler's theory of gender performativity owes much of its genesis to her fascinated examination of Herculine Barbin, a 19th Century hermaphrodite.³⁷ Because Herculine is not categorizable within the gender dualism as it exists, Butler found that she "deployed, redistributed [and disrupted] the terms of a binary gender system" (Butler, 1998, 31). Herculine's non-binary existence and body make it difficult to separate her primary sexual characteristics from her gender identity, so she also serves to disrupt linguistic conventions used to produce intelligible gendered selves (175). Butler's analysis of Herculine led her to propose that gender must be a constructed identity that is created through performing "a stylized repetition of acts in which the mundane social audience, including the actors themselves, come to believe" (179). It follows that the effect of gender is produced through— often and usually stereotypical—

³⁷ Butler drew largely upon Michel Foucault's book *Herculine Barbin: Being the Recently Discovered Memoirs of a Nineteenth Century French Hermaphrodite* (1980) to inform her argument. Foucault discovered the diary of Herculine in the archives of the French Department of Public Hygiene, had it translated to English, and wrote its introduction in which he describes the nineteenth century as being "so powerfully haunted by the threat of the hermaphrodite" (xvii).

attributes, role-playing and mannerisms of various kinds that create the illusion of “an abiding gendered self” (ibid).

Similarly, we can also extrapolate that all heterosexual performances sanction and reinforce scripted cultural heterosexual norms—what feminist poet Adrienne Rich terms “compulsory heterosexuality.” These norms—like those of gender— serve to legitimize heterosexual masculine dominance. Over time these repeated performances assume a naturalness and necessity at the same time that they hide their constructed artificiality. Their political purpose lies in preserving the androcentric, heteronormative status quo.³⁸ Repetition (Butler stresses this factor) is the key to making the artificial indistinguishable from the real.

Butler provocatively suggests that we are all simply unwitting actors in a gender performance that is continually being scripted by social convention. We reflexively create and maintain those norms: our performance of gender, our “doing” gender, *is* gender. Our collective performances create and comprise the hegemonic narrative of gender. The impetus for Butler’s research was her quest to find a method with which to resist and dismantle gender-based oppression; she found that it lies in understanding how “performativities” expose the artificial nature of cultural gender norms.

Biologist Anne Fausto-Sterling was chagrined that feminists had fallen into the trap of using a dualistic argument themselves in their effort to escape the bonds imposed by the gender dichotomy. She sought to end the dualism between biology and

³⁸ Heteronormativity is the set of cultural practices that hierarchically categorizes the two genders, insists that gender reflects biological sex and posits norms for the maintenance of heterosexuality.

gender by arguing that not only is gender socially constructed, but sex itself is as well, constructed as we know it by science and surgeons. “The truths about human sexuality [are] created by scholars in general and biologists in particular...and refashion our cultural environment” (2000, 5). We noted earlier that the emergence of the field of biology in the nineteenth century was coincidental with debates about race and gender in the national politics and that science was bent to serve the purposes of the state. “What we call ‘facts’ about the living world are not universal truths,” observed Fausto-Sterling (7). “The more we look for a simple physical basis for sex, the more it becomes clear that “sex” is not a pure physical category,” she continued, noting that plastic surgery routinely creates what appears to be material sex(4). The reader should not be surprised to know that Fausto-Sterling is the modern world’s preeminent research scientist of intersex people. Her work was prompted by her painful realization that advances in medical technology have been harnessed to “correct” the pathologization of unusual bodies, rendering them to appear “normal.” Where Dreger termed the nineteenth century obsession with categorizing sex “The Age of Gonads,” Fausto-Sterling named the twentieth century medical/surgical intervention with ambiguously sexed bodies “The Age of Conversion.” We are still in that age, where medical practitioners feel it imperative to catch mixed sex people at birth and convert them to male or female (40). While today there is quite a bit of controversy over the common practice of surgically “treating” babies born with ambiguous genitalia, few parents wish to be unable to answer the question, “is it a boy or a girl?” The belief that compels us to continue to condone this practice was summed up in 1915 by surgeon William Bell who declared, “The possession of a single sex is a necessity for our social order.”³⁹

³⁹ William Blair Bell was one of the first physicians to specialize in surgically altering the genitalia of

In sum, the sex/gender system continues to be our primary way of categorizing people. Because society eschews ambiguity and prefers normalcy, standards have historically been established and maintained so that everyone can be readily identified and placed into either the category “man” or the category “woman.” Twentieth century feminists resisted the hierarchical ordering of the two categories and so separated gender from sex as a means of deconstructing and delegitimizing the power dynamics conferred by the binary. Because the distinction between gender and sex as separate entities arose out of the practices and methods employed by the social sciences, it has met with little resistance—unless and until there is a mismatch in an individual. Those whose appearance or behavior does not fit socially or culturally accepted norms are suspected as being uncategorizable, and they are considered a problem.

For most of us the subject of gender is deeply personal, for perhaps the most primary aspect of our identity is that of our gender, even if we take it for granted. We need to feel a sense of belonging, and our two-sex/two-gender culture provides that by insisting that we fit into one or the other of these categories. Consider, then, the dilemma faced by every transgender person, confronted as they are with a gender identity the polar opposite of their sexed body. How can they convince the society they live in—composed of those people who attribute their gender— that they are unquestionably categorizable and thus deserving of the acceptance bequeathed on all normal people? This is the subject of the next chapter.

intersex people so that they would appear to be clearly one gender—that decided upon by the surgeon, and usually due to which “sex” would be easier to create.

Nicole's Story:**I'm a Boy-Girl.**

“When I was really little, before I knew there was anything wrong with it, I would always introduce myself as a boy who wants to be a girl because I thought that was sort of like a token of my identity”—Nicole Maines, 2016

“Susan Doe is a girl,” reads the opening line in the *Doe v. Clenchy* Appellant Brief (2013). “She is also transgender. This means that although assigned the sex of male at birth, Susan has always had a female gender identity.” These words sum up the predicament rather concisely: which is she, legally? Is Nicole (Susan Doe) both a girl and a boy as the brief suggests, or a boy, or a girl? As discussed earlier, the very etymology and definition of “transgender” implies movement: crossing. Thus, is Nicole expected to, or to be more Procrustean, *must* she, take steps to un-become whatever it is that makes her one or the other in order to fit neatly into a single category, given there are legally only two? The court has been charged to consider and to render a judgement whether to, or not to, grant her admittance through a door marked “Girls.” They must decide if she is a girl—or not a girl and therefore a boy. But, is Nicole charged with any conformity measures as a condition of being granted the status she desires? As we noted in the previous chapter, it is still customary practice for doctors to surgically alter ambiguous genitalia on infants so they appear to be either a boy or a girl and thus may be duly categorized as such.

Cisgender people cannot fathom the constant dilemma lived by transgender people: the sense of non-belonging, of not being whole, but being both/and. Feminist Chicana poet Gloria Anzaldua writes that her fellow borderland dwellers called transgender people *mita'y mita'*, “neither one nor the other, but a strange doubling...a half-and-half” (1999, 41).⁴⁰ Appropriately, and perhaps ironically, Nicole’s favorite early childhood toy was an Ariel doll, modeled after the heroine in the animated Disney musical *The Little Mermaid*. Ariel is a mermaid, half fish and half human—but she is

⁴⁰ Anzaldua uses her childhood homeland of the Mexican/U.S. border as both a geographical place and also a metaphorical place where she, like the half-and-half who is neither male nor female, is neither Mexican nor American, but both.

also very much a girl. Her dilemma is that she doesn't want to be a half-and-half: she wants her bottom half, which is a fish's scaly tail, to match her top half, which is a pretty human girl with long red hair and a pre-teen's hint of breasts. Ariel dreams of shedding that tail, becoming a complete human girl and living on land, leaving her home in the ocean where she must exist in a liminal state of non-belonging.

Like Ariel, Nicole wanted the part of her that she felt to block her path to wholeness to go away. Her father Wayne recalls the startling moment that occurred just after Nicole turned three years old when she blurted out, "Daddy, I hate my penis" (Nutt, 2015, 23). "When will my penis fall off?" she asked her mother. "When do I get to be a girl?" (ibid,29). Nicole referred to herself as a "boy-girl," saying, "I'm a girl in a boy's body," feeling she needed to explain her difference, her state of being and becoming, to people. "So, I would always introduce myself as a boy who wants to be a girl," Nicole recalled, "because I thought that was sort of like a token of my identity" (Maines, N. 2016). She implied that, like the process of growing up, she would eventually transform into a complete girl. The journey of becoming is so common to transgender people that it is termed "transition."⁴¹ "Susan's journey began at a very young age," recounts the "Statement of Facts" in a brief filed by her attorneys (2013). "Her parents recount that she frequently wore a shirt or towel on her head to create the feeling of long hair. She wore tutus and played with Barbie dolls."

⁴¹ Transition, noun: 1. a change from one form or type to another, or the process by which this happens: as in the dramatic example of a caterpillar making a transition into a butterfly. 2. a change in which someone starts living their life as a person of a different gender: She began her transition from male to female almost seven years ago (Cambridge Dictionary, 2016). Like "transgender," this word relies on *trans*- which means "to cross."

Nicole began to question her gender assignment at a young age. “I think I started experiencing feelings of feeling like a girl when I was about two or three years old,” she recollected (Maines, N., 2016). “I just felt that [my] being a girl was the most reasonable, sensible thing in the world...but I wondered what was wrong with me, my not being a girl.” The feeling of being “wrong” is, of course, due to the way gender is hegemonically structured to push people towards standards of normalcy. Nicole’s parents were well aware of the problems inherent in her state of being, and worried that others might notice and disapprove. Nicole remembers their early reactions to her behavior as they hoped they could help her conform to typical boy-like behavior. Recalling her strong desire to be given an Ariel doll for Christmas, Nicole remembers her parent’s reaction: “They would sort of look at me funny and say, ‘oh well, why do you feel like that?’ and they’d sort of try to push me more toward boy’s things.” She remembers quite distinctly that they always respected her feelings, though, and never were “straight out, like, what you’re feeling is wrong, you’re different, you’re not okay.” Rather, Nicole was aware that her parents were afraid about what other people were going to say. She said her father kept trying to “simply nudge me back towards being normal, but always in such a loving way. He was trying to make it easier [for me] to sort of fit into society.” At that point her mother had already begun taking proactive steps and learning about—and how to cope with parenting- transgender children. “That’s when my dad just left it up to my mom,” recalled Nicole. Her mother worked hard to prepare Nicole and her school for each other. While she did all she felt was possible to help the teachers and staff understand Nicole’s situation, society—and school kids, who hold very rigid beliefs on gender norms—had its own agenda regarding the reception of the girl-boy entering first grade.⁴²

⁴² Kessler & McKenna’s research with young children (they used three groups: pre-school, kindergarten

Indeed, Nicole suffered no small amount of bullying and abuse. “When I was in first grade other kids teased me and called me ‘girly,’ which in retrospect is what I wanted,” she remembered. “But even in first grade I was able to pick up on tone and I knew that that was being used in a hostile sense and the way that they were using it made me want to feel like, ‘Oh, I shouldn’t be girly. I shouldn’t be like this because the way they’re saying it to me is that I’m wrong to be this way.’ And so they were giving cues that I need to change who I was. People I didn’t even know were being more hostile than people I had known forever. I didn’t know how to deal with that.” Nothing Nicole’s parents did could prevent bullying from other kids in school, which was focused on her gender non-conformity. Their pressure was directed at her to change. “And that’s when I started seeing counsellors so I could deal with it,” recalled Nicole. It is often said of people who are transgender that it is not they who transition—after all, they’ve always known their gender identity—but those closest to them. While her parents took her from therapist to doctor to psychologist looking for someone who was familiar with her condition and who could offer help, Nicole knew what she needed to do so she would not be different, wrong or a boy-girl. That same first grade year she announced to her parents, “You know, I can have an operation that will fix me” (Nutt, 2015, 54).

As soon as Nicole entered first grade, her mother introduced herself to Lisa Erhardt, the counselor at Asa Adams Elementary School, so she could be made aware of

and third grade) and adults to find how they attribute gender showed the children were better at doing so with clothed depictions, where adults relied on genitals to do so (1978, Ch. 4 & 6). This is evidenced in a vignette from Nutt’s book, where the mother of a two sons that were the same age and friends of Nicole and her brother referred to them as “the Maines boys.” Her sons corrected her, saying, “Mom, you mean the Maines kids. They have a boy and a girl.” She replied, no, they both had penises. After a pause one son responded, “I know that boys have penises and girls don’t, but Nicole is a girl, and she just happens to have a penis” (2016, 44).

Nicole's unusual situation.⁴³ Erhardt wasn't familiar with transgender kids, and pulled the *Diagnostic and Statistical Manual* off her bookshelf to learn more (this book, critical to the diagnosis and treatment of psychological problems, has been significantly upgraded since the edition used by Erhardt in 2003).⁴⁴ There, under the section titled "Gender Identity Disorder," they read that children likely to be so diagnosed "evidence a strong and persistent cross-gender identification, which is the desire to be, or the insistence that one is of the other sex" (DSM-IV, 1994, p. 576). As evidence for cross-gender identification, the book listed the following diagnostic features:

A strong desire to be of the other gender or an insistence that he or she is the other gender... in boys, a strong preference for cross-dressing or simulating female attire...their favorite female-type dolls, such as Barbie, are often their favorite toys, and girls are their preferred playmates. They may express a wish to be a girl and assert that they will grow up to be a woman. More rarely, boys with Gender Identity Disorder may state that they find their penis or testes disgusting, that they want to remove them (ibid).

⁴³ Asa Adams Elementary is a small (260 students when Nicole attended), pre-K through 5th grade school in the university town of Orono, Maine.

⁴⁴ The *Diagnostic and Statistical Manual* ("DSM") published by the American Psychiatric Association ("APA") is the standard classification of mental disorders used by mental health professionals in the United States. At the time Nicole was in first grade (2003), the 4th edition was in use, and "Gender Identity Disorder," or GID, was listed as a mental disorder. In the revised fifth edition, DSM-5, published on May 18, 2013, GID has been removed and replaced by "Gender Dysphoria." According to the APA, "people whose gender at birth is contrary to the one they identify with will be diagnosed with gender dysphoria. [The new designation] aims to avoid stigma and ensure clinical care for individuals who see and feel themselves to be a different gender than their assigned gender. It is important to note that gender nonconformity is not in itself a mental disorder. The critical element of gender dysphoria is the presence of clinically significant distress associated with the condition. For a person to be diagnosed with gender dysphoria there must be a marked difference between the individual's expressed/experienced gender and the gender others would assign him or her, and it must continue for at least six months. In children, the desire to be of the other gender must be present and verbalized. This condition causes clinically significant distress or impairment in social, occupational, or other important areas of functioning. Gender dysphoria is manifested in a variety of ways, including strong desires to be treated as the other gender or to be rid of one's sex characteristics, or a strong conviction that one has feelings and reactions typical of the other gender. Persons experiencing gender dysphoria need a diagnostic term that protects their access to care and will not be used against them in social, occupational, or legal areas. Replacing "disorder" with "dysphoria" in the diagnostic label is not only more appropriate and consistent with familiar clinical sexology terminology, it also removes the connotation that the patient is "disordered" (APA, 2013).

Nicole's mother knew that her daughter matched all these criteria perfectly. What troubled both mother and counselor was the pathologization of the child implied by the DSM, implicit in the terming of the condition of cross-gender identification as a "disorder." For them, Nicole's self-identification as a girl seemed to fit her perfectly well and comfortably; what troubled Nicole was the fear that others felt she was not completely a girl. While she regularly had dressed and played and otherwise lived as a girl at home, she had only marginally expressed her girl nature at school, and that caused her significant stress. The psychological distress that results from having a gender identity that is different from one's assigned sex at birth is medically referred to as "gender dysphoria." The standard course of care to alleviate gender dysphoria in children is called social role transition. In the case of a transgender girl like Nicole, social role transition requires the child's full integration into society as a female. Together, and with the help of a psychologist, her mother and Erhardt set out on a program to help Nicole express herself fully as the girl she felt herself to be at school.



Plate 1: Nicole Maines in class, third grade, 2005. (Source: *Doe v. Clenchy*, Appellant Brief, 2013)

Two years later she had fully arrived. Nicole lived and presented completely as a girl her third grade year, with teachers and students referring to her with female pronouns. (*Doe v. Clenchy*, 2013, 3). A case brief notes that by fourth grade she “wore skirts, dresses, female-style bracelets, barrettes in her hair, and nail polish...and had shoulder length hair” (4). Not only did she look the part of a girl, but she was accepted as one. The same brief relates that “She could typically be found with a bunch of girls that became kind of her cadre of friends. She was placed in the girls’ section of the school choir.” Most critical to the case was the stated fact that “She used the girls’ restroom in third and fourth grades, and other students were comfortable with that” (4). By spring of fourth grade, Nicole had completed the social transition to female.

When Nicole was in fifth grade she revealed her greatest fear was “going to high school looking like a boy” (Nutt, 2015, 83). At ten years old she knew that puberty and the changes it would wreak on her body lay just ahead. She dreaded the thought of having a hairy body, a deep voice, growing big and broad shouldered and having an Adam’s apple on her throat—all seemingly inevitable for someone born a boy. That same year she became a patient of Dr. Norman Spack, a pediatric endocrinologist based in Boston, Massachusetts. Spack was a pioneer of what is often called the “12-16-18” treatment program for transgender youth.⁴⁵ It refers to three major treatment steps

⁴⁵ In a paper he co-authored in 2009 titled “Endocrine Treatment of Transsexual Persons: An Endocrine Society Clinical Practice Guideline,” Spack laid out a three-step process for adolescents who fulfill eligibility and readiness criteria for gender reassignment: “1. We recommend that suppression of pubertal hormones start when girls and boys first exhibit physical changes of puberty (confirmed by pubertal levels of estradiol and testosterone, respectively); 2. We suggest that pubertal development of the desired opposite sex be initiated at about the age of 16, using a gradually increasing dose schedule of cross-sex steroids; 3. We recommend referring hormone-treated adolescents for surgery when 1) the real-life experience (RLE) has resulted in a satisfactory social role change; 2) the individual is satisfied about the hormonal effects; and 3) the individual desires definitive surgical changes” (Hembree, 2009).

taken that generally correspond to those ages: at 12 the child is given a puberty suppressing drug that delays typical bodily changes; at 16 they are given appropriate hormones (i.e., estrogen for a transgender girl, testosterone for a transgender boy) and at 18 they undergo genital reconstruction surgery. Nicole was one of Spack's first transgender girl patients when she began his treatment program in 2009.⁴⁶

The purpose of such treatment programs is to alter the body to match the person's gender identity and to support the person's ability to live fully in that identity. The physical interventions that transgender people may undergo—such as puberty blockers, cross-hormone therapy, and genital reconstruction surgeries—are meant to help a transgender person live congruently with their gender identity. These medical treatments do not make a woman into a man or a man into a woman, for they already identify as one or the other. “A transgender man is already a man because that is his gender identity, and a transgender woman is already a woman because that is her gender identity,” notes a *Doe v. Clenchy* amicus curiae brief (2013, p.8). “Instead, medical treatment helps transgender people have bodies that reflect their identity as male or female.” However, the need for an individual's gender identity and its attribution by others to match is socially driven and is considered vitally necessary by both the individual being assessed and by society at large. As we understood in the previous chapter, all people attribute gender to those they observe based on many

⁴⁶ It is significant to understand that previous to this, transgender children who passed through puberty underwent those massive changes, which are sometimes impossible to reverse. Puberty Blockers (Puberty Suppressors, Hormone Suppressors) are a group of medications that are prescribed by an endocrinologist to suppress or inhibit puberty. The medications work by suppressing the production of sex hormones (testosterone and estrogen). Puberty Inhibitors are reversible and are used to prevent the devastating effects of developing unwanted secondary sexual characteristics in gender dysphoric children, like breast development and menstruation in natal females and growth of facial hair and an Adam's apple in natal males. These secondary sexual characteristics can be devastating to the child. They are expensive (about \$1000/month), must be taken for several years and their cost is not covered by insurance at this time.

different cues; if a person's gender cues and performance of their respective gender role do not match standard norms, then they are flagged and suspected for being imposters. The term for successfully convincing people that one is the gender they portray and exhibit is "passing." To pass successfully is the goal of most all transgender people, for they simply want to be accepted for the gender in which they identify. To not pass is often embarrassing and can lead to confrontational incidents and even sexual violence and death—especially in places or activities that are restricted customarily to one sex/gender.⁴⁷

Nicole knew it was her penis that marked her as a boy, even though it wasn't visibly apparent. While socially she was accepted and lived as a girl, under her skirt was a secret that many were aware of. "You feel, why do I have this part, why can't it go away?" recalls Nicole. "You know it's just how you were born and it's your mark for life, and you wish that a fairy with a magic wand could change you" (2016). For her, as for many transgender people who feel great social pressure to conform their bodies to their gender identity, the fairy that changed her was a surgeon who accomplished the task with a scalpel and hundreds of stitches rather than a magic wand. That happened the summer of 2015 when Nicole turned 18 years old. "As easy as a choice as it was, like I knew I wanted it...but it was a brutal process. It was really hard...all really hard," she painfully recalled a few months later. "If somebody does not want to have to go through all of that, I don't think they should be forced to. But, people say, oh well you should

⁴⁷ Sex-segregated spaces such as the public or school bathroom are the most frequent places of such confrontational crises; this will be covered in depth in Chapter 4. Many transgender women are murdered each year in America (twenty three were killed in the year 2016), usually when the man they are engaged in sexual activity with "discovers" their partner has a penis and acts in a rage triggered by homophobia. Often used as a defense argument, the idea here is that the transgender woman was deceiving the man who desired sex with a woman, for the "straight" man would never choose to have sex with a "man" and thereby be qualified as a homosexual. The penis is implicated in both cases.

have to get the surgery. I'm like, you are not the ones who have to go through this—it's really hard." The surgical procedures utilized in genital reconstruction for transwomen are complicated, lengthy (eight hours is average), dangerous (severe hemorrhage and bowel perforation are not uncommon) and painful; recovery is a slow process, part of which requires a life-long maintenance regimen. As Nicole inferred, it is a life-changing, mind-altering experience as well.

The irony in Nicole's case is that her lawsuit argued that her gender identity was the determining factor of her right to use the girl's room, and not the fact of her genital anatomy. The decision reached in the Great Maine Bathroom Case—which came just two years before she underwent GRS—removed the legal and social rationale to compel her to change her body. While the decision she won paved the way for other transgender people to not be forced to undergo gender/genital reconstruction surgeries, clearly she wanted the contest to be over so she would be judged a girl and a woman in all possible circumstances. Modern medicine and technology made that possible. In her father's childhood only a handful of people in the world had undergone such surgery, and then it was far riskier and with much less satisfactory results.

Chapter 2

Crossing Gender

“One is not born, but becomes a woman.” —Simone de Beauvoir, 1964

“Turn outward the woman’s, turn inward, so to speak, and fold double the man’s [genital organs], and you will find the same in both in every respect.” —Galen of Pergamum, 130-200 CE

“My own transgendered state is a sacred calling given to me by Spirit, not a neurosis discovered by white medicine.” —Apache Indian Gary Bowen, 1988

“Transsexuals present people with an option that maybe they don’t want to contemplate—that you can change who you are.”

—Jonathan Ames, 2005

Nicole Maines was born a boy but became a girl. What constituted her “becoming?” Though by all accounts she identified as a girl from her earliest memories and her behavior, it was her parent’s enculturation of her as a boy in response to the social norms dictated by her genitals that inscribed her as “boy.” But, allowing Beauvoir’s theory to gain praxis in Nicole’s instance, we can understand that there was a great deal of becoming to do in order for her to convince everyone that, despite what her genitals might suggest, she was a girl. Nicole may seem exceptional for her desire to live in a gender that did not match her assigned sex at birth, but history tells us that she actually followed a long tradition of others like her. People have lived cross-gender lives as long as historical records exist, spanning the entire world and enveloping all cultures. In this chapter we will look at how the binary sex/gender system has been challenged by such people in America from the time of first contact between colonist and indigenes until the “bathroom bill” confrontations of 2016. We will also examine the ways in which society, the law, the church and the state have shaped transgender people’s behaviors and lives in the effort to maintain and police hegemonic sex/gender standards—and why these standards were held to be critically essential.⁴⁸ In respect to this we will explore how twentieth century medical and legal discourses wielded medical technology to coerce transgender bodies to conform to their inhabitant’s gender identities, resulting in what radical feminist scholar Janice Raymond called the “transsexual empire.” Considering her and similar critiques that transsexuals only serve to reinforce stereotypical gender norms and thus further the oppressive nature of the

⁴⁸ Here again I use the term “transgender” broadly, so to encompass a wide range of people from 17th century third-gender Native Americans to 21st century transsexuals.

gender binary, we will look at the movement of transsexual/transgender people to claim their own agency.

“The sight of...men disguised as women surprised the Europeans who first landed in America,” wrote Jesuit priest Joseph Lafitau in 1724 (Lafitau, 1724, 57).⁴⁹ Lafitau, a learned student and teacher of Western history who was embedded with an Iroquois tribe in the area south of Montreal, noted that explorers believed the cross-gender expression they saw among the New World’s indigenous peoples was proof they were hermaphrodites—people in whom the two sexes were mixed. Because of his first-hand observation of Native American society, Father Lafitau knew that for people to live in genders opposite their biological sex was not only a frequent and accepted practice in indigenous culture, but also that such people were often “regarded as extraordinary since they have adopted this state of life because of a religious vocation” (ibid, 58). This he understood to be due to the high status of women in the tribes he observed, where what he termed “gynocracy” was the standard form of government. Women maintained the tribe, Lafitau observed. “In them lies all the real authority: the land, the fields, the harvest belong to them; they are the arbiters of peace and war; they hold the taxes and public council; the children are under their authority; and the order of succession is founded on their blood” (69). In such a society how could one question that a man might choose to live as a woman? That a man who lived as a woman had high spiritual value was because of their ability to walk between the two genders and bridge

⁴⁹ Joseph Francois Lafitau (1681-1746) is considered the first of the modern ethnographers (“He insisted primitive cultures should be judged in the light of conditions under which they operate rather than in terms of European cultures,” noted John Cooper of Catholic University). Embedded as a Jesuit missionary with an Iroquois tribe (Mohawk) south of Montreal from 1712-1717, he carefully observed and recorded all facets of their society. On his return to France he wrote the two-volume, 1,100 page *Customs of the American Indians Compared with the Customs of Primitive Times* which was published in 1724 and translated to English in 1974. He especially noted the egalitarian gender system the tribes practiced and the gynocratic (i.e., matriarchal) form of government which resulted.

differences; as such they were valued as marriage counselors and consulted in times of war and strife.

Whether Spanish, French or English, the European explorers (and colonists who followed them) came from a nearly opposite patriarchal culture. “The ignorance of the Europeans as to the cause of [the Native American transgender people’s] condition aroused shameful suspicions in their minds...that so influenced them that they imagined everything objectionable,” relates Lafitau, to the extent they were often murdered for their effeminate behavior (58). He cites a 1606 book which reported how Vasco Nunez de Balboa (credited for discovering the Pacific Ocean) was “so aroused that he put to death a great number of them by setting loose on them fierce dogs” (ibid, 58).



Plate 2: Balboa, center above with scepter, supervising the slaughter of effeminate Indians.

(Source: Engraving by T. de Bly, 1594, New York Public Library)

Was Balboa's severe policing of gender really about preventing sodomy, or was he more concerned with the threat these female men posed to the European sex/gender system? Western patriarchal ideology, scripted by the Bible, held that sex was to be for procreative purposes only and must be regulated strictly.⁵⁰ Accordingly, sex acts between same-sexed people were made illegal and punishable. The ancient Greek tradition of man-boy love gave way on similar moral and ethical grounds: because one of the couple must necessarily take on the feminine, receptive role, he broke the strict code of manliness prescribed by the gender binary. Patriarchy brooks no such gender-bending, for its hierarchy of power and privilege is built on sex *difference*. As Aristotle made axiomatic in his *Politics*, "the male is by nature superior and the female inferior, the male ruler and the female subject," this because woman was imperfect as compared to man, she being "as it were, a deformity" (Aristotle, 1944, 1254b). Those who defend the bearded philosopher against the multitudinous charges of misogyny tend to do so on the grounds that he was misinformed about the biology of the body (see Witt, 2016; Martin, 1996). Aristotle believed that semen was produced by both men and women; men, that begot, had thick, virulent fluid which gave the fetus its form, while women's weaker, more passive constitution and thinner fluids (which she let flow once a month)

⁵⁰ The Catechism of the Catholic Church holds that "sexual pleasure is morally disordered when sought for itself, isolated from its procreative and unitive [between spouses] purposes" (1997, 2351). Numerous Biblical verses advise that the sex act is meant strictly for procreation. Among those prominently cited are, Genesis 1:28: "God blessed them; and God said to them, 'Be fruitful and multiply, and fill the earth, and subdue it; and rule over the fish of the sea and over the birds of the sky and over every living thing that moves on the earth,'" Corinthians 7:2: "But because of the temptation to sexual immorality, each man should have his own wife and each woman her own husband;" and, Corinthians 6:18: "Flee from sexual immorality. Every other sin a person commits is outside the body, but the sexually immoral person sins against his own body." During his campaign for the Republican candidacy in the 2012 Presidential primary cycle Pennsylvania senator Rick Santorum made national headlines when he expressed his opinion that contraceptives should be banned, for sex- even when restricted within marriage between a male and a female- is meant for procreation.

resulted in her role as recipient and incubator in the procreation process. His reputation was somewhat redeemed five hundred years later by the Greek physician Galen who also argued that woman was simply an inferior copy of man (Laqueur, 1990). Galen sought to prove his thesis by revealing that women's genitals were almost identical to men's: they were only inverted and held hidden within the body. Anatomy drawings upheld this theory through the sixteenth century.⁵¹

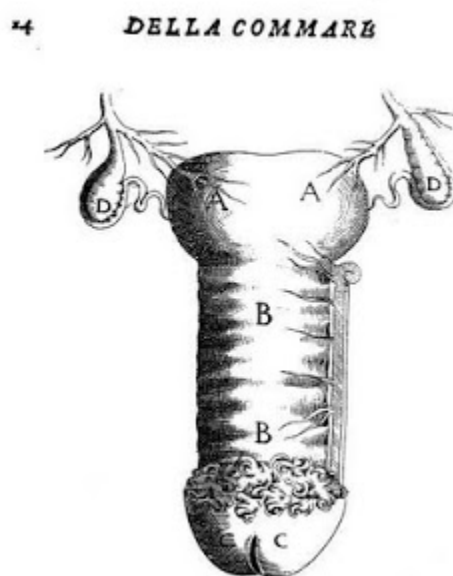


Plate 3: 16th century drawing of a vagina, uterus and ovaries showing their resemblance to a penis and testicles. (Source: New York University Health Sciences Library; www.hslcat.med.nyu.edu/cgi-bin/koha/opac-detail.pl?biblionumber=48014)

The materiality of the sexed body vis-à-vis relationships of power weaves its thread through cultural and political history (Foucault, 1978, 1985, 1986). Here, with Aristotle, we first see it explicated to support the philosophical foundation of Western patriarchal

⁵¹ “Turn outward the woman’s, turn inward, so to speak, and fold double the man’s [genital organs], and you will find the same in both in every respect,” wrote Galen of Pergamum who lived from 130-200 BCE. In 1958, Dr. Georges Burou followed Galen’s advice and was credited as the inventor of the “Penile Inversion Technique” for male-to-female surgical Genital Reassignment Surgery (GRS). This procedure remains today the standard technique for Vaginoplasty. Dr. Burou, a French born Gynecologist, practiced in Casablanca because of laws which prohibited GRS in America and most European countries.

government. Not only did the sexed body absolutely and naturally prove man's superiority to woman, but the nature of his body also proved his superiority to the slave: full citizenship was available only to those born with natural privilege. "The intention of nature therefore is to make the bodies also of freemen and of slaves different—the latter strong for necessary service, the former erect and unserviceable for such occupations, but serviceable for a life of citizenship," explained Aristotle, for "everyone would say that those who were inferior deserved to be these men's slaves" (Aristotle, 1254b.). It is critical to note here that bodily difference has long been used to create and justify inequality.

Sumptuary laws were enacted beginning in ancient Greece so to leave no doubt as to the class—and gender, though gender does designate a class—of a clothed individual. These laws regulated and enforced social hierarchies by prescribing what material goods, including clothing, food and lodging, various classes and genders were entitled to. Clothing was the most commonly regarded such arbiter of social rank, with statutes strictly controlling sartorial splendor reaching their zenith in late Elizabethan England. "None shall wear..." began list upon list of styles, fabrics and items of clothing specifying the class and rank of those allowed and those prohibited, motivated by the desire to put a stop to those "seeking by show of apparel to be esteemed as gentlemen" (Seccara, 2001). Queen Elizabeth effectively outlawed cross-dressing, but along the lines of class rather than gender (legend has it that the virgin monarch often dressed in men's habiliment); that was left to her heir and successor, James I (Garber, 1992). Notably bisexual and foppish, King James was troubled by powerful women—and especially

those who wore men's clothes.⁵² James's two greatest accomplishments were his direction of the re-writing of the Bible, wherein he accomplished much of his fervent earlier work to persecute witches, and his involvement in colonizing North America. The first successful English colony in North America was begun in the lower Chesapeake Bay as a for-profit venture by the Virginia Company in 1607. King James revoked the company's charter in 1624, making the settlement a Royal Colony and naming it after himself. It was there, five years later, that a fascinating trial occurred in the General Court which was charged with enforcing sumptuary laws and the regulation of sexual acts.

As much public controversy as the Great Maine Bathroom Case stirred up over the issue of gender identity, it might pale in comparison to the sensation caused by the trial of Thomasine Hall in Jamestown three hundred seventy five years earlier. Hall was believed to be a woman by her employer and neighbors, for she dressed as one and did a woman's work. However, that identity was a matter of inquiry when she was arraigned and brought before the court on charges of unlawfully having sex with another woman, which was forbidden according to sodomy laws. In the process of deposing her employer, several neighbor women and the defendant, doubt was raised as to the true gender of the defendant. Court records state that she was called on to testify "whether hee were man or woeman" (McIlwaine, 1925, 194). Her answer was "both," and she explained that she was given a woman's name by her mother at her christening and was dressed and raised as a girl through her childhood and youth. However, when an opportunity to serve as a well-paid soldier occurred, she cut off her hair, dressed as a man and enlisted. When that vocation ended, she transformed back to a woman and set

⁵² James I's mother, Mary Queen of Scots, was imprisoned and later executed by Queen Elizabeth.

sail for Virginia, where women were in high demand.⁵³ When further questioned as to the nature of hir genital anatomy as the deciding attribute of gender, Thomas/ine replied that s/he “had not the use of the man’s parte,” for it was “a piece of fleshe as bigg as the top of [my] little finger [an] inche longe.” That was enough for the court; as male impotence was grounds for the annulment of marriage, Thomas/ine was proclaimed not a man and therefore placed into the default category of woman. However, the women testifying in the trial were not satisfied and insisted on further physical examination, which the judge granted. They found that Thomas/ine, while not a well- equipped man, did not possess female genitalia, and was therefore not really a woman. They persuaded the General Court that Thomas/ine was an imposter and that she must be punished for her transgressions against the rigid gendered social order. The Court reversed course and satisfied these demands with a judgment of guilt, sentencing Thomas/ine to wear the clothes of a man, but also the cap and apron of a woman over them to signify that she “was a man and a woman” (McIlwaine, 1924, 195). Being judged neither, she was not entitled to the full privileges afforded either gender.

While many scholars have commented on the Thomas/ine Hall case, none have made note of the critically obvious: that in sentencing Hall to dress in such a way that s/he was clearly not man or woman, but both, s/he was declared to be outside the legal and social norm—she was effectively cast out (see Brown, 1996). This, of course, is just the opposite of the Great Maine Bathroom Case: here, the plaintiff sued for inclusion, after striving—with parents’ and counselor’s help for years—to meet all the criteria, including dress (the appeal brief filed had several photographs of the plaintiff dressed

⁵³ With a gender ratio of four adult men to one woman in Jamestown at the time of her trial, Thomasine was suspect for not having sexual activity with men.

and coiffed in very feminine appearance), to pass as the gender with which she identified. Hall's great offense was that s/he made a mockery of the sumptuary laws and the sex/gender system under their aegis by crossing back and forth whenever it benefitted hir—exactly what those laws were meant to prevent. In Hall's case, the defendant conflated gender with economic benefit as a backwards-leaning device: because gender rules granted and prohibited certain privileges, Hall exploited them as it suited hir.

Another issue to remark upon in the Hall case is that genital examination was only resorted to as a last resort when observation, history and questioning failed to make a clear determination. While “the apparel oft makes the man,” Hall revealed through hir discovery that other cues are also relied upon to attribute gender.⁵⁴ Hall's genitals were judged insufficient to classify her fully a man, yet too manly in their protruding evidence to mark hir a woman. From the testimony given, we can reasonably assume that Hall was born with some degree of ambiguous genitalia and was an intersex person. Had s/he come into the world in the twentieth century, no doubt the physicians attending hir birth would have surgically removed any doubt that s/he was a girl.

For gender to be marked by occupation and appropriately regulated was not restricted to the European colonists of North America, as the country's indigenous peoples had similarly portrayed/categorized gender through occupational practices. As scholars have commented, occupation was a far greater attributor of gender among Native Americans than clothing, mannerisms and sexual practices (Lang, 1997; Roscoe, 1998; Whitehead, 1981). Lafitau's impartial ethnographic observations of gender roles

⁵⁴ This phrase, now idiomatically “clothes make the man,” was spoken by Polonius in William Shakespeare's *Hamlet*, first published and performed about 1604.

among the Haudenosaunee (Iroquois) at the dawn of the 18th century were not repeated by Euro-Americans for over one hundred years⁵⁵. Few of them, however, remarked as did he on the relatively egalitarian balance of power between the genders. Lafitau noted that men's greater physical size and strength gave them the role of warrior, while women were the producers and keepers of material goods and children. Men's power lay in the temporality of physical aggression and contest with prey animal and tribal foe; women's lay in the wealth of progeny and belongings. For a person born biologically male to choose the occupation of women was not seen by Native Americans as detrimental—in fact, it was perhaps a better, safer path in life. No doubt some men who crossed genders to live as women were chided by other warriors for not being “man” enough; anthropologists have found few cultures that lack masculine aggression criteria.

Lafitau remarked that gender-crossing was widespread among many tribes, not only the Iroquois he was embedded with, but also “among the Sioux, in Louisiana, in Florida and in the Yucatan there are young men who assume women's costumes, wearing them all their lives, and take it as a mark of honor to lower themselves to women's occupations” (57). Historian Will Roscoe found that over 155 North American tribes have documented evidence of male-to-female gender crossers, or “Berdaches” as anthropologists have termed them.⁵⁶ Roscoe prefers to call such people “third gender” (he terms female-to-male Native American gender-crossers “fourth gender”), and notes

⁵⁵ Sadly, by that time the pressures on Native Americans to conform to Christian/patriarchal behavior norms and to abandon their own traditions had taken effect.

⁵⁶ “Berdache” was first used to describe Native North American gender-crossers by French explorer Deliette in 1704. It is the French derivation of a Persian word that meant a male sex slave. Its use to refer to Native Americans emphasized the “unnatural” sexual proclivity of some gender-crossers. The term was first used in an anthropological text in 1877 to describe a Native American person, usually a male, who assumed the gender identity and was granted the social status of the opposite sex. It remained in popular usage by anthropologists until Native American people, disenchanted by its derogatory meaning, requested in 1990 that it be replaced by “Two-Spirit.”

that every tribe that incorporated third and fourth gender people had names for them.⁵⁷ The two most often cited reasons for people to cross genders (to become third or fourth genders) were the demonstration during childhood for preference for work roles of the other gender or dreams and visions, the latter incorporating a spiritual aspect (Lang, 1981; Roscoe, 1998; Dollarhide, 2016). Lafitau noted that “[gender-crossers] are present at all the exercises in which religion seems to play a part [for] their profession of an extraordinary kind of life makes them pass for people of a superior order above the common run of mankind”(ibid). Both explanations contradict popular notions that the Native North American institutions of gender- crossers (berdaches/third gender people/Two-Spirits) were motivated by an attempt to integrate sinful or deviant sexual behavior. For Euro-Americans with the burden of their cultural history, that explanation rose directly out of the Molly culture of 17th and 18th century England, where men cross-dressed and exhibited feminine behavior to arouse and gain the sexual attention of other men.⁵⁸ As is the case with transgender people today, Native North American gender-crossers’ lived gender did not inform what body types they interacted with sexually. Because Native Americans understood that sexual acts served two purposes—reproduction and pleasure—and connected no shame or guilt with either pursuit, then for gender-crossers living the occupational role of women to have sex with men, and

⁵⁷ Male-to-female berdaches were known among 150 tribes. In the Great Plains area alone, they were known among the Arapahos (hoxuxunó), Arikaras, Assiniboines (winktan'), Blackfoot (ake:škassi), Cheyennes (he'eman), Comanches, Plains Crees (ayekkwe), Crows (boté), Gros Ventres, Hidatsas (miáti), Kansas (minquge), Kiowas, Mandans (mihdeke), Plains Ojibwas (agokwa), Omahas (minquga), Osages (mixu'ga), Otoes (mixo'ge), Pawnees, Poncas (minquga), Potawatomis (m'nuktokwae), Quapaws, Winnebagos (shiéngge), and the various Siouan-speaking tribes (winkte, Lakota; winkta, Dakota).

⁵⁸ “Molly houses” were a central part of the homosexual subculture in London in the 17th and 18th centuries. They were places- often taverns and public houses- where homosexual men could meet, socialize and partner for sex. As described by Jonathan Wild, “They could take on a female persona, have a female name, and affect feminine mannerisms and speech... calling one another my Dear, and hugging, kissing, and tickling each other, as if they were a Mixture of wanton Males and Females, and assuming effeminate Voices and Airs.” Sodomy was illegal at the time, punishable by death; three men were hanged in 1726 after being caught in the act at Mother Clap’s, London’s most famous Molly-house.

even to be the wife of a man, was not uncommon—it was part of women’s role.⁵⁹

However, many, including the famous Crow women/warrior Osh-Tisch (“Finds-them-and-kills-them”) also chose women for sexual partners and wives.⁶⁰

Osh-Tisch’s explanation of how sh/e came to be a *boté* (the Crow term for a third gender, male-to-female gender crosser) is remarkably similar to Nicole Maines story. When asked in 1919 by interviewer Hugh Scott why s/he wore women’s clothes, Osh-Tisch, then 65, replied, “That is my road,” that ever since birth s/he “inclined to be a woman, never a man” (Roscoe, 1998, 27).⁶¹ Scott pressed on with his questioning: was it because of a vision or a dream? “No! Didn’t I tell you—that is my road. I have done it ever since I can remember because I wanted to do it. My father and mother did not like it. They used to whip me, take away my girl’s clothes and put boy’s clothes on me but I threw them away—and got girl’s clothes and dolls to play with” (ibid). Though one hundred thirty years separated Osh-Tisch and Nicole, both sets of parents felt societal pressure to compel their children to conform to the gender roles predicated by their genitalia.

⁵⁹ Nor was it uncommon for fourth-gender Native North Americans to have wives and to have sex with other women.

⁶⁰ Much of what is known about the Crow *boté* Finds-them-and-kills-them, also known as Osh-Tisch, Woman Jim and Squaw Jim, comes from the writings of Hugh Scott of the 7th Cavalry. A talented hide-tanner and seamstress (s/he made Crow Chief Iron Bull’s majestic teepee), Finds-them-and-kills-them fought valiantly on the side of the U.S. Cavalry at the Battle of the Rosebud in 1876 (the Sioux and Crow tribes had long disputed hunting territory and were enemies). There the combined forces of the Crows and the United States Army fought the Sioux and Cheyenne warriors to a draw—a week before the latter routed General Custer at the Battle of Little Big Horn. Scott and other historians noted that two women fought with the Crows that day; the other was a fourth-gender warrior-woman name The Other Magpie, who scalped a Sioux warrior that Finds-them-and-kills-them had slain.

⁶¹ At the time of this interview U.S. Army Officer Hugh Scott was in the capacity as an inspector for the Bureau of Indian Affairs. Scott began his work with the Native Americans of the western United States as a soldier in 1877, the year following Custer’s defeat. Though not trained as an anthropologist, his writings—published and unpublished—demonstrate high research qualities and provide some of the most valuable information on the tribes he studied during the period 1877-1928.



Plate 4: Osh-Tisch (L) and his wife, 1877 (Source: Photo Lot R92-39, Copies of John H. Fouch photographs of Plains and Plateau Indians, National Anthropological Archives, Smithsonian Institution.)

Scholar Ken Dollahide studies the role of transgender people in the culture of the Lakota Tribe. Born and raised a Lakota on Pine Ridge Indian Reservation in the 1940s, Dollahide remembers his grandmother telling stories of retrieving the corpses and belongings of her family from the site of the massacre at Wounded Knee in 1890. It was her Sioux tribe that had defeated Custer at Little Big Horn 1876 and was later slaughtered in retaliation. When Ken was a toddler and first saw a winkte, he asked,

“Grandma, why is that boy wearing a dress?”⁶² Telling him to hush, she replied, “That is not a boy—that is a winkte, a blessed person.” Thus began Dollarhide’s lifelong fascination with gender-crossing people. I have heard him, in both conference presentations and personal interviews, tell the story of the Lakota ritual of becoming one’s gender. Around the age of ten, children who had expressed behavior that was counter to their birth sex were subject to a ritual test that was meant to determine in which gender they would function in society. They would be placed in the center of a circle of dry brush, a bow and arrow on one hand and basket-making supplies on the other. The brush was then set afire, and when the flames were leaping high the child was told to grab one or the other set of items and run out of the circle of fire; the items in the child’s grasp when they emerged determined the nature of their gender. Dollarhide noted that not only might this “test” be repeated more than once were any doubtful signs observed, but also that its determination was not permanent: the individual could change genders (back) again should they desire. If the child chose to be a winkte, on reaching adulthood she would go through a “putting on the skirt” ritual, where she would be formally introduced to her tribe as a woman. As a woman, she fulfilled all occupational roles designated for women in her tribe, including raising orphaned children (Dollarhide, 2016). The point here is that in this tradition—which Dollarhide reports was common to many Plains and Southwest Native American tribes—the individual self-defines their gender by choosing its related occupation. Lame Deer, a Lakota Holy Man, said, “To us a person is what nature, or their dreams, make them. We accept them for what they want to be. That is up to them” (Lame Deer, 1972, 153).

⁶² Winkte, the Lakota word for a third-gender person (one born male but living as a woman), is literally translated from the Lakota language as “on the point of becoming a woman,” or “will be a woman.”

While not common to the etiology of present day gender-crossers, dreams and visions were part of the story of becoming for many Native North American third and fourth gender people; this was due to their naturally and geographically oriented cosmology.⁶³ Depending on the tribal custom, various deities were credited for bestowing the gift of gender-crosser (Double Woman and the Moon figured prominently among the Lakota) on the person seeking a vision or dream; the calling usually came in the form of special skills associated with the feminine identity, such as weaving, hide tanning or basket weaving (Roscoe, 2011).

Lafitau and most other early European and Euro-American observers regarded gender crossers through the biased lens of Judeo/Christian morality, universally reacting with varying degrees of wonder, horror and disgust.⁶⁴ "I saw a most beastly and brutish custom," wrote Cabeza de Vaca while among the Karankawa Indians of what is now Texas in 1540, "a man who was married to another, and these be certain effeminate and impotent men who goe clothed and attired like women, and perform the office of a

⁶³ In *God is Red*, Native American scholar Vine Deloria, Jr. compares and contrasts the space/nature oriented religions of Native North Americans with the time/history oriented religions of Judaism and Christianity. The former, in its understanding of the interdependence of all nature (which includes man, not setting him apart and in control of it, as does the latter), believes that each form of life has its own purpose and its own unique quality to its existence.

⁶⁴ Prohibitions against cross-dressing and same-gender sexual acts abound in texts of the Abrahamic religions; here we are concerned with those found in the Torah (Hebrew Bible) and the Christian Bible as they have influenced moral beliefs of Europeans and Euro-Americans since the time of first contact until the present. Leviticus 18:22 states that, "You shall not lie with a male as with a woman; it is an abomination." and 20:13 also addresses the issue of sex between two men, with the latter verse saying, "And if a man also lies with mankind, as with womankind, both of them have committed abomination; they shall surely be put to death; their blood shall be upon them." The Judaic Deuteronomy 22:5 states that, "A man's item shall not be on a woman, and a man shall not wear a woman's garment; whoever does such a thing is an abhorrence unto Adonai," while the Christian version reads, "A woman shall not wear a man's garment, nor shall a man put on a woman's cloak, for whoever does these things is an abomination to the Lord your God." The story of the consumption of the cities of Sodom and Gomorrah by fire and brimstone are common to both holy books; Jude 1:7 records that they were "giving themselves over to fornication, and going after strange flesh, are set forth for an example, suffering the vengeance of eternal fire." The English term "sodomy" to describe the unlawful act of anal intercourse between two men is derived from this story.

woman” (Roscoe, 1998, 4). Three hundred years later when fur trader/ethnographer Edwin T. Denig, Jr. observed similar behavior when among the Crow Indians in Montana, he commented, “Strange country, this, where males assume the dress and perform the duties of females, while women turn men and mate with their own sex!” (Denig, 1961, 187). As noted earlier in the case of Balboa, some who were disturbed by what they regarded as the Biblical sins of sodomy and cross-dressing reacted with violence towards the indigenous gender-crossers.

As the United States of America continued its westward expansion in the mid-nineteenth century, its settlers found the country they claimed through Manifest Destiny already populated by hundreds of different tribes of indigenous people. Most were unwilling to vacate the lands they had occupied for generations, some for thousands of years. What to do with them came to be known as the “Indian Problem”—and demanded a solution. Programs of removal to reservations, assimilation and elimination were enacted by the Bureau of Indian Affairs of the U.S. Government and by the U.S. military, which, after removing the indigenous population to plots of land called reservations, either forced cultural colonization on them or eliminated them. The Federal Government customarily assigned each reservation to a Christian church to oversee the religious conversion and Westernization of its inhabitants. Dollarhide recalls that Pine Ridge Reservation was run by the Catholic Church, whose schools—like those on other reservations—sought to eliminate all traces of the traditional Lakota culture and to instill Anglo-American morals and values in their place. The Church especially sought to erase the tradition of the *winkte* as they considered them an abomination to God, even forbidding the burial of the gender-crossers in the reservation graveyard. “I heard sad

stories of winktes committing suicide, hanging themselves rather than change,” remembered one Lakota of a purge that occurred in the 1930s (Lang, 2011, 118).

Largely because of the influence of Judeo-Christian moral teaching on Euro-American culture, the disapprobation of gender crossing continues today to result in a high rate of suicide among transgender people. The first large scale survey of the U.S. transgender population was completed in 2011.⁶⁵ One of its most alarming findings was that 41% of respondents had attempted suicide—twenty-five times the rate of non-transgender people.⁶⁶ According to the survey, respondents reported loss in nearly every major life area, from employment to housing to family life, revealing the clear connection between the consequences of bias in the lives of transgender and gender non-conforming people and suicide attempts (NTDS, 2011, 82). Not all transgender children receive the support that Nicole Maines did from her parents and school staff. Osh-Tisch’s story of the disapproval and punishment s/he underwent in childhood is much more common. The 2014 suicide of seventeen year-old Leelah Alcorn of Ohio was a result of her parent’s refusal to accept her transgender status. Rather than handle her as Nicole’s parents did, Leelah was taken out of school and forced to undergo Christian-based reparative therapy counseling in an attempt to “cure” her.⁶⁷ One of the most popular arguments used to justify bias and discrimination against transgender people

⁶⁵ The *National Transgender Discrimination Survey (NTDS)* was conducted by the Gay and Lesbian Task Force and the National Center for Transgender Equality between 2009 and 2011. 6,450 transgender-identifying people from all 50 states and the territories took part in the survey, replying to 70 questions on a broad range of issues. A second iteration of the survey was conducted in late 2015 and the results are to be published mid-2016.

⁶⁶ The *NTDS* reports, “A staggering 41% of respondents reported attempting suicide compared to 1.6% of the general population, with rates rising for those who lost a job due to bias(55%), were harassed/bullied in school (51%), had low household income, or were the victim of physical assault (61%) or sexual assault (64%)” (2011).

⁶⁷ Reparative (or conversion) psychotherapy for transgender people attempts to change a person’s gender identity so that it matches their assigned sex at birth on the basis that being transgender is a mental disorder.

has been that they are mentally ill. There was truth to that, given that until two years ago the *Diagnostic and Statistical Manual* listed “Gender Identity Disorder” as a diagnosable mental disorder. Therefore, people who identified as—or were identified by others as—transgender could be *and were* fired from jobs (including being discharged from the U.S. military), denied housing, thrown out of school, refused admission to shelters and a litany of other discriminatory actions.

“Gender Identity Disorder” was a product of the medico-juridical discourse of the mid-twentieth century. As Foucault argues in his development of the concept of biopower, beginning with the rise of the modern nation-state in the 18th century, regulation of the individual subject was accomplished through “an explosion of numerous and diverse techniques for achieving the subjugations of bodies and the control of populations” (1978, 140). Relying heavily on Foucault, psychologist Arlene Lev argues “The history of diagnosis in western cultures reveals bias and prejudicial assumptions that belie these expectations, and exposes an underlying psychomedical gaze that has intentionally sought out human deviance with the intention of establishing institutionalized social control” (2005, 37). *The Diagnostic and Statistical Manual* does not merely reflect the categorical norms of masculinity and femininity in American society, but promotes them and reifies their prescriptive roles. Given the decision reached by the American Psychological Association that gender identity was innate and fixed and therefore could not be reassigned through psychoanalysis or other means, and given that if one’s gender identity was at odds with one’s physically sexed body, then one was diagnosed with GID, it follows that the treatment prescribed as a cure for the disorder was gender reassignment surgery (at first referred to as “sex reassignment surgery”). This is clearly a Foucauldian exercise: the body must be made to fit regulatory scripts.

Bernice Hausman argues that “transsexuals entered the *DSM* [in 1980] as a ‘legitimate’ object of medical scrutiny” because they “must seek and obtain medical treatment in order to be recognized *as transsexuals*” (her italics; 1995, 3). The crux of her claim is that transsexuals are complicit in their being classified as mentally ill, because only with that diagnosis can they obtain the hormones and surgeries they desire to complete their transition. Hausman supports this logical claim by reviewing several autobiographies by transsexuals that evidence the reflexive/reciprocal relationship that existed between them and the doctors who were the gatekeepers to and providers of the treatments they sought. Having read all the books she mentions and a few more, and having been privy to many sessions at transgender conferences and gatherings, I can attest to the verity of her claim. However, it is critical to note that this situation developed because federal and state law prohibited any genital surgery or hormonal treatment of people unless they were injured or diseased; without a valid medical diagnosis to obtain these services they were legally unavailable in the United States (Bolin, 1988, 1996; Hausman, 1995; Prosser, 1998; Meyerowitz, 2002).⁶⁸ As Lev notes, “the gatekeeping system requires that people who desire medical treatments have the same standardized autobiography since crossgendered people cannot simply request services, but must be fit a proscribed narrative to be eligible for services” (Lev, 54). With that understanding one can readily accept the logic underlying the authority and directedness exercised by transgender people who sought (and continue today to seek) medical and surgical intervention. By and through their ability to convince physicians of their legitimate need for the services they desired, they created the symptoms for the

⁶⁸ Prior to 1980, U.S. citizens travelled to such places as Denmark, Germany, Morocco and Mexico to avail themselves of such procedures and treatments.

needed diagnosis and sought remedy. Transsexuals were a product of 20th century American culture which, completely unlike Native American culture pre-contact and pre-conversion/assimilation, allows no change to or transformation of the two sex/gender categories. A person may change as needed to fit the category man or woman, but it is incumbent for the transsexual to alter behaviorally and materially to fit the category he or she feels they belong in—unlike the Native American gender-crosser, who moved into a third category with no such requirements.

Exactly when and for what reasons did the practice of changing one's body to match one's gender identity occur? Hausman offers a hint when she states that transgender people did not want to be identified as "sexually deviant," that they insisted their condition was unlike and unrelated to that of homosexuals. "Gender is between your ears, while sex is between your legs," has long been a popular euphemism among transgender support groups as an explanation of why the "T" is different than the "LGB." To this end Hausman accuses transsexuals and the medical people who provide them with services of being homophobic, so deep is their desire for an identity that cannot be conflated with sexual/erotic desire.⁶⁹ Her principal thesis is that the late 20th century medical/technological innovations that made such bodily changes possible were coopted by the group called "transsexuals" who actively participated in their reconstitution so that not only could gender be socially constructed, but now sex could also be constructed. A portion of her theorizing was previously explicated in Janice Raymond's controversial 1979 book, *The Transsexual Empire: The Making of the*

⁶⁹ Hausman uses "transsexual" selectively, to differentiate that group from transvestites, whom she considers to be motivated to cross-dress for sexual fetishistic purposes. The term "transgender" was not in wide usage when her book was published in 1995.

Shemale (which inadvertently helped trigger the field of Transgender Studies).⁷⁰

Raymond, a radical feminist and a biological essentialist, argued transsexuals are medically and surgically contrived artifices constructed by the patriarchal medical establishment in order to perpetuate traditional sexist gender role oppression.⁷¹ She claimed transsexuals were the unwitting victims of medical men and that they were simply a technological phenomenon created to prop up stereotypical gender roles. While Raymond's thesis and angry rhetoric served some of the relatively narrow goals of radical lesbian feminists through rejecting everything related to the male sex, she accomplished little towards accomplishing the broader feminist goal of ending gender-based hierarchical oppression. In reducing transsexuals to objects and denying their subjectivity, Raymond practiced the very form of oppression she railed against. Perhaps what drove her was fear of the greater implication represented by the transsexual: that the construction of sex itself removed the dichotomy between essentialism and constructionism that substantiated her positionality.⁷²

⁷⁰ Raymond's book took aim at a transgender lesbian feminist named Sandy Stone. After losing her job as a sound engineer at a lesbian recording studio due to Raymond's actions, Stone turned to academia to gain the tools she needed to respond on even turf. Armed with the knowledge and skills provided by her PhD, Stone wrote an essay, "The Empire Strikes Back: a (Post) Transsexual Manifesto," which not only debunked Raymond but also became the foundational essay for the emerging field of transgender studies. Stone argued that transsexuals had been objectified by the medical discourse- which she called a genre- and further ostracized by Raymond to the point that they did not have a voice that was uniquely their own, and thus were forced to "occupy a position which is nowhere, which is outside the binary oppositions of gendered discourse" (Stone, 1991,295). Stone called for transgender people to become the agents of their own subjectivity and, in talking and theorizing about themselves, to actively create their own genre wherein they craft their own identities. She urged transgender people to come out and to no longer obscure themselves as the stealth model that had been prescribed by the medical discourse. Stone called for transgender people to assume their own agency by telling their stories which would construct a discursive political transgender identity.

⁷¹ Raymond focused almost entirely on transgender/transsexual women in *The Transsexual Empire*. She considered transmen "the tokens that save face for the transsexual empire" and dismisses them as women who caved in to the patriarchal subordination of women by joining the dominant group.

⁷² For the essentialist, reality is conferred by the timeless condition of the physical body; for the constructionist, reality is situated in social roles that are "constructed" by actors in everyday life. Hence, in the sex/gender dualism their oppositional role to one another is eroded by the capability of changing a body's physical sex.

The transsexual was created out of the confluence of necessity and technology in the post-World War II boom that offered everyone in America a chance to attain their dream. The sex/gender system had been destabilized with the war effort shifting gendered labor roles by bringing women into the work force and into traditionally male occupations. With the war's end and military uniforms removed, men moved to reclaim their former position in work and in society. The state mustered cultural forces in an endeavor to reinstall and revalidate traditional gender roles and expectations. Soon, though, the newly created split between gender and sex posed a vexing problem: how was a person whose gender identity differed from their biologically sexed body—and who therefore threatened the stability of both categories—to be identified within a social system based on sexual dimorphism? This was a legal question of national, even international, magnitude that demanded resolution. One answer was found in the practice developed to answer the problem of intersex people: use medical technology to match the body to the gender of choice. With transsexuals, unlike infants born with ambiguous genitalia, the subject was able to choose; their reward was a stable identity. Their motivation was just what Raymond accused them of: they wanted to fit neatly into the hegemonic norms of the sex/gender system. Considering this was also the era of McCarthyism and the Lavender Scare, the desire for transsexuals to distance themselves from the taint of sexual deviancy was also quite understandable.⁷³ Seen in this light,

⁷³ The “Lavender Scare” (from the term “lavender lads” used in 1950 to describe homosexual men) was part of and paralleled the Red Scare begun by Senator Joseph McCarthy in 1950 when he claimed that the US State Department and other government agencies had been infiltrated by communist agents. McCarthy charged that the government had also been infiltrated by homosexuals who posed a threat as grave to national security as Communists; his premise was that homosexuals could be blackmailed into revealing state secrets. He began a campaign to identify and remove all government employees suspected of homosexuality.

Hausman's accusation of their complicity in homophobia is a reach; transsexual people simply wanted to avoid marginalization and discrimination.

The story of Christine Jorgensen, arguably the most famous of all transsexual people in twentieth century America, is typical and exemplary of others like her in an era which began with her triumphant coming out in 1953 and lasted well into the 1990s. Troubled by "homosexual tendencies" as a young adult, Jorgensen claimed that her desire to live as a girl had come well before any attraction to men; this substantiated her argument that she was like any other heterosexual woman—just that nature had played a cruel trick on her by assigning her male at birth. Jorgensen wanted to "relate to men as a woman, not as another man" (Meyerowitz, 2002, 57). The new science of hormone treatment and recent advances in surgical technology were available for her to change that fate by changing her sex, something heretofore infrequently attempted.⁷⁴ Because neither program was legally available in America at the time, she travelled to Denmark to obtain both. That she did not have a vagina constructed as part of her surgeries was also telling of the period: the medical emphasis, and her stated desire, was not on sexual intercourse but on social life as a woman. With the shadow of erotic desire removed, Jorgensen's story fit neatly into other popular dream-come-true narratives of the time. The *American Weekly* wrote of its serialization of her "The Story of My Life", "as the courageous fight of a desperately unhappy person with the fortitude to overcome a seemingly hopeless obstacle" (65). As she told her parents on her return to America, "Nature made the mistake which I have had corrected and now I am your daughter" (ibid).

⁷⁴ "Sex change" surgeries had been attempted with varying degrees of success in Europe several times in the 1920s and 1930s, most notably that of Einar Wegener, known as Lili Elbe after her gender change (her story was the subject of the 2016 motion picture *The Danish Girl*).



Photo by Tom Gallagher

Plate 5: Christine Jorgensen: February, 1953. (Source: New York Daily News)

Similar origin stories were an integral part of most transsexual's journeys because they were necessary to obtain approval for and access to desired hormones and surgery. The litany of being “female trapped in a man’s body” (or “male trapped in a woman’s body”) was meant to convince providers of the authenticity of the patient—and after the 1980 version of the *DSM*, that they were diagnosable as having gender identity disorder—and that they were *not* homosexuals or transvestites. Their goal and observed pattern was, after obtaining medical and surgical intervention, to move on away from transsexual status and become verified members of the sex their gender identity aligned with. Being a transsexual, then, was only seen as a temporary position and an identity that was to be shed so that one could become a complete women (or man).

These circumstances and practices caused a great rift between transsexuals and cross-dressers beginning in the 1970s and lasting through the first decade of the 21st century. An hierarchy was prescribed according to the authenticity of the individual: transsexuals, who were risking everything and doing all that was possible to irreversibly change themselves into the sex with which they identified, considered themselves superior to cross-dressers, who only played at impersonating women for brief periods, retreating back to the safety of their assigned sex after those escapades. Sadly, there was truth to the argument. Those who chose to live and present themselves full time in the gender opposite their assigned sex at birth—and especially those who underwent GRS and went stealth—usually did have an accompanying story of loss.⁷⁵ The stories written and told by those who identified as transsexual (and many who identify now as transgender, due to the shift in terminology over time) share common items lost due to gender transition, including loss of home, wife (or partner/husband), children, job, friends and most family members including mother, father and siblings.

Jonathan Ames reads the same transsexual autobiographies that Hausman did quite differently than she, finding in the stories of loss something heroic. Rather than argue as she did that they were simply a manipulative device used by their authors to gain access to body-changing medical intervention, instead he says, “I found the memoirs of transsexuals to be parallel in structure to that classic literary model—the *bildungsroman*, the coming of age novel” (Ames, 2005, xii). Ames outlines the genre’s pattern thus: first, the boy or girl shows they are uncomfortable in their gender role, senses a mistake was made and that they should be the other sex; second, their parents

⁷⁵ Stealth refers to the policy many transsexuals followed—often at the direction of their medical care providers—wherein they erased all evidence of their previously gendered lives, moved to a different geographical place and began a new life as a new person. It was, in effect, a new life, and for many if not all who went stealth family, wives, jobs and homes were sacrificed.

and society pressure them to conform, so they repress their urge, eventually leaving home and living as their other sexed self and moving away from having to masquerade; third and last, in the aftermath of their sex change or transition, they arrive at a place of self-acceptance, feeling they have done all they can: their journey is complete. Ames makes the point that this coming-of-age journey is akin to a quest, where the transgender person is subject to a rite of passage where they must undergo persecution and torment from the outside world to attain their goal. He suggests this is because that world is afraid of them because gender-crossers are exceptional people who “present people with an option that maybe they don’t want to contemplate—that you can change who you are” (xiii). Is this, then, the source of the fear that drives transphobia and those who wish to deny transgender existence? Is it that this group of people is truly exceptional and chooses to bravely go where most men (and women) do not, because our Judeo/Christian society forbids it? Perhaps this is the source of Raymond’s angst (and anger), given her extensive Christian schooling and religion-based essentialist view.⁷⁶ The Catholic Church’s position on the transgender phenomenon makes this a logical assumption. Recently Francis, Pope of the Catholic Church, warned against the trend of transgenderism—which he calls “gender theory” —saying, “Let us be on guard against colonization...and the manipulation of life...by gender theory, that does not recognize the order of creation...and which is out to destroy the family” (McElwee, 2015). The Pope reasoned that in embracing the ideology of gender constructionism, a person is necessarily defying God and ignoring His natural design. While both science

⁷⁶ Janice Raymond received her B.A. from Salve Regina University, a private, Catholic school run by the Sisters of Mercy, then her Master’s in Religious Studies from Andover-Newton Theological School, a graduate school and seminary. She then joined the Sisters of Mercy for a short duration, leaving because her emergence as an open lesbian was at odds with Catholicism. In 1977 she earned her Ph.D. in Ethics and Society from Boston College, a private Jesuit research university.

and religion endorse similar essentialist viewpoints, science diverges radically because it was responsible for the creation of the transsexual—which represents the reification of the mutable materiality of gender. Religion apparently is left alone in its denial of recognizing gender identity as a legitimate marker of one’s existence.

The transsexual era gave way to the current transgender era beginning in 1991 with the publication of Sandy Stone’s essay “The Empire Strikes Back: A Posttranssexual Manifesto.” Stone called for an end to the stealth mentality, for transsexuals to become visible and to be read—in short, to forego passing.⁷⁷ Alluding to their genre of autobiographies, Stone demanded that they begin to write about themselves as subjects rather than as the passive objects they cast themselves as in order to become incorporated into the medical discourse so vital to them (2002, 232)⁷⁸. She sensed that transsexuals—and she hinted here, transgender people—must claim their own agency, become visible, and “begin laying the groundwork for the next transformation” (ibid). Christine Jorgensen foreshadowed the shift before she died in 1989 when she said she preferred the term “transgender” to “transsexual” because “Gender is different than sexual preference. It doesn’t have to do with bed partners, it has to do with identity” (Meyerowitz, 2002, 281). I will add that it doesn’t have to do with constructing penises and vaginas where vaginas and penisses previously resided: this was perhaps the largest

⁷⁷ In transgender parlance to be “read” is to not convincingly portray one’s gender to someone tasked with attributing it—in other words, to not pass as the gender one desires to have attributed to one’s self. Stone cleverly puns “to read/to be read” here: she calls on transsexuals to willingly make themselves readable as gender-crossers in their writings and in their daily lives.

⁷⁸ Hausman, Raymond and Garber influentially argued that transsexual autobiographies were reducible to manipulative textual pleas by their authors for gender-change surgery and medical treatment. As such, these autobiographies helped create the medical discourse of and about the transsexual: their authors shaped the field of knowledge of which they were the object. The three aforementioned feminist scholars all endeavor to expose this genre as a ruse on the part of the authors. They variously argue that the transsexual authors are knowing (or unknowing) pawns of the patriarchal system who are intent on infiltrating the category “woman” and furthering the perpetuation of women’s subjugation through reinforcing oppressive gender roles.

push of the pendulum. Once gender-crossers publically outed themselves as called for by Stone, what was the point in their undergoing expensive, painful and dangerous surgeries? The simple answer is that they legally and socially were forced to in order to survive: without identification documents that showed their chosen name, gender and image they could not access jobs, housing, healthcare, accommodations, education and transportation.⁷⁹ But, let me raise the question again: what did genitals, which are hidden away from public sight, really have to do with how gender operates in everyday social life—and why should people be forced to reconstruct them to match their lived gender?

This question—troubled by Stone’s manifesto—triggered a revolution. For decades transgender people had followed the script and changed themselves and their bodies in order to conform to the dualistic sex/gender system. Like good sheep they had obeyed the liberal directive for the individual to adapt to the system. Now they began to refuse to do so and instead, by demanding their civil right to exist as they were, they called for the categories themselves to change. In claiming their own agency and subjecthood transgender people began to rise up and challenge the social system that had been oppressing them for so long. The omnipresent tempering factor for the transgender rights movement was, simply, survival. While their ultimate goal might well be a third-or-fourth gender category, the more immediate objective was to open the requirements for admission to the two existing categories. To begin to move from the margin to the center, three objectives needed to be attained. First was to gain the legal ability to change from one gender to the other; second was to relax or remove the

⁷⁹ In 1991, birth certificates, passports, social security cards and state and government issued photo identification cards all required proof of sexual reassignment surgery (SRS) in order for gender/sex to be changed, though some states refused to amend them no matter what; names (still) cannot be changed except by court order, and most judges required the same proof of SRS.

surgical/medical requirements to do so; and third was to gain legislation that would prohibit discrimination on the basis of gender presentation or identity. While progress towards accomplishing these goals has been made, today, twenty-five years after the transgender rights movement was sparked, none have been fully accomplished. The reasons are multiple, intertwined and both cultural and political.

In the introduction to the 1994 edition of *The Transsexual Empire*, Raymond faults the transgender movement for failing to work towards a “real sexual politics...that transforms, instead of conforms to, gender” (xxxv). Radical feminist Robert Jensen echoes her, blaming the “liberal ideology” of the transgender movement for focusing too narrowly on individual responses to structures of power and authority.⁸⁰ He claims this is because the movement’s approaches are centered on short term relief approaches rather than doing “the difficult political work that is required to change deeply entrenched systems of power, such as patriarchy” (2012). They both share a very valid point, and through invoking the tenets of liberal ideology, Jensen touches on why the transgender movement remains on the outside looking in—much as the women’s movement did early in the 19th century.

⁸⁰ Jensen, one of the few male radical feminists, is Professor of Journalism at the University of Texas, Austin.



Plate 6: Poster from the motion picture *TransAmerica* (Source: IFC Films, 2005. Fair Use).

The evocative print above, from the film *TransAmerica*, illustrates this positionality of the transgender person and the entire movement. America's foundational ideology of democratic liberalism, reappropriated, globalized and institutionalized into the neo-liberal political system of today, keeps transgender people struggling primarily for incorporation into the very gender categories that have managed—and limited—access to opportunity and power since our Republic's origins. America was built by establishing population-level systems that regulated property and labor through the institutionalization and utilization of gender (and racial/ethnic/religious/class) categories (Spade, 2015). Control of these categories determines who is deemed as part of the “In” group and deserving of benefits and

protection and who is marked as an “Other,” unfit for admission and marked as a threat. Trans-activist attorney Dean Spade draws attention to “how the categorization of people works as a key method of control” (74) and notes that through the way it operates in regulating and policing the two gender divisions, it “produce[s] a trans politics that supports and legitimizes those very systems and institutions that make trans people so vulnerable” (87). Spade, like Raymond and Jensen, chastises the transgender movement for engaging in identity politics while simultaneously reinforcing the segregatory system that marginalizes and excludes them—but he alone admits that he can understand their desperate need for inclusion. Perhaps because, as a transgender man, Spade knows firsthand the experience of not belonging to that most primary of identities, a gender, he is able to forgive the group called transgender their complicity in perpetuating the dualistic schema in which they seek membership. Additionally, as an attorney Spade understands the specificity of the statutes that encode and enforce gender and the legal barrier they maintain between the two categories. He understands the innate compulsion transgender people have that compels them to claim a gender—and so, departing from the position argued by Bem and Kessler/McKenna, he does not advocate for the end of gender. Judith Butler understands this fine distinction too, disparaging the “feminist police [who] dispute a trans person’s sense of their lived reality,” because for most transgender-identifying people “gender...is crucial to who they are...[and they] have a strong sense of self bound up with their genders, so to get rid of gender would be to shatter their self-hood” (Williams, 2014). Spade understands that inclusion in a gender category is for a transgender person like being Black is for bell hooks: each

depends on an undeniable primary identity as a prerequisite to participating in pushing back against political systems of subjugation.⁸¹

At the same he time recognizes transgender people's quandary, Spade agrees with Lisa Duggan who rebukes those who participate in identity politics for not understanding that the cultural and identity issues that consume their lives prevent them from understanding their link to and embedment in the larger political economy. As Duggan points out in *The Twilight of Equality* (2003), neo-liberalism continues the policies of liberal democratic capitalism by separating the private sphere of the individual and the family from the public sphere of the state, the economy and civil society. Our current neo-liberal political system controls the population and their access to wealth "by separating class politics—the critique of economic inequality—from identity politics—protests against exclusions from national citizenship or civic participation, and against the hierarchies of family life" (Duggan, 2003, 2). In sum, gender has been utilized as perhaps the largest system of categorization to control access to wealth and opportunity in America's meritocratic liberal democracy. The relentless policing of the divisions and boundaries of gender and its related subcategories—family, marriage and sexuality—insure that the national hegemonic norms it creates will cause marginalized portions of the population to prioritize inclusion within this social system above most other goals or ambitions.

The two gender categories are produced and policed concurrently and reflexively by the state. Among the many components of the gender-categorization system (photo IDs and driver's licenses, passports, birth certificates, health insurance and public

⁸¹ In arguing that the feminism of the 1970s was a product of privileged white women that ignored the unique oppression suffered by Black women, hooks claimed Blacks' identity required its own form of feminism that would best serve its unique needs.

benefits), sex-segregated spaces, including homeless and women's shelters, prisons, jails and public restrooms have the most immediate and potentially dangerous impact on transgender people. This is largely because they are sites of sighting. Gender attribution, in its quotidian practice, is dependent on sight: that is, how one categorizes as "man" or "woman" the body of a person they are looking at. "The sexual siting of human beings within the polarized groups "men and "women" is not just dependent on certain physiological aspects of the body," notes legal scholar (and transgender man) Stephen Whittle. "The major societal organizing structure, having a bearing upon access and power within the public and private spheres of life, is instead related to sighting, what we see and the cultural constructs that we place around what we see" (Whittle, 1999, 18). When people are instructed to sort their bodies into spaces which are segregated by sex/gender, then the visual confirmation of that selection further reinforces (or contradicts) the attribution process. Among sex-segregated spaces, public bathrooms are the ultimate—in terms of both the meaningfulness they convey and the sheer number of such spaces—site of gender classification. The way in which sex-segregated spaces not only manage and police the gender of those people who enter them, but at the same time also produce the gender of their inhabitants, is the subject of the next chapter.

Nicole's Story:**Fifth Grade**

“It was so easy for the grandfather to do what he did to me when I was in fifth grade because he'd never met me. I've never said a word to him in my life and still haven't. Because I wasn't a person to him, I was just an idea that he could attack without having to actually come face to face with me”—Nicole Maines, 2016

Architecture had a devastating effect on Nicole's life when she entered the fifth grade, though neither Nicole, nor the tiled room, had it a mind, would have anticipated the cataclysm. That grade saw her move to another physical part of Orono, Maine's Asa Adams School, and there the bathrooms were communal (multi-stall) and sex-segregated. Through fourth grade all the bathrooms were single stall and therefore there was no group association made—nor was there any critical association made between student's gender and their genitals. But, among its many powerful functions, architecture segregates and categorizes its occupants by gender. The change in bathroom design at Asa Adam's school reveals architecture's performance as a built means of the social program whereby children are indoctrinated into becoming adult members of our society. The communal bathroom did not present a problem for Nicole personally, for she knew where she belonged, as did all her classmates who accepted her as the gender she felt she was. "In fourth grade, [Nicole] wore skirts, dresses, female-style bracelets, barrettes in her hair, and nail polish," observed Jennifer Levi (*Doe v. Clenchy*, 4, 2013). Continuing to paint a picture of a typical young girl, she added, "She had shoulder length hair. She could typically be found with a bunch of girls that became kind of her cadre of friends. She was placed in the girls' section of the school choir. With the agreement and support of school staff, [Nicole] used the girls' restroom in third and fourth grades. Other students were comfortable with [her] use of the girls' restrooms" (*Doe v. Clenchy*, 4, 2013). As she related in conversation with me, Nicole had been playing on the girls' softball team for the summer, so she anticipated a seamless entry through the door that marked a girl's-only space. Besides, her mother had anticipated future gender issues, and before that school year started she had taken Nicole through the legal procedure—including going before a judge with the request—to get her name

changed from Wyatt to Nicole. So, with long flowing hair, painted nails and wearing a billowy green skirt, Nicole began fifth grade in September, 2007.

School got off to a wonderful start; she was fun and popular, and her classmates quickly elected her vice-president. But one day her happy school life was shattered when a boy in her class called her a “faggot” and walked past her into the girl’s room, entered a stall and urinated. This set a few of the girls screaming in outrage, prompting the arrival of their teacher who immediately pulled the offender out of the bathroom. When she asked him what he thought he was doing by such an act, the ten year-old named Jacob replied that he “was just a boy using the girl’s bathroom,” adding, “If Nicole can go in, then I can go in” (Nutt, 2015, 124). He had been set to the deed by his grandfather, who also served as his legal guardian. As Nicole’s father Wayne recalled, “This kid came into the bathroom in October and said, ‘My grandfather says we don’t have to have any faggots in our school’” (Harrison, 2011). An appellate brief recounted the facts of the incident:

Susan’s use of the girls’ restroom at the beginning of fifth grade went smoothly until a male student followed her into the restroom on September 28, 2007 and again disrupted her use of the girls’ restroom on October 3, 2007.⁸² The male student entered the restroom at the instigation of his grandfather, who was his guardian. The grandfather disagreed with the sexual orientation antidiscrimination law.⁸³ He told the male student that Susan was really a boy and should not be allowed to use the female restroom. The grandfather instructed his grandson that if Susan used the girls’ restroom, he should do so as well. The male student’s conduct was a violation of the school’s anti-harassment policies.

⁸³ The Maine Human Rights Act of 2005 prohibits discrimination against people on the basis of sexual orientation, defined by L.D. 1196 as “a person’s actual or perceived heterosexuality, bisexuality, homosexuality or gender identity or expression.”

Clearly, Nicole's classmate Jacob was being used as a pawn by his grandfather in his effort to fight against progressive social customs that he felt threatened the traditional moral values he held dear.

The *Bangor Daily News*, Maine's major newspaper, headlined the event on December 7 "Mainer upset boy using girls restroom; Orono 5th-grader wants to change genders." Paul Melanson, Jacob's grandfather, felt he had a civic and moral responsibility to stop Nicole from being who she was—in his opinion, a boy wrongfully imposing himself in a girls-only space. For him, gender was immutable and was the same thing as the sex that God gave each person at birth. "At this kid's request, he's being treated like a little girl," he said to the school committee that met to hear him Tuesday December 6, and argued that it was wrong that Nicole was "being allowed to use the girl's restroom because he allegedly wants to change genders" (Dolloff). "I'm going to keep fighting it," Melanson said in the article. "It's going to continue. I want the law straightened out." The article noted that Melanson was supported in his effort by the Maine Christian Civic League and their attorney. They soon became key antagonists in Melanson's confrontation with the ten year old girl.

Who were the people in this group, and what drove their involvement in this issue? The League's website says it is a "nonprofit research and education organization dedicated to the preservation of the family and Christian family values" (CCLMaine.org). It claims its mission is "to bring a Biblical perspective to public policy issues that impact the family and equip citizens to be voices of persuasion on behalf of traditional family values in their localities." League Executive Director Michael Heath addressed Nicole's situation and the guidelines that the Maine Human Rights

commission had established to protect transgender children like her from harmful discrimination. “[T]he laws on sexual morality [are like] trees that shelter a kingdom,” he asserted in a letter to the editor of the Bangor Daily News (2013). “Where could any man stand upright when the last tree was cut down and the winds started to blow?” He predicted “now that transgenderism is accepted as normal, the last tree has been cut down, and the winds are starting to howl.” Warning that under the guidelines “boys identifying as female would be allowed access to the girls’ locker rooms, bathrooms and shower areas and would be allowed to play on girls’ sports teams,” he said the issue should be confronted “not in legal and sociological terms, but in terms of right and wrong, which is after all the basis of God’s law.” He announced his intention “to help the public focus on the harm done to society and to individuals by acts that are by their very nature harmful. The issue that needs to be settled once and for all is whether or not society is harmed by sexual immorality.” As spokesman for the League, Heath clearly prioritized what he called “God’s law” over the laws reached by society as a whole. Citing what he felt was a rightful and higher guiding principle, he warned that Nicole (and other transgender girls and women) would harm society; their danger lay in their refusal to conform to traditional gender standards that were predicated on one’s biological sex as assigned by God at birth.

Nicole’s peers had no trouble accepting Nicole for who she was. In a February 2016 interview, Nicole told me when an annual boys-versus-girls track and field day tug of war competition took place in fifth grade; she pulled on the winning team- the girls. After all, she noted, she’d been playing Little League girls’ softball for years. “All the girls had grown up with me and they watched me transition. And they were like, “Hey. It’s no

big deal. We know you're a girl.” To this day Nicole cannot understand how any of her adult opponents—such as Melanson and Heath—think she poses a threat. “If I could I’d ask them, how am I going to destroy your family?” she said. “I’m not. I’m not after your family. I have not made an attempt on your life. You’re fine. Your wife is fine. Your daughter is fine. Your sister is still OK.”

What was “no big deal” to Nicole’s friends continued to be a very big deal to the League. In an opinion piece published in the *Bangor Daily News*, editors questioned the League’s fixation with the bathroom incident.

At a time when the state is cutting back assistance to the elderly, children and the poor, you might reasonably assume that the Christian Civic League of Maine would have larger concerns than the bathroom practices of an elementary school student. You’d be wrong.

The league, which has long been obsessed with sex, has entered the fray over an Orono 10-year-old, guaranteeing that this battle over bathrooms, sadly, will continue for a few more rounds.

The stresses faced by a 10-year-old boy who believes himself to be transgendered must be enormous. The boy’s plight is now public, thanks to the grandfather of a fellow student. The man directed his grandson to mimic – and essentially mock – the transgendered boy’s use of a girl’s bathroom, and later, a faculty bathroom. For this, the league called the man “courageous.”

With the most powerful editorial voice in the state weighing in on the League’s questionable motives and even calling into question what constitutes Christian behavior, issues around Nicole’s gender status loomed larger.

Nicole did not find Melanson courageous whatsoever– in fact, he hadn’t even met her, his embodied opponent. “It was so easy for the grandfather to do what he did when

I was in fifth grade because he'd never met me. I've never said a word to him in my life and still haven't," Nicole reflected recently. "Because I wasn't a person to him, I was just sort of an idea that he could attack without having to actually come face to face with me... and it's so much easier for people to do that." Indeed, that a grizzly, ex-military, adult man chose a fifth-grade girl as the target of his campaign to preserve traditional notions of gender norms seems beyond fair, good or morally defensive. No doubt Melanson would have been judged to be possessed of a very hard heart if he had met with and listened to Nicole, and then decided to pursue his fight against her.

Nicole's life was abruptly upset following the protest move staged by Jacob. "Things changed as if a light switch had been hit," Wayne said of the effect of Melanson's and Heath's complaints and activism on Nicole's life at school (Harrison, 2011). Court documents recite the events that followed:

In early October 2007, a male student followed Susan into the girls' bathroom at Asa Adams Elementary.⁸⁴ Local news outlets began reporting Susan's story shortly thereafter. On October 10, the Superintendent of the Orono School District, Kelly Clenchy, terminated Susan's access to the female restrooms while attending school, forcing [Susan] to use a staff bathroom, because of her sexual orientation. Following Superintendent Clenchy's decision, Jane Doe contacted administrative staff at the Orono School Department and indicated her strong opposition to Superintendent Clenchy's position. John and Jane Doe later met with superintendent Clenchy to see if the parties could come to some resolution concerning Susan's access to the girls' restroom facilities at Asa Adams Elementary. At the meeting, John and Jane Doe clearly indicated that they wanted Susan's access rights to the girls' bathroom restored. Superintendent

⁸⁴ In all documents related to the ensuing lawsuits, Nicole was referred to as "Susan Doe" and her parents Wayne and Kelly Maines as "John and Jane Doe." This was done because of Nicole's underage status in an effort to protect her.

Clenchy allegedly responded to the Does' request by saying, "I'm not going to do that" (Doe v. Clenchy, 2011).⁸⁵

In an attempt to placate larger and louder voices, school administrators reversed their practice of treating Nicole the same as the other girl students. They had included her with them for years and in all instances of separating children by gender—all part of a years-long, carefully considered interaction between teachers, counselors, child psychologists and both Maines parents—and yet they quickly caved to the tyrannical behavior of a couple of self-righteous moral crusaders.

The following school year—Nicole's sixth grade—Asa Adams' administrators implemented what they termed an "eyes-on policy" to alleviate her being bullied by Jacob. That policy essentially meant that someone appointed by the administration kept her under close surveillance during all unstructured times that she was out of the classroom. Additionally, to ameliorate Melanson and the League, she was forbidden use of the girl's bathroom and instead required to use the teacher's single-stall, non-gender specific bathroom. This had the effect of singling her out as an "Other" from all the other students. "[Her] exclusion from the shared girls' restroom made her feel isolated and abnormal. It was 'sort of like something that's pulling you out from a crowd, like here are the normal kids, here's you,' [Nicole] explained" (Harrison, 2011). She was

⁸⁵ This document prefaced the above section by stating, "It should be noted from the onset...that Susan Doe was born biologically male, but has expressed herself and identified as a female from a very young age. The parties do not dispute this fact. Susan Doe was at all times relevant to this action a transgender student attending Asa Adams Elementary School in Orono, Maine. Prior to the 2007-2008 school year, Susan's parents met with administrative staff at the Asa Adams Elementary School to discuss how Susan would be addressed by school staff and what bathroom facilities she would be able to use during the school day. It was agreed at the meeting that staff would address Susan using a female pronoun, and most importantly for the purposes of this litigation, that Susan "would use the girls' bathroom unless other girls or their parents objected."

essentially thrust into Hester Prynne's shoes and forced to wear a big scarlet letter.⁸⁶ For Nicole it was fraught with stress. "An adult would stand 15 feet away from me wherever I went," she said. "When I would go to the bathroom, they would follow me. When I would go to the lunchroom, they'd follow me. It was like I had an invisible string attached to me and they were on the other end. It was ridiculous" (Harrison, 2012).

These two policies proved to be the final ignominy her parents were willing for her to tolerate. Indeed, they were all too aware of the suffering their child was enduring. "I realized that my kid didn't have any rights and I didn't know how to protect her," Nicole's mother recalled. "We tried to work with the school for a whole year." Feeling they had no other recourse, the parents hired a lawyer in the spring semester of Nicole's sixth grade year and promptly filed a complaint with the Maine Human Rights Commission. In the complaint, they argued that Nicole was being discriminated against by Asa Adams School by their deprivation of access to the bathroom that matched her gender identity.

Fourteen months later, at the end of Nicole's seventh grade year, the Commission found that Asa Adams School had indeed discriminated against her. However, they did not find that she had been harassed by the exercising of the "eyes on" policy and her forced use of a separate bathroom. The Maines's were deeply unsatisfied with the ruling.

⁸⁶ Hester Prynne is the female protagonist in Nathaniel Hawthorne's 1850 magnum opus *The Scarlet Letter*. A kind and beautiful single young woman, Hester is accused and convicted of adultery in 17th century Boston and forced to wear a prominent scarlet letter "A" on her dress that labels her as an adulteress, a critical legal offense at that time. The book and Hester's plight examine and illuminate issues of shame, guilt, gender and legalisms. My comparison of Nicole to Hester is not a reach: the conservative Christian morals and values that Melanson and the Christian Civic League claimed Nicole's existence and actions were violating are nearly identical to those that guided Puritan Boston. In fact, it can be argued that Hester and Nicole were both thrust into the role of Eve as the fallen woman who must shoulder the burden of guilt for man's removal from Paradise—the biblical story that supports the subordination of all women in patriarchal society.

Five months later they and the Commission filed a lawsuit against the school district over her how they had treated Nicole, how they handled Jacob's bullying of her and how they had denied her access to the girl's bathroom.

They did not achieve the justice they sought in that lawsuit, either. As reported in the November 20, 2012 *Bangor Daily News* article, "A Superior Court judge on Tuesday ruled in favor of the Orono schools and against the parents of a transgender child who in 2007 was forced to stop using the girls bathroom and told to use a staff bathroom after the grandfather of a male student complained" (Harrison, Nov. 2012). In his opinion the judge stated, "In this case, the school acted within the bounds of its authority in prohibiting [the girl] from using the girls' restroom; it did not itself harass [the girl] by its actions, and it was not deliberately indifferent to the harassment that [she] experienced from others." This setback did not deter the Maineses. In stating that the decision would be appealed to the Maine Supreme Judicial Court, their attorney argued that, "This case involves a fifth-grade girl who was made an outcast by the school and subjected to severe bullying. The school acknowledged that a transgender girl needs to be able to live as a girl in order to get an education. We are going to pursue this case on an appeal because the need to get an education in today's world is critical to every student in Maine" (Harrison, 2012). This time the Maines's were also seeking damages, as Nicole, her mother and brother felt forced out of their home in Orono and compelled to move two hours away to southern Maine in order to find a more supportive school environment for her; her father remained behind at his job at the University of Maine, Orono.

Arguments for their case were finally heard at Maine's Supreme Court in Bangor beginning June 12, 2013. At question was the conflict between a 1920s law that requires schools to have separate bathrooms for boys and girls and the provision in the 2005 Maine Human Rights Act that prohibits discrimination on the basis of sexual orientation. The MHRA definition of "sexual orientation" includes "a person's actual or perceived gender identity or expression;" it does not provide a definition of "sex." In order for the Maines complaint to prevail, legal precedents that established a clear distinction between sex and gender had to be presented to and accepted by the judges. Further, they needed to show that gender was customarily used as a means of categorizing a person as a man or a woman was just as legitimate as sex, and that sex was determined socially as well as biologically. A pre-trial brief filed with the Court by the Maines' attorney did so by citing several cases, including one (*Price Waterhouse v. Cooper*) that was decided by the U.S. Supreme Court: "Since 1989, and in reliance upon *Price Waterhouse*, federal courts have consistently rejected a limited reading of the word "sex," finding that while it may include biological sex, it also includes non-biological gendered characteristics that make up the social determinations of whether someone is a man or a woman" (*Doe v. Clenchy*, 13 March, 2013, 30). The attorney for the for the Maine Human Rights Commission (who joined in the appeal) filed a separate brief with the Court in which he argued that gender identity was more definitive of a woman's community status than was their biological sex:

In the case of sex discrimination, the prejudices and stereotypes directed at women [are] based on their status as women, which is usually determined by identity and perception, not biology. A company that refused to hire a woman as its president because she is female does not check her chromosomes first. In the

context of bathrooms, the meaning of the term 'sex' should be no different...[people] of the same gender share a common identity. (Harrison, 2013).

These two arguments set the stage for the debate the Court must decide. Ultimately, there were two essential questions to be resolved in the case: 1. Was Nicole's school practicing unlawful gender segregation (in violation of the Maine Human Rights Act when it denied her access to the girl's restroom) in her case? 2. Was gender identity or biological sex to be used as the determinate factor when segregating people according to the gender/sex system?

Chapter 3

Sex-Segregated Spaces

“For a long time, the story goes, we supported a Victorian regime, and we continue to be dominated by it even today.” —Michel Foucault, 1978

“As much as the fear or abhorrence of homosexuality may be a psychological problem for many individuals, that fear or abhorrence is created by an institutional and an ideological emphasis on gender polarization and compulsory heterosexuality.” —Sandra Bem, 1993

“The most formidable general evil under which woman has suffered during the Christian ages has been that of protection; a non-recognition of her ability to care for herself, rendering watchful guardianship over her a recognized part of man’s law; not alone to prevent her from sinking into the depths of vice but to also prevent her entire subversion of government and religion.” —Matilda Joselyn Gage, 1897.

Sex segregation was a regular and established American practice long before the 1920s Maine Law that demanded separate school bathrooms for girls and boys. The first built space that was designed to segregate the Anglo-American populace according to gender was the single family home.⁸⁷ It was the “proper” domain of women in their role as rightful occupants of the private, domestic sphere of eighteenth and nineteenth century culture. The home was considered a place of refuge and nurturing for the family. As the front line of the young republic’s need to populate its vast and growing land mass, the American family was essential to the success of its expansionist goals. Policies for the regulation of the family were rooted in English common law and ultimately depended on maintenance of a strict gender binary such that women would be relegated to their biological function of producing healthy citizens.⁸⁸ As late as 1873 the U.S. Supreme Court opined that it was regarded as “an almost axiomatic truth that God designed the sexes to occupy different spheres of action, and that it belonged to men to make, apply, and execute the laws” (*Bradwell v. Illinois*, 1873).⁸⁹ While codified and

⁸⁷ Here I refer to the Euro-American, settler population. Many Native American tribes had customs which saw women gather together in designated huts when they were menstruating. Dollarhide and other scholars note that third-gender (biologically male) people would often cut their upper thighs or groin area with sharp instruments so that they would bleed in simulation of menstrual flow, and thus be qualified to enter these huts.

⁸⁸ Sir William Blackstone’s *Commentaries on the Laws of England* (1765) was the definitive source of the legal system used in the United States since pre-revolutionary time. Because our system of law operates according to precedent, *Commentaries* has been cited even in recent times. In these pages Blackstone codified the oppression and submission of women in the practice known as “coverture.” He explains, “The husband and wife are one person in law; that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs everything; and is therefore called in our law-French, a *feme-covert*.”

⁸⁹ In the majority opinion of *Bradwell v. Illinois*, Justice Bradley wrote, “the civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman’s protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The Constitution of the family organization, which is founded in the divine ordinance as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interest and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. So firmly fixed was this sentiment in the founders of the common law that it

enforced by the judiciary, “The “Doctrine of Separate Spheres” depended heavily upon social hegemony for its acceptance and operation.⁹⁰ Here I use hegemony in the Gramscian sense, meaning the consent given by the majority of the population to the dominant group to impose the direction of social life. It is the normal means of state control in a pluralistic society, with force being resorted to when power exercised in such a cultural method is no longer able to maintain the order required by the state.

The notion and practice of the strict separation of gender by biological sex and by social role was accepted by most Americans in this period, though first wave feminists were beginning to stir in opposition. Barbara Welter’s foundational essay “The Cult of True Womanhood” explicated the role of the majority of white women in ante-bellum America. Though a bit sardonic—for I will argue that Welter, at the time of writing this piece in 1966, felt that the doctrine of separate spheres was not only alive but was functioning quite well—the article drew heavily upon Catherine Beecher’s best-selling 1841 book *A Treatise on Domestic Economy* for its tenets.⁹¹ Besides providing a script for women’s role as a pious, nurturing, wife and mother, Beecher’s book cemented the place of woman in the home. It was her domain, and she was to remain there and oversee all activities that took place there. In chapter twenty four, “On the Construction of Houses,” Beecher provides architectural drawings and details on the proper design of

became a maxim of that system of jurisprudence that a woman had no legal existence separate from her husband, who was regarded as her head and representative. 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. And the rules of civil society.” Blackstone’s precedent of coverture is apparent in these words.

⁹⁰ While the ideology called “The Doctrine of Separate Spheres” became quite dominant with the emergence of the Industrial Revolution in both Europe and America, its cultural roots were described in the 4th century B.C. by Aristotle in his work *Politics*.

⁹¹ Welter’s article was written contemporaneously with Betty Freidan’s pivotal book *The Feminine Mystique*, credited with launching the second wave of the feminist movement in America. Freidan effectively argued that American women had been forced back into the domestic sphere following their brief emancipation during the war years, all part the state’s cultural goal to re-invigorate the American family in its critical role as producer of children and consumer of goods.

woman's space, even providing some of the first published and illustrated instructions on how to install indoor plumbing for cooking and personal sanitation (Beecher, 276). Not only did this new convenience make women's lives more comfortable, but it also kept her from exposing herself to the public eye when she must venture to the outhouse to answer her bodily needs.

While indoor, flushing toilets were a modern notion in Beecher's time, public toilets were not available for another fifty years—and even then there were none for women. Once again the built space served as a site that privileged men. Public toilet facilities first became possible in the 1870s when municipal public works technology allowed running water to be piped inside and waste to be piped out of buildings. For decades they were provided for the convenience of white men only and most required payment for their use, effectively operating as an arbiter over what gender and class were meant to occupy public spaces. The absence of facilities to provide bodily waste relief effectively confined Victorian-era women to their domestic sphere; those few who were willing to venture away from home—often lured by the new sensation of department stores in urban areas—for lengthy periods of time faced extreme discomfort and possibly embarrassment. Noting that “the inner linings of Victorian dresses worn by women were often stained by urine indicating that ladies used these garments to cloak the practice of urinating while standing outside in public,” Sheila Cavanaugh reveals the evidence of this exclusionary lack of provision (2011). The first public toilet reserved for women's use was not built until 1905 in London. Both sex-segregated spaces intended to admit only the upper echelons of class; if the signs, “Gentlemen” and “Ladies” did not keep out the rabble of “Men” and “Women,” then forcing people to pay for the use of the

facility certainly did. In their performance as sites of segregation, public toilets have a long history of discrimination, where the mantra of “separate but equal” has been utilized to privilege some genders, classes, physical abilities and races and over others. In the United States, public toilets were racially segregated until after the civil rights movement of the 1960s. Debate over the public accommodations section of the 1964 Civil Rights Act was rife with concerns about racial mixing (Cooper, 1999). Public restrooms discriminated against physically disabled people until the Americans with Disabilities Act (ADA) of 1990 forced these facilities to accommodate people who, like Victorian women one hundred years previously, had no outlet when away from home. Today transgender and gender nonconforming people bear the brunt of this type of discrimination.

Public—and by this I mean to include schools and institutions— restrooms remain the most numerous of sex-segregated spaces in America today. They are a concrete, built means of maintaining the reality of a polarized sex-gender system. As such they are sites of many intersecting and contested ideologies surrounding notions of gender, sexuality and the body. The greatest social function performed by the public restroom in the twenty-first century is the way in which they continue to reify, regulate and police the gender binary.⁹² Serving as a perfect model of Jeremy Bentham’s Panopticon, it is an institutionalized disciplinary site that directs people to police the appearance and behavior of themselves and others.⁹³ Operating as a Foucauldian

⁹² As I discussed in Chapter One, the gender binary is the traditional bastion of heteronormativity which insists that there only two genders (man/woman), that they are essentially linked to each person’s biological sex (male/female) and that each person must be strictly identified as either one or the other

⁹³ A Panopticon is a type of carceral building designed by the English social theorist Jeremy Bentham in the late 18th century. This unique design enables all inmates of a prison to be observed by a single watchman without their knowing whether or not they are being watched. Although impossible for a single watchman to observe all cells at once, the inmates are aware they may be under surveillance and thereby

institution of the state, the public restroom compels people to impose self-and-other discipline on manifestations of the gender binary, and through their guarding of the entrance portals they categorize and police the gender of those whom they admit. However, because many people's gender performance does not match their physically sexed body or because they do not perform gender to the appropriate norms as maintained and judged by their peers, public restrooms are often sites of gender-based discrimination against such transgressors.

American public restrooms continue to serve as sites for discrimination based on gender, race, physical ability and sexual orientation. The historic scarcity of toilet facilities subordinates and marginalizes such groups of people and sends the clear message to them that they are "outsiders to the body politic" (Gershenson, 2009). Refusing people toilet access remains a remarkably effective form of social exclusion, "and in defiance of basic human rights, toilets have become a potent means of further marginalizing social untouchables" (ibid). The public restroom is remarkably effective in demarcating who is such an "Other" or outcast—which is exactly the experience that Nicole Maines realized when she was barred from the girl's room.

In sum, restrooms clearly function as a means of extending men's authority over women. They are among the few sex-segregated places in the American landscape and "they remain among the more tangible relics of gender discrimination" (Anthony and Dufresne, 2007). Because most architects, engineers and building code officials that design and build restrooms are predominantly men (as women are under-employed in

police their own behavior constantly. Influential social theorist Michel Foucault used the Panopticon as a metaphor for the disciplinary manner in which modern societies direct their populace to self-police their behavior to fit "normal," hegemonic standards.

these typically male-dominated professions), men are privileged over women in both the functional design and the sheer number of toilets built—leaving women’s needs largely ignored.⁹⁴ This is colloquially known as “potty privileging.” Many scholars and activists challenge the binary gender classifications that have traditionally restricted public restrooms to either males or females and call for a new approach that approximates what one finds on a jetliner or in a private home: gender-neutral facilities that accommodate all genders and categories of people.

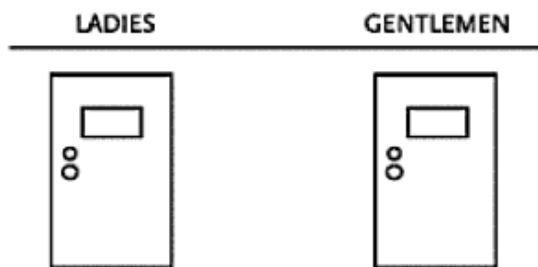


Plate 6: Lacan’s “Twin Doors.” (Source: Jacques Lacan’s *Écrits* (1977), 151)

When we face the twin doors of the restroom and make a choice to enter one or the other, we are complicitly participating in the maintenance of the gender binary. When we do pass through one of the doors, we are making a public statement about our gender and what body parts we might possess, or not. This assumption we generate about our genitals lies at the heart of the debate on what criteria is to be used to determine a person’s right to enter the Ladies or the Gentlemen room. Let’s take a brief detour into theory to try to understand and appreciate the scholarly approach to this issue.

⁹⁴ Men’s public restrooms accommodate and process much larger groups of people than do women’s public restrooms, largely due to the use of urinals in men’s space; while this is predicated on biological anatomy, much has to do with social notions of privacy and cleanliness.

Language theorist Jacques Lacan uses the above diagram of the rest room signs “Ladies” and “Gentlemen” hanging over otherwise identical doors to illustrate his argument that signifiers have primacy over that which they signify.⁹⁵ In an anecdote he uses to illustrate this relationship, he relates:

A train arrives at a station. A little boy and a little, girl, brother and sister, are seated in a compartment, face-to-face next to the window through which the buildings along the station platform can be seen passing as the train pulls to a stop. “Look,” says the brother, “We’re at Ladies!”; “Idiot,” replies his sister, “Can’t you see we’re at Gentlemen!” (152).

Here Lacan shows how anatomical sexual difference is positioned through time and space and configured by language. However, each place only exists in its exclusion of the other; “Ladies” does not “stand for” the thing, but exists and operates only in opposition to “Gentlemen.” Thus, gender identity operates as a law: it is imposed on the individual, so that he or she is regulated according to an opposition. Lacan argues that the signifier that sets up the opposition is the phallus and that one’s place is determined by its lack or possession.

Following from this approach, McKenna and Kessler call the operative signifier of gender attribution “cultural genitals.” They note that “the cultural genital is the one which is assumed to exist and which, it is believed, should be there” (1978). Thus, as Lacan suggests that the sign “Gentlemen” signifies that a restroom with urinals lies behind the door it marks, so also do McKenna and Kessler argue that through their act

⁹⁵ Jacques Lacan (1901-1981) was an influential French psychiatrist, post-structural theorist and psychoanalyst considered by many to be Freud’s successor. His theories on the Phallus have generated much criticism, both positive and negative, from feminist theorists. In this anecdote we see how Lacan suggests that sign systems can be seen as supporting the notion that language does not “reflect” reality but rather constructs it. Note, too, that the regulatory signs “Ladies” and “Gentlemen” also serve to segregate by class in addition to gender.

of entering that particular door, those who do are attributed penises. “As evidence of ‘natural sexuality,’ the cultural genital is a legitimate possession. Even if the genital is not present in a physical sense, it exists in a cultural sense if the person feels entitled to it and/or is assumed to have it,” they argue, and then distinguish between the physical and social by stating that, “Physical genitals belong only to physical (genderless) bodies and consequently are not part of the social world. Attributed genitals are constructed out of our ways of envisioning gender and always exist in everyday interactions” (ibid). Lacan’s anecdote relied on his concept of the Phallus as the Center of power; because women lacked the ability to gain the phallus and were thus the Other, away from the Center and forever on the subordinate side of the gender/sex binary. Kessler and McKenna corroborate this notion of lack, noting that because “it is the penis which is either attributed or not attributed, we maintain that the only cultural genital is the penis” (173). Therefore, it follows that as gender is a social construct and public restrooms are ostensibly social spaces, then one’s cultural genitals are the determinate that direct one to enter either one door or the other. That the penis is the dominant cultural genital is generally accepted in our androcentric, heteronormative society. But, because it is so privileged—and is at once endowed with harmful power—it must be feared and controlled. The twin doors are there to insure and assure us that penises are only found in the men’s room. The question arises and lingers as to the underlying motive: are the [male] architects who designed these dichotomous spaces and the [male] legislators and judges who mandated them working to enslave or to protect women through such segregationist actions? One could possibly answer, perhaps both, as either reflects hegemonic masculinity.

What was the origin of the laws that demanded segregation as determined by the possession or lack of a penis? Paying homage to the binary power invested in the signs “Ladies” and “Gentlemen”, Lacan writes “The image of twin doors symbolizes, through the solitary confinement offered Western man for the satisfaction of his natural needs away from home, the imperative that he seems to enjoy with a great number of primitive communities, by which his public life is subjected to the laws of urinary segregation” (1977). The genesis of these laws in the United States is found in the ante-bellum era; the social/political system that engendered them will be discussed in depth in the following chapter.

Legislation to segregate sanitary facilities on the basis of the gender binary was born in nineteenth century America as a combination of scientific realism and the patriarchal ideology that offered women the elevated sphere of domesticity in exchange for public self-representation. The middle-to-upper class women that were bound to that cult of “true womanhood” did not (or were told not to) venture far enough, often enough from their home to require such facilities. Theirs was the domestic sphere- the public was reserved for men. However, the working class women that began to populate the mill floors of the textile factories did insert themselves in non-domestic modes of production, and the conditions they faced were far from sanitary and farther yet from modest. While the need to protect and preserve working women’s health, safety— and to a lesser degree, modesty— was seemingly the basic justification for gender separated sanitary facilities, that cause was nearly impossible to extricate from the larger one of hegemonic social morality (Kogan, 2010). The first laws to mandate gender-segregated toilet facilities in the workplace were enacted in the 1880s. “These laws can best be

understood as an attempt by legislatures to re-create the separate-spheres ideology within the public realm,” states Kogan. “If women could not be forced back into the home, substitute protective havens would instead be created in the workplace by requiring the separation of water closets, dressing rooms, resting rooms, and emergency rooms” (ibid). Lawmakers mandated the architectural space of the public rest room as a means to enforce the dominant social and moral agenda. Thus, the first laws requiring sex segregated public restrooms were not driven by anatomical differences and their functions. Rather, they vindicated and solidified the nineteenth century patriarchal ideology that stipulated the “proper,” subordinate place and role for women in society. However, as we now discredit the seemingly antiquated concept of the cult of true womanhood and the doctrine of separate spheres, why do we not embrace a more contemporary (that is, gender-neutral) architectural approach to the design of the public restroom? Perhaps the function of the subject space as a resting room or emergency room offers an answer from women’s point of view today, as it also did in the late nineteenth century. The “Ladies” offers sanctuary from the scrutiny, demands and threat of men when one is, as Lacan phrased it, “away from home.” However, given the intense spate of legislative activity across America in 2015-2016 to strengthen laws mandating gender-segregated public restrooms, there is clearly a deeply rooted ideological issue at stake that may well not have women’s welfare at its core.

When discussing the history of the public restroom and using the term “segregated” in the discourse it is necessary to recall that not only has the space—indeed, the institution—been separated by gender polarization, but also until well into the twentieth century it was segregated by racial polarization, too. Relying on the then-

popular myth that Blacks might spread filth or disease to their fairer, cleaner bodies (here the virginal white woman was offered as metaphor), policy makers assured that African Americans could not access public restrooms used by whites (Boris, 1998). The public restroom was the focal point of many protests against forced segregation in the 1950s and 1960s, with white fears of catching venereal disease from blacks underpinning a large number of them. Because of their large numbers in the south and in factories across the country, Blacks were provided facilities under the “separate but equal” doctrine. Court cases that drove racial desegregation of public restrooms did not abate until 1977 with *James V. Stockholm*.

Meanwhile, the public restroom developed its own discourse, revolving around women’s bodily presence and an emphasis on cleanliness, class consciousness and racial difference, which “reflected an unintentional cultural strategy for preserving existing social categories, ‘cherished classifications,’ that separated and ranked women and men, whites and Blacks” (Cooper, 1999). At the same time lawmakers spread fear over the dangers of racially mixing restrooms they also trumpeted the adverse consequences of sexually mixing them. They did this by playing to people’s worries over privacy (primarily a concern over opposite-sex people seeing their genitals) and by tapping “deep fears about sexual mixing, transgressing social boundaries, and ending recognition of gender differences” (Cooper and Oldenziel, 1999).

In an effort to defeat passage of the Equal Rights Amendment, the socially conservative right deployed fear-mongering by conflating lesbianism with male predators in the Ladies Room. In a 1979 essay Gore Vidal writes,

In the late sixties and early seventies, the enemies of the Equal Rights Amendment set out to smear the movement as lesbian. All sorts of militant right-wing groups have since got into the act: Phyllis Schlafly, the Conservative Caucus and dozens of other like-minded groups. Their aim is to deny equal rights to women through scare tactics. If the amendment is accepted, they warn us that lesbians will be able to marry each other, rape will be common, and men will use women's toilets. This nonsense has been remarkably effective (552).

Antifeminist campaigners defeated the proposed Equal Rights Amendment to the U.S. Constitution largely through employing fear-mongering arguments that the amendment would mandate unisex bathrooms. Columnist Jack Anderson described how the right-wing John Birch Society intentionally trumpeted the false arguments that the ERA “would outlaw separate restroom facilities,” in its effort to scare people into voting against the amendment. The society played a key role in Operation Wake Up which raised the phony specter of unisex bathrooms, referring to the amendment as the “Common Toilet law” and urged votes against the “unisex amendment.” Operation Wake Up was formed in 1975 as a coalition of organizations and individuals united to defeat the ERA. The organization was “dedicated to the preservation of the family as the basic unit of society and to protection of all members on the family at every level of dependency...and to the preservation of femininity and to the concept of one nation under God” (Brickman, 1978). “These exaggerated statements and illustrations were designed for maximum shock value,” said Anderson in 1978, “without regard for the truth, in the Watergate tradition.”



Plate 7: "Unisex bathroom rumors" (Source: *Kingman Daily Miner*, March 20, 1979.)

Such efforts to sway legislation against the ERA and the feminist agenda preyed on the public's fears of unwanted (hetero)sexual impropriety and violence if men were allowed access to women's restrooms. The "potty" issue, as it was called then, has now morphed into the "bathroom bills" of today. Both sound scatologically humorous in retrospect, but scholars and those who suffer oppression from their machinations need to take them seriously. The argument— or more accurately phrased, the scare tactics— that mobilized significant number of voters to the polls to defeat the ERA amendment of the late 1970s has seen its recent iteration utilized to defeat the Houston Equal Rights Ordinance in the autumn of 2015.⁹⁶

⁹⁶ On November 3, 2015 voters in Houston, Texas were asked to vote yes or no on the question, "Are you in favor of the Houston Equal Rights Ordinance, Ord. No. 2014-530, which prohibits discrimination in city employment and city services, city contracts, public accommodations, private employment, and housing based on an individual's sex, race, color, ethnicity, national origin, age, familial status, marital status, military status, religion, disability, sexual orientation, genetic information, gender identity, or pregnancy?" It failed by a two-thirds margin after an intense campaign in which opponents warned it would give male sexual predators access to women's bathrooms under the guise of being transgender.

The specter of the public restroom as a site for sexual activity was not limited to fears of heterosexual man-on-woman rape. With its appearance in the late nineteenth century the urban men's room was quickly claimed as a haven for homosexual meetings and furtive sexual encounters (Chauncey, 1995; Cavanaugh, 2010; Edelman, 1993). Apprehension of such unwanted sexual behavior was then, and remains today, part of the culture of the men's room—and by extension, to all public rest rooms. Architect Alexander Kira describes his observation of behavior patterns in men's rooms in his book *The Bathroom*. He finds that almost invariably a man entering to use a urinal looks first for a vacant one that is not next to one in use. "Only in a crowded situation is the intimacy imposed by tight fixture spacing tolerable or permissible, he finds. "A violation of this pattern is at once suspect [of homosexuality] and cause for concern and aggression" (1966, 204). Lee Edelman agrees, saying "the men's room, whose signifier enshrines the phallus as the token of determinate, knowable difference, is the site of a particular heterosexual anxiety about the inscriptions of homosexual desire and about the possibility of knowing or recognizing whatever would constitute the homosexual difference" (1993, 562). This same "heterosexual anxiety" is transcribed onto the Ladies Room, where the presence of a penis triggers fears of unwanted sexual molestation. We can summarize that notions of sexual impropriety problematize the laws of urinary segregation. As Lacan and McKenna and Kessler emphasize, the penis is always implicated.

Sociologist Erving Goffman reaffirms the reflexive agenda that sex-segregated rest rooms perform, noting:

Now clearly, if ogling and sexual access is to play the role it does in pair formation in our society, then sequestering of toilet functions by sex would seem to be indicated. But the sequestering arrangement as such cannot be tied to matters biological, only to folk conceptions about biological matters. The functioning of sex-differentiated organs is involved, but there is nothing in this functioning that biologically recommends segregation; that arrangement is totally a cultural matter. And what one has is a case of institutional reflexivity: toilet segregation is presented as a natural consequence of the difference between the [genders], when in fact it is rather a means of honoring, if not producing, this difference (1977, 316).

Goffman uses the term “institutional genderism” to describe this concept of the public restroom as a site that produces gender (1977, 305). If that term sounds Foucauldian, no wonder, for in its reflexive function as a site of social discipline, it is “a type of location of bodies in space, of distribution of individuals in relation to one another, of hierarchical organization, of disposition of centres and channels of power, of definition of the instruments and modes of intervention of power [where a] particular form of behaviour must be imposed” (Foucault, 1977, 205). The gendered public restroom door, then, clearly functions in our culture as an arbiter of gender: to pass through it one declares one’s gender, and when within the space it guards one is subject to scrutiny and the burden of proving one’s gender through satisfactory performance of the roles and attributes assigned to it (West and Zimmerman, 1988; Butler, 1988). At the same time that it produces, maintains and polices gender, the public restroom also enforces heteronormativity.

The following vignette from columnist Olivia Wilson is illustrative of how the public restroom functions in this capacity:

The lady blocks my way as I try to walk into the bathroom, I go to walk around her, she's looking me right in the face and when I try to dodge her she sidesteps into my path again, we do a little dance, her challenging me, me trying to walk in the door, coincidentally I need to pee. Eventually, she lets me in with a suspicious little squint in her eye and when I'm sitting on the toilet I can see her sensible shoes standing guard outside. For some reason I make sure to pee loudly. She lets me leave and I'm struck with a bad case of the staircase wit... silent and just flashing my boobs at her. If anything grants entitlement to the ladies' bathroom, surely they do. Her problem [was that] she thought I was a man. This isn't unusual for me, it happens all the time. People...will stride into the loo, see me, stop in their tracks and do a double take on the sign on the door, confirm that they really did see a stick figure with a skirt and then proceed with caution and a few stares as I wash my hands and try not to do anything to make them uncomfortable, like stare back (2015).

The reaction of those who scrutinized Olivia's appearance— people whom Schilt and Westbrook call "gender normals" — reflects their perception of a mismatch between her gender attributes and her biological sex. It also reveals "the interactional precariousness of the seemingly natural heterosexual gender system," and demonstrates that it is difficult to separate the "doing" of gender from the maintenance of heteronormativity (Schilt and Westbrook, 2009; West and Zimmerman 1987). Sociologists Schilt and Westbrook did a study in 2009 that showed that doing gender in a way that does not reflect biological sex could be perceived as a threat to heterosexuality. They found that cisgender men and women attempted to "fix" these perceived disruptions by reaffirming the heteronormative assumption that only "opposite sex" attraction between

two differently sexed and gendered bodies is normal, natural, and desirable (Schilt & Westbrook, 2009, 442).⁹⁷

In a subsequent 2013 study Schilt and Westbrook analyzed the responses of “gender normals” to the presence of transgender people in sex-segregated restrooms. When these cisgender people perceived a disruption to the genitally-based gender ideology they had what Schilt and Westbrook call a “gender panic” and tried to “frantically reassert the naturalness of a male–female binary” (2013, 3). The two sociologists call the task of stopping such panics “gender naturalization work,” and it consists of legislating and enacting policies that require surgical and hormonal criteria for admission into gender-segregated spaces. They note that “gender panics” might be more rightfully termed “penis panics” as the imagined culprit is none other than the cultural genital. They posit that fears of unwanted heterosexuality motivate gender identity policing in women’s sex-segregated spaces and that the assurance that physical genitals match cultural genitals is necessary to prevent such panics.

Their study, as common observation also substantiates, reveals that access to gender-segregated public restrooms is not evenly policed: only women’s spaces are heavily monitored. The possession or lack of a penis is the criteria for determining gender. Schilt and Westbrook argue this is because of the cultural ideology that woman—the “weaker sex”—are inherently vulnerable to rape by men/penises and simultaneously are in need of protection by men:

⁹⁷ Cisgender people are those whose gender identity and biological, natal sex match—as differed from transgender, those whose gender identity and biological, natal sex do not match; “denoting or relating to a person whose self-identity conforms with the gender that corresponds to their biological sex; not transgender” (Oxford Dictionary, 2015).

Two persistent ideologies about womanhood are deployed to counter identity-based determination of gender: Women are weaker than men, and, as a result, women are always at (hetero)sexual risk. This construction produces “woman” as a “vulnerable subjecthood,” an idea that what it is to be part of the category of woman is to be always in danger and defenseless. Conversely, men, or more specifically, penises, are imagined as sources of constant threat to women and children, an idea that reinforces a construction of heterosexual male desire as natural and uncontrollable. Women-only spaces, then, can be framed as androphobic and, as a result, heterophobic, due to the assumed inability of women to protect themselves from men combined with the assumption that all men are potential rapists.

Sandra Bem suggests another trope, perhaps symbiotic to that above, which undergirds the “no men in women’s bathrooms” movement. Sociobiologist Edward O. Wilson’s Reagan-era essentialist arguments that aided the backlash against feminist gains made in the 1960s argued that men were promiscuous, sexually violent and infidel because of their need to maximize the reproduction of their own genes (14).⁹⁸ Because of this, Wilson argues, “men are intolerant of female infidelity, and they sequester females whenever possible to ensure that those scarce female resources are used to reproduce their own genes and not someone else’s” (Bem, 1993, 18). Extrapolating from this, consider that the women’s bathroom can be seen to serve as a corral, a holding pen, where women are kept safely away from other men. Their accessibility is limited, feasibly being saved for he who has some sort of claim or title to them.

In sum, all those entering the “Ladies” who do not pass scrutiny of their gender are suspect of possessing a penis and may potentially provoke a panic. These penis

⁹⁸ *Wilson’s Sociobiology: The New Synthesis* (1975) posited that both human social behavior and human social organization were encoded in the genes.

panics are triggered by fears of unwanted sexuality and rely upon the presumption of heteronormativity. This is ostensibly what lies behind the recent surge in legislation aimed at guaranteeing compliance with laws that police access to gender-segregated bathrooms, exemplified by the anti-HERO (Houston Equal Rights Ordinance) slogan “No men in women’s bathrooms” which has also served as the mantra for HB 2 in North Carolina.

The penis panic trope is well ingrained in American cultural representations. Recent ads deployed by various groups to mobilize public opinion regularly depict the bathroom setting and those who would violate it. In February, 2013, the parents of a 6 year-old girl filed a civil rights suit against her Colorado school for its sex-based discrimination against her when she was denied use of the bathroom because she was transgender. Immediately a socially conservative group named The Pacific Justice Institute responded with a statewide media campaign to sway public opinion against what they portrayed as a threat to America’s girls, posting the following paid advertisement:



Plate 8: Ad placed in many Colorado newspapers by Pacific Justice Institute, February, 2013.

The following month, in its vendetta against Nicole Maines, the Maine Christian Civic League launched a media campaign. It was an effort to rouse public ire against what they saw as a breakdown of a traditional, morality-based behavioral system that segregated girls and women from men so to protect their innocence and chastity. This is the pictorial they ran in the Bangor Daily News, borrowed from a conservative on-line news website:

Education



Maine's supreme court foists
choose-your-own-bathroom policy
on entire state

GETTY IMAGES

Plate 9: Pictorial in *Daily Caller*, 1 February, 2014. (Source: Getty images.⁹⁹)

In July, 2013 Dade County, Florida, the Christian Family Coalition along with seventeen other religious groups organized together to defeat a bill that would end discrimination against people whose gender identity differed from their natal sex. Again, they portrayed transgender people as sexually deviant pedophiles who masquerade as women in order to gain access to defenseless female bodies:

⁹⁹ *The Daily Caller*, founded in 2010, is a politically conservative American news and opinion website based in Washington, D.C.



Plate 10: Bathroom predator. (Source: Christian Family Coalition, Florida)

In August, California Governor Jerry Brown signed Assembly Bill 1266, the School Success and Opportunity Act, which ensures transgender students access to facilities and activities with respect to their gender identity into law. It was immediately and derisively labelled “the “Bathroom Bill” and became the target of political action by many socially conservative groups with close ties to the religious right.



Plate 11: Ad placed by *Pacific Justice Institute* protesting AB 1266

In October, 2014, a coalition of Minnesota groups from the religious right mustered in opposition to a policy proposed by the statewide High School Athletic League that sought to prohibit discrimination against transgender high school students and set guidelines that would allow them to participate in school sports and other activities. Their fierce opposition, again effectively playing on religious beliefs and negative stereotypes of transgender people, resulted in the policy being tabled. This ad took up the entire back page of the sports section:

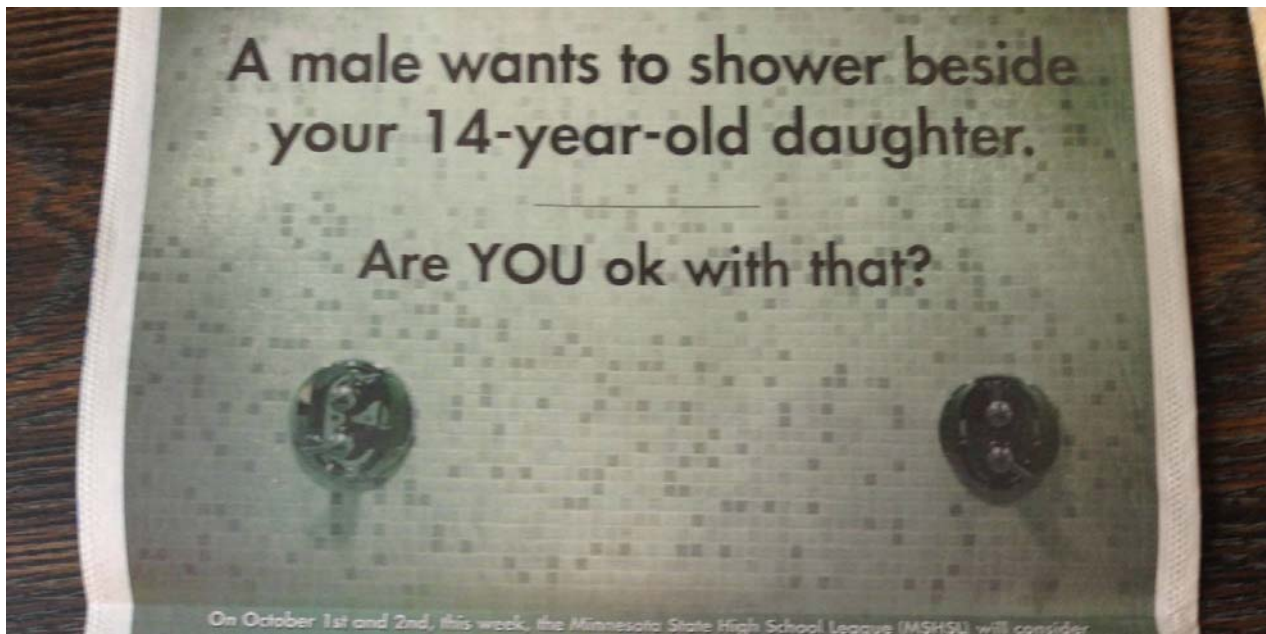


Plate 12: Portion of ad in *Minneapolis Star Tribune*, September 28, 2014.

The pictorial ads deployed by these groups all shared a common setting: the tiled bathroom. This is a space that is assumed to be sex-segregated and where “the weaker sex” can expect to find sanctity and refuge away from men. The selection of the setting was not coincidental, for the American screen had prepared the nation’s public well. No doubt the “pro-family” electorate being shocked into action by the political ads had seen Alfred Hitchcock’s *Psycho* (1960) and Brian dePalma’s *Dressed to Kill* (1980). The

climactic scenes from those blockbusters were burned in their minds. Both these thriller/horror films depicted horrendous murders of defenseless women in tiled bathrooms by deviant transvestite men.



Still from *Psycho*, 1960



Plates 13: Posters advertising *Dressed to Kill* (1980).

As noted in the preceding chapter, increasingly liberal attitudes towards identity-based notions of gender have gained acceptance across American culture in the second decade of the new millennium. Predictably, they have triggered a backlash. Social conservatives are pushing back against challenges to patriarchal sex/gender norms by preying on people's fears of rape, sexual violence and molestation. They fabricate, frame and blame the perpetrators as (heterosexual) males who would disguise themselves as women in order to gain access to female bodies who seek refuge in women-only spaces.

On Monday morning, February 22, 2016, South Dakota, Governor Dennis Daugaard was tasked with whether or not to sign into law a bill sent to his desk by the legislature that would bar transgender students— who often encounter bullying and discrimination— from using bathrooms or locker rooms that correspond with their gender identity. The bill required that every restroom, locker room, and shower room in a public school be "designated for and used only by students of the same biological sex," effectively negating the very concept of gender identity, as it defines sex as "the physical condition of being male or female as determined by a person's chromosomes and anatomy as identified at birth." However, federal officials say the bill violates federal law, specifically Title IX of the Civil Rights Act which was recently interpreted by the Department of Education to extend to transgender students.¹⁰⁰ Realizing that his signing the bill would be akin to Pandora's opening of the fabled box, Daugaard vetoed

16 Had this bill been signed into law it would have been in clear violation of Title IX — the federal civil rights law that prohibits sex discrimination— for which the U.S. Department of Education issued guidelines in 2015 that stated that its prohibition against sex-based discrimination extends to claims of discrimination based on gender identity. The Department's Office of Civil Rights determined that, "When a school elects to separate or treat students differently on the basis of sex . . . a school generally must treat transgender students consistent with their gender identity." This interpretation has since been further strengthened by a decision on April 19, 2016 by the U.S. Court of Appeals for the Fourth Circuit. In *G.G. v. Gloucester County School Board* the majority held that a Virginia school board's policy barring a transgender boy from using the boy's restrooms at his school violates Title IX's ban on discrimination on the basis of sex.

it, announcing simply that the bill did "not address any pressing issue concerning the school districts of South Dakota" (Bothelo, 2016). A record number of bills that seek to limit the permeability of the twin doors have been proposed in the first few months of 2016.¹⁰¹

On January 29, 2015, Republican Kentucky lawmaker C.B. Embry Jr. introduced a bill that he calls the "Kentucky Student Privacy Act." It would require all students to be identified by their "biological sex" which the bill states "means the physical condition of being male or female, which is determined by a person's chromosomes, and is identified at birth by a person's anatomy." The bill demands that all bathrooms and locker rooms be divided according to "biological sex;" further, schools are forbidden from accommodating transgender students by allowing them access to any facility "designated for use by students of the opposite biological sex while students of the opposite biological sex are present or could be present" (Ford, 2015). It seems unnecessary to point out that chromosomes are poor criteria for gender attribution because they are invisible and are themselves often not definitive signifiers of membership in a binary sex-gender system (Kessler & McKenna, 1978; Fausto-Sterling, 2000). Additionally, one might consider what West and Zimmerman posited: "Neither initial sex assignment (pronouncement at birth as female or male) nor the actual existence of essential criteria for that assignment (possession of a clitoris and vagina or penis and testicles) has much—if anything—to do with the identification of sex category in everyday life" (1987, 132). Further, when one imagines how the genital inspection

¹⁰¹ Of the 44 such bills filed in 2016, 23 are directed at transgender children in schools. Research has shown that allowing transgender students to access spaces consistent with their gender identity — guaranteed by laws in 17 states as well as adopted by hundreds of cities and school districts across the country — have not resulted in any problems. Conversely, forcing transgender students to use a sex-segregated facility that is contrary to their gender identity can impose real harm on transgender students.

process implied might be implemented, images that range from the ludicrous to the criminally offensive leap into the mind.

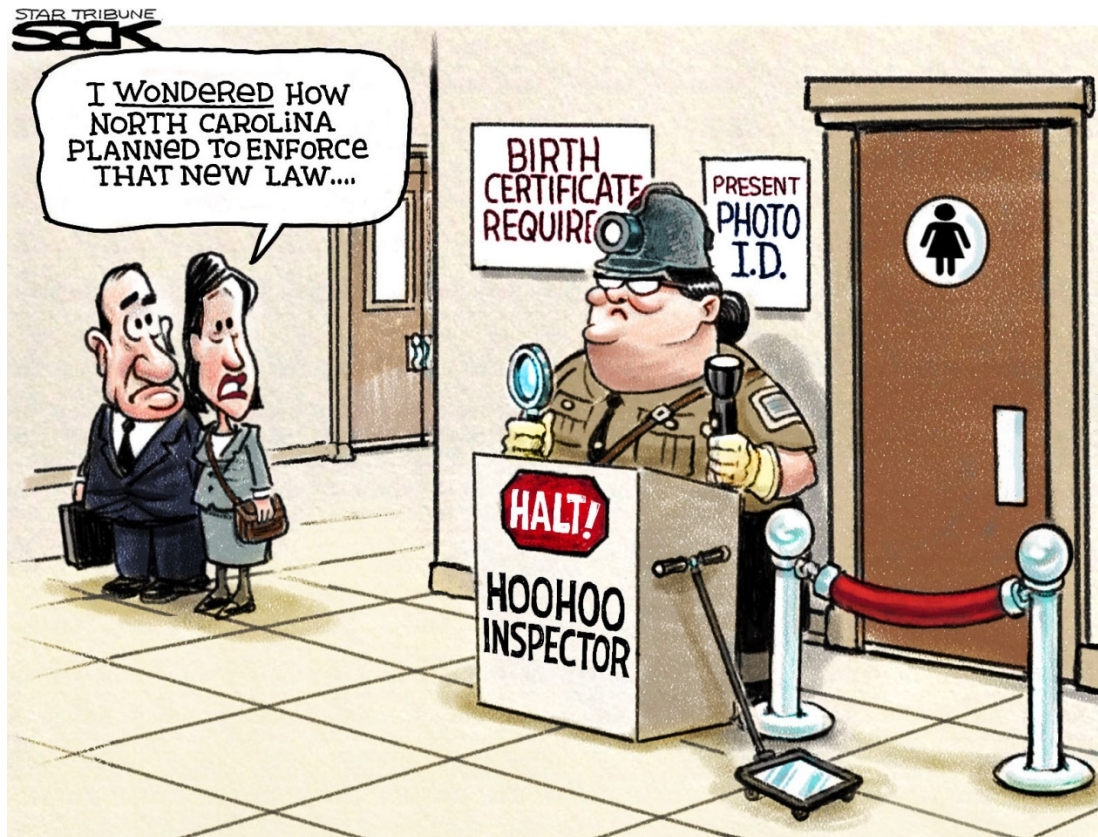


Plate 14: Cartoon by Steve Sack in the Minneapolis *Star Tribune*, March 31, 2016.

Not to be outdone and in a valiant effort to protect similarly threatened Texans, in February, 2015, Republican Representative Debbie Riddle entered two bills that would make it a crime for a transgender person to use the bathroom that corresponds to their gender identity; they must use the bathroom that matches their birth sex assignment (news.vice.com/article/texas-lawmaker-proposes-bills-that-would-force-transgender-discrimination). She proposed that if anyone over the age of seven uses a bathroom that does not match their natal genitals (certainly problematical for intersex people) they will be charged with a felony (Byknish, 2015). House Bills 1747 and 1748

would amend sections of the Texas penal and health codes to criminalize "entering a public restroom that is designated by a sign for members of the opposite sex," and propose to define gender as "the gender established at the individual's birth or... by the individual's chromosomes." A person entering the incorrect restroom would be guilty of a Class A misdemeanor, punishable by a fine of up to \$4,000 and up to one year in jail. However, any "operator, manager, superintendent, or other person with authority over a building" who allowed a person to use the incorrect restroom would be charged with a state felony, which carries a minimum 180 days in prison and a fine up to \$10,000. "I've got four granddaughters, and I'm not interested in anybody that has a question about their sexuality to be stepping in on them," said Republican Representative Dan Flynn who co-authored Riddle's bills (Walters, 2015).

One again must wonder, who will police the lady's room, and will they require clothing to be removed to inspect for the presence or absence of a penis? As Riddle's bills are inclusive of gender, if a suspect is positioned at a urinal in the men's room, is the police-person meant to ascertain that he indeed is urinating through a verifiable flesh-and-blood penis that meets definitive legal standards?

On April 17, 2015, the Pacific Justice Institute filed the "Personal Privacy Protection Act" with the California Attorney General. The proposed law would require that people use the restroom facilities signed with their "biological sex." Offenders face a minimum \$4,000 fine, plus attorney's fees if convicted. The Institute has raised the concern that teenage boys will dress as girls, claim to be transwomen, and enter the women's bathroom to watch girls; they also raise the fear that adult men will do the same, posing a threat of harassment or assault on women.

Introduced by Republican state Senator Jim Tomes in December, 2015, Indiana Senate Bill 35 demands “that facilities in school buildings must be designated for use by female students or male students, and may be used only by the students of the biological gender for which the facility is designated”. It would also criminalize transgender adults’ use of bathrooms by making it a Class A misdemeanor to use a prohibited restroom, punishable by up to a year in jail and a \$5,000 fine.

A nearly identical bill that focuses on schools has been proposed in Wisconsin for the current 2015-2016 legislative year, prohibiting “a member of the female sex from using a changing room that has been designated as the male changing room and prohibits a member of the male sex from using a changing room that has been designated as the female changing room. It also defines “sex” as the physical condition of being male or female, as determined by an individual’s chromosomes and identified at birth by that individual’s anatomy” (Wisconsin, 2015). Additionally, this bill would allow parents to sue school districts and collect monetary and other damages if they believe their child’s privacy has been violated by another student’s bathroom use.

A close reading of the language used in several of these bills reveals a shared methodology that reflects an intent to conflate gender and sex and in doing so to deny the existence of gender identity: “the gender established at the individual’s birth or the gender established by the individual’s chromosomes,” and “may be used only by the students of the biological gender for which the facility is designated” are typical. In the case of the Wisconsin bill gender is denied, with “sex” being the universal: “The pupil identifies as a member of the male sex but is a member of the female sex.”

The backlash against transgender and gender-non-conforming people not only involves proposed restrictive legislation as described above, but also many efforts to repeal non-discrimination legislation in the few places that it has been established. As reported in *The Guardian*, on February 19, 2016, “a Seattle man decided to test the city’s new restroom regulations by walking into the women’s bathroom at Evans pool. When female guests asked him to leave, he said: ‘The law has changed and I have a right to be here.’” According to the article, the movement to police gender has taken to social media— in this case a Facebook group called “Keep Locker Rooms Safe” that posted a “call to action” for its male members to occupy women’s bathrooms— in an effort to create the illusion of predatory men invading women’s-only-spaces. This effort is evidently necessary in order to provide some substance to reports spread by conservative media outlets that many men were pretending to be transgender in order to sneak into the restrooms of the opposite sex and behave inappropriately. These reports were investigated by the truth-in-media group Media Matters and found to be entirely spurious and completely fabricated.¹⁰² In a report published June 3, 2015, Media Matters found that “The collective experience of 17 U.S. school districts has shattered the right-wing myth that says prohibiting discrimination against transgender students causes confusion and inappropriate behavior. Years after implementing their own anti-discrimination policies, none of the schools have experienced any problems.”

Utilizing these statistics along with quantitative evidence that most targeted victims of sexual violence are transgender people, officials in Charlotte, North Carolina, spent more than a year carefully considering, publically debating and finally passing in

¹⁰² According to their website, “Media Matters for America is a Web-based, not-for-profit, 501(c)(3) progressive research and information center dedicated to comprehensively monitoring, analyzing, and correcting conservative misinformation in the U.S. media” (www.mediamatters.org/about)

February, 2016 an antidiscrimination ordinance that exemplified the city's culture of inclusiveness.¹⁰³ As if in retaliation, the state's Republican legislature hastily convened a special session on March 23 and repealed that ordinance— all Democratic senators walked out in protest prior to the vote— by passing a bill that bars transgender people from using public restrooms that match their gender identity.¹⁰⁴ .Republican Governor Pat McCrory signed House Bill 2, the Public Facilities Privacy and Security Act, into law the same day, saying it was necessary to undo Charlotte's ordinance which included protections for gay and transgender people. He tweeted, "Ordinance defied common sense, allowing men to use women's bathroom/locker room for instance."

The *New York Times* responded in a feature editorial three days later:

Proponents of so-called bathroom bills, which have been introduced in state legislatures across the country, have peddled them by spuriously portraying transgender women as potential rapists. That threat exists only in the imagination of bigots. Supporters of the measures have been unable to point to a single case that justifies the need to legislate where people should be allowed to use the toilet. North Carolina is the first state to pass such a provision (March 26, 2016).

As of March 25, 2016, none of the two-hundred plus localities that have enacted LGBT-inclusive nondiscrimination ordinances have seen an instance of transgender predators — or predators pretending to be transgender —entering women's restrooms with the intent of sexual assault. Such behavior is now and will continue to be a crime regardless, with or without gender identity protections.

¹⁰³ According to the National Conference of State Legislatures, similar legislation restricting access to sex-segregated facilities is currently pending in Illinois, Indiana, Kansas, Kentucky, Massachusetts, Minnesota, Missouri, Oklahoma, South Carolina, Tennessee, Washington and Wisconsin.

¹⁰⁴ HB2 further prohibits N.C. cities from passing antidiscrimination ordinances that protect gay and transgender people.

Further, the continued rhetoric “no men in women’s bathrooms” is supported by the uninformed dogma that men will masquerade as women so they may gain access to women’s bathrooms in order to sexually prey on females. “The common denominator in all of these scenarios is fear of attacks and harassment carried out by males—not fear of transgender people,” writes Harvard professor of Law Jeannie Suk. “The discomfort that some people, some sexual-assault survivors, in particular, feel at the idea of being in rest rooms with people with male sex organs, whatever their gender, is not easy to brush aside as bigotry” (2016). Adding her voice to this refrain, Denise McAllister writes in *The Federalist*, “While many transgender people pose no physical threat, the fact is sexual predators cannot be distinguished from other males because all a man has to say is “I identify as a woman” to use the bathroom. There is simply no way to weed out the true transgender person from those who aren’t. Women and girls would no longer have any protection from a man who wants to lurk in the bathroom.”¹⁰⁵ What McAllister fails to note is that there is nothing to prevent a man who desires to rape from doing so anyway.

This typical hyperbole completely ignores the fact that a rigorous process exists to certify transgender people’s claim to their gender identity. For example, the state of Pennsylvania uses criteria that are similar to most other mid-Atlantic states for those who seek to change their gender designation on their driver’s licenses or state-issued

¹⁰⁵ But, what of America’s numerous cross-dressing men who might want (or need, for their own safety) to enter women’s bathrooms? Most conservative estimates are in the range of 2% to 5% of all adult males engage in routine crossdressing (Conway, 2002). Considering our deep-seated cultural bias against men displaying any feminine appearance or behavior, most cross-dressing men do not venture out in public. We have been presented, through popular culture, instances of men doing so, such as portrayed in the movies *Tootsie* and *Mrs. Doubtfire*, where they do so in order to gain employment, but the script always has them reverting back to decidedly male norms as soon as they have achieved their goal. These caricatures are meant to be (embarrassingly) laughed at; these films serve to endorse, rather than challenge, established gender role behavior. But, some cross-dressed men do enter women’s rest rooms, and are often the culprits who are framed as examples of unwanted intrusion.

identification.¹⁰⁶ Such identification is vital to exist in America's post-911 world: one cannot get a job, open a bank account, obtain a credit, matriculate at any level of higher education, board a plane, and enter any state or federal governmental institutions without it. On Pennsylvania Department of Transportation form DL-32, "Request for Gender Change on Driver's License/ID Card," the applicant must sign a statement that they "hereby certify under penalty of law that this request for the selected gender designation to appear on my Driver's License/ID Card accurately reflects my gender identity and is not for any fraudulent or other unlawful purpose." Additionally, the form must bear the signature and license number of state-certified medical or social service professionals who have provided gender identity related care to the applicant. Similarly, as was the case with Nicole Maines, school children must also meet established guidelines demonstrating a verifiable history of treatment for gender identity in order to be (re)classified as the gender with which they identify.

The heteronormative logic that underlies proposed and approved legislation to police access to sex-segregated spaces presumes that all male bodies (that is, penises), regardless of gender identity, desire female bodies (that is, vaginas) and that many of them are willing to use deception to gain access to those bodies. These imagined sexual assaults always are sited in women-only spaces—even though women share other spaces with men daily without similar concerns. *The Guardian* reported that, "While these [imagined] acts are meant to illustrate the danger of 'men in women's restrooms', they prove the exact opposite: it's the will of the privileged and the powerful that remains a

¹⁰⁶ Pennsylvania's Department of Transportation website (www.dmv.org/pa-pennsylvania/changing-your-name), under the subtitle "Gender Change on Penn DOT Documents," states, "To change your gender on your driver's license, you will need to visit a PennDOT driver's license center in person. You will need to complete a Request for Gender Change on Driver's License/Identification Card (Form DL-32). This form must also be completed by your physician, therapist, or social worker."

grave threat.” This is my point: that the “privileged and the powerful” are the dominant group that controls America’s social and economic behavior; that they do so through the consent of the population; and when the population begins to accept and adopt cultural attitudes that are counter to those established, the dominant group will move to reestablish mores in order to preserve their power. These many cases of anti-transgender legislation reach far beyond their rampant discrimination against a target group of less than one million Americans; rather, they are meant to reestablish and reinforce the sex-gender system that consolidates power hierarchically and oppresses and subordinates a majority of the population.¹⁰⁷

Earlier in this chapter I queried, what ideology lies behind this recent push for legislation to keep public restrooms segregated by gender and policed by the state? Under the law of coverture that reigned when public bathrooms were first introduced to America in the late nineteenth century, patriarchs had legal ownership over their daughters and wives. Thus, keeping them confined to the back of the house or corseting and sheathing them in volumes of chaste clothing when (infrequently) allowing them out into the public was *de rigueur*, for sole control of and access to their bodies was guaranteed to fathers and husbands by law. Surely, we have moved well beyond these laws and the patriarchal moral ideology of that era that sought to keep women in the domestic sphere, protected, cherished and ultimately enslaved by their fathers and husbands, haven’t we? However, given the recent legislation discussed we are led to conclude that a significant portion of the nation’s population has not effectively abandoned that traditional, religiously and biologically justified mindset. In the

¹⁰⁷ According to a June, 2016 report by The Williams Institute at the University of California at Los Angeles, approximately .6% of American adults identify as transgender; given the nation’s population at the time, the United States has a total transgender population of 1.4 million people.

following chapter we will examine the economic, political and ideological evolution of America's gender hegemony, and the ways in which society, church and state have interacted reflexively to create, maintain and police the sex/gender system that we have inherited and practice today.

Wayne's Story:

People Who Fear the Unknown.

“We must not let our ignorance or misunderstanding lead us to discriminate or hurt real people”—Wayne Maines, 2016

The Maine Supreme Judicial Court reached its decision on The Great Maine Bathroom Case January 30, 2014, over seven months after arguments had been heard.¹⁰⁸ In the majority opinion, Judge J. Silver stated that Orono School District's action to prohibit Nicole Maines from accessing the girl's bathroom "constituted discrimination based on Susan's sexual orientation" because it was not predicated on some change in her status "but on others' complaints about the school's well-considered decision [to allow her such access]" (12).¹⁰⁹ This ruling left no doubt that Nicole's school had practiced unlawful sex/gender segregation against her, handing the Maines team a resounding victory. However, the remainder of the decision struggled inconclusively with debate over whether gender, or sex, was to be prioritized as the determining factor of a person's identity for admission to spaces segregated according to boy or girl, man or woman. In noting that because Maine law provided no definition of "sex," dissenting Judge Mead's opinion noted that the decision basically prevented "the denial of access to any public bathroom on the basis of a person's sex. Obviously this result is an extraordinary departure from the well-established custom that public bathrooms are typically segregated by sex" (9). His concern was reflected in Judge Silver's admission that "it can be challenging for a school to strike the appropriate balance between maintaining order and ensuring that a transgender student's individual rights are respected and protected" (6). He went on to point out that "we do not suggest that any person could demand access to any school facility or program based solely on a self-declaration of gender identity or confusion. Our opinion must not be read to require

¹⁰⁸ Maine Supreme Judicial Court, *John Doe et al. v. Regional School Unit 26*. 2014 ME 11, Pen-12-582. Argued: June 12, 2013; Decided: January 30, 2014.

¹⁰⁹ The Maine Human Rights Act of 2005 prohibits discrimination against people on the basis of sexual orientation, defined by L.D. 1196 as "a person's actual or perceived heterosexuality, bisexuality, homosexuality or gender identity or expression."

schools to permit students casual access to any bathroom of their choice” (13). In Nicole’s case the school “determined that Susan should use the girls’ bathroom...based upon its determination that Susan is a girl in keeping with the information provided to the school by Susan’s family, her therapists, and experts in the field of transgender children” (12). Clearly, she had followed established protocol that determined and certified her status as a girl. However, Silver’s statement reveals the soft underbelly of the transgender phenomenon that is often the focal point of those that seek to attack and deny the legitimacy of gender identity.

Most opposition expressed in response to those who claim or express a gender identity which differs from their natal sex revolves around the instability of the situation. The question raised is, what expert or what set of standards are used to verify and ground in reality a claim of gender identity? Gender attribution and assignment are considered by those who scrutinize and regulate it far too important a signifier of power and privilege to be allowed to be put on or taken off like a piece of clothing. The *Antioch Review* recently published an academic’s argument against unregulated self-determination of gender. Daniel Harris argues that,

The ‘social construct’ theory of gender dematerializes the body...and provides a kind of instantaneous, out-patient sex reassignment surgery performed not by a “genital reconfiguration specialist” with a few sharp incisions of a scalpel but by a gender studies adjunct with an onslaught of paper cuts from his copy of *On Grammatology*, for why does anyone need to submit to the knife if one can change one’s gender simply by exploiting the malleability of reality itself? The brave face with which postmodernists confront both empirical reality and their colleagues in the sciences is one of the great farces of contemporary academia. (2016).

Harris lays the blame for the rising social acceptance of (self-declared) transgender people completely on prioritizing the word and concept “gender,” arguing that it is inextricably linked to and should not be separated from biological sex. His argument constitutes the common refrain in most efforts to deny basic civil rights to transgender people and to block efforts to end discrimination against them. Harris claims that “gender” is a post-modern theory that has no connection to the empirical world of science—and yet we have examined earlier in these pages how gender, as we define the word and use the concept now, was created by scientists and medical men. Harris insists on the materiality of sex: for him, gender must be embodied to be given the legitimacy of “sex.” He is deeply troubled by the idea that sex and gender are being demonstrated as mutable: in this technological age, a person can change both.

The overarching problem that Harris wrestles with is what the effect upon gender and sex based hierarchies of power might be when an autonomous individual can willingly— or willfully— switch from one to the other? Given that the categories “man” and “woman” are freighted with so much weight and authority, he feels their defining boundaries must be demarcated and policed so that no confusion or rupturing can occur—or they become unstable and meaningless. Regulation of gender is thus critically important to the stability of the state and cannot be allowed to be tampered with by the individual. And, because gender continues its legacy of being inextricably linked to biological sex, doctors, psychologists and legal scholars manipulate the discourse that regulates the two categories.

The Maine Supreme Judicial Court agreed with the decision by “the school district, [Nicole’s] family and counselors that... [Nicole] is a girl” (12). The contention

arose, Judge Silver wrote, not over whether Nicole was a girl, but because she was a singled out as a *transgender* girl. While this analysis is helpful and it allowed Nicole and other transgender people who have passed various legal litmus tests to access many sex-segregated spaces, it really just kicks the debate down the road to be dealt with at a later time. Indeed, this is the very reason for Judge Mead’s dissent. In stating “it falls to the Legislature to reconcile the plain language of the MHRA as it is currently written and interpreted by the Court with society’s longstanding expectation of having multiple-user bathrooms segregated by sex,” he argues—and warns of the consequences—that the debate over the legal primacy between sex and gender needs to be settled by legislation (18). In sum, Mead pleads for legislators to agree on a clear definition of “sex” if it is to be used as a segregatory instrument. Yet at the same time he cautions against the danger with too hastily choosing an essentialist definition, stating “I repeat that the right of transgendered individuals to access public accommodations consistent with their gender identity must be protected” (19). Mead seems here to admit the mutually contradictory dilemma he is faced with—realizing that, in asking to allow Nicole to “have her cake and eat it, too” at the same time he urges legislators to clearly define the categories “man” and “woman,” he has failed to serve either divergent paradox.

When Nicole’s apparent transgression of gender/sex regulations triggered a policing response she was emotionally hurt. Wayne Maines was yanked rudely out of his traditional paternal role in life when, as he stated, “the Christian Right attacked our babies” (2013). He promised then “to fight back and speak out” and, despite the affirming victory won for Nicole in the Maine Supreme Judicial Court, he has not backed off his campaign for the rights of transgender people—and especially

transgender children. Long before Melanson and the Maine Christian Civic League targeted his daughter, Wayne was struggling with the issues that would frame his resolve to seek justice. His basic understanding of gender and sex were turned upside down by the reality that one of his twin boys expressed the identity and behavior of a girl around the age of three. Wayne's social and cultural notions of gender underwent a thorough metamorphosis over the ensuing years, opening his mind to a much more accepting and supporting attitude of people's behaviors and beliefs—and the idea that gender and sex were not immutable. As he has evolved into the most prominent pro-transgender child activist in America over the past five years, he has become a sought after writer—he is a regular in *Time* magazine and the *Huffington Post*—and speaker. His message has not varied over time, with two words always repeated, mantra-like, in every one of his written pieces and speeches: *fight* and *fear*.

Fight, of course, is Wayne's traditional masculine response to those who threaten his daughter, his family and his convictions. Because he is a kind, educated and reasonable man he fights fairly—with words of love and persuasion, rather than words of denial and denigration. He does not attack other people's beliefs; rather, he asks them to open their minds and hearts. Such you would expect from a man who holds a doctorate in education, and whose profession is centered on ensuring other people's safety.¹¹⁰ He fights through the multitudes of speaking appearances he makes and articles he churns out. Instead of fighting against those that attacked his babies (and by extension all innocent transgender people), Wayne fights for them to face their fears.

¹¹⁰ Dr. Wayne Maines is Director of Safety and Environmental management at the University of Maine, Orono.

“I am on a mission to help people who fear the unknown,” Wayne Maines wrote in his email to me two months before the Maine State Supreme Court rendered its decision on Nicole’s appeal. Two months after that triumphant decision he penned an article where he expressed that “I am still very worried about the trend in our nation. The trend of listening to a fearful few who are often reacting to groundless fears before exploring the truth is not healthy or productive” (March, 2014). I asked Wayne what he thought they feared. “Change,” he replied, “they are afraid of change. We live in a society that forces us to conform, and yet the norm changes every day” (January 2016). Wayne has expressed, to me in conversation and in his articles and talks, that homophobia and transphobia are the direct results of this fear of social change.¹¹¹ For him it is that reducible: he saw his daughter and family suffer from it firsthand, brought on them by “a homophobe, a simple guy who wanted to be a champion” for standing up against change (ibid). I asked him what he would say to such people. “I want to look them in the eye, I want to ask them, ‘Tell me what it is that you are afraid of,’” Wayne replied. Wayne sees himself battling “against good Americans who cannot or will not try to conquer their fears,” saying that the same fears kept him from accepting that his son was in fact his daughter. “With time,” he acknowledged, “I gained the courage and strength to change. It required a strong loving heart and an open mind, and with new knowledge I mustered the courage to admit I was wrong and discard my fears” (June, 2016). Kessler and McKenna suggest that knowledge “is now grounded in the everyday social construction of a world of two genders where gender attribution (deciding whether someone is male or female)...is what concerns those who fear change” (1987, 157).

¹¹¹ Homophobia is the irrational fear of, aversion to, or discrimination against homosexuality or homosexuals; transphobia, accordingly, is the irrational fear of, aversion to, or discrimination against transgender or transsexual people (Merriam Webster).

Clearly, the (in)stability of America's traditional two-sex/gender system is a matter of critical concern to many. What is the feared, unfavorable destiny that such change might lead to?

One of those "good Americans" that Wayne Maines refers to who is quite resistant to change is a William and Mary College student named Mitch Hall. In a July, 2016 *National Review* article, Hall angrily denounced those who "recognize as legitimate the absurd notion that the subjective self-perceptions of 'gender identity' are equal to immutable characteristics like race and sex in the context of both society and the law. If we agree to give the state the authority to impose this new understanding of men and women, then we also agree to give the state the power to re-define humanity itself." Arguing that what he and many social conservatives call the "Transgender Agenda" is a creation of the progressive left with deep Marxist roots, Hall says, "The question we should be asking ourselves when we consider the bathroom battles [is] whether we're ready to endorse the Left's radical new standard for what it means to be a man or a woman—and the tragic rejection of both freedom and reality that inevitably comes with it. These are not the words of a simple man looking for notoriety. They are fighting words expressed by an educated person who is afraid that America's traditional culture and associated political ideology is gravely threatened by the change Wayne endorses—and as embodied by his daughter Nicole.

Wayne Maines shies away from identifying as a feminist. In trying to shift my conversation with him about the transgender phenomenon to that which I argue is its parent movement, I asked him how he related to the movement to attain political, social and economic equality for women. "I guess I have always been for gender justice," he

told me in May, 2016, adding that he feels “women should be treated fairly.” Though he admits that “I just did not know all of the ways women were not equal,” he says, “I would not call myself a feminist.” Wayne is not in a minority with distancing himself from that term and cause. Feminists have, as the vernacular expression goes, gotten a bad rap in America ever since the Reagan years. As Susan Faludi historicizes in her book *Backlash* (1991), the denigration of the movement and the cause has almost entirely been the result of patriarchal, social conservative smearing—of the type that Mitch Hall expounds. Quite simply, it has been yet another confrontation in the ongoing contest over the hierarchical gender-based power structure. What Wayne and most American citizens miss seeing because of the smoke rising from the many current identitarian culture battles (such as that over HB 2 in North Carolina in mid-2016) is that the practice of sex segregation—ostensibly in the service of erstwhile, time-proven moral traditions of protecting and sanctifying the “fairer, weaker sex”—only serves to perpetuate the subordination of women and other marginalized groups. “While we are busy fighting about the basic right to use a restroom, bigger issues are being ignored,” Wayne recently expressed with deep concern. “I’m worried about transgender people not having access to the right medical care, that they can be fired in many states for just being transgender. I want to fight for the things that will allow transgender people to enjoy life, to grow old, thrive and be happy - and that includes the right to use the toilet without fear” (Maines, April 2016). America’s small number of transgender people is but the tip of a monstrous iceberg. With just over one percent of the population identifying as transgender, their struggle to use restrooms is, as Wayne argues, causing us to ignore or at least obfuscate larger issues.¹¹² The submerged part of the iceberg consists of one-

¹¹² Not all transgender people struggle, as many have abided by legal regulations so that they qualify as

half the world's population who are women and who continue to suffer the effects of patriarchal social traditions and political practices.

Wayne is troubled by the discrimination suffered by certain groups of people in our nation and he feels a calling to end it. "Over the past seven years my family has asked our state and national leaders to guarantee equality for every American no matter their race, religion, sexual orientation or gender identity," Wayne earnestly stated in *Time* magazine earlier this year (2016). Sadly, there is no ratified Equal Rights Amendment today; were there, Wayne could be pardoned for his omission—or substitution—of "gender identity" for the larger, still unprotected category "gender." He is not unlike most good American men—fathers, brothers, and sons—who believe, with good faith and the extensive privilege that being born male grants, that vulnerable females deserve to be treated well, protected, and have equal opportunity to succeed in our liberal democracy. Wayne wrote about how he learned to define his masculinity from his father, who advised him to "Be a man, walk tall, and show no fear." He told of how until challenged by finding out his son was a transgender girl that he "was confident that these core beliefs made me the type of man who could help my family strive and prosper. I would later learn that there was a great deal of room for improvement" (ibid).

members of the gender with which they identify, and, perhaps more critical to everyday existence, many pass as the gender in which they present and identify.



Plate 15: Wayne and Nicole Maines (Source: *Argus Leader*, 2016).

Wayne Maines is completely honest when he declares, with a strained, hurt face, that he doesn't understand how people can possibly fear his young daughter Nicole or feel she is a threat and a danger. And of course, she actually is neither—because she is fully complying with all our cultural hegemonic norms and regulatory criteria for “being” a girl. The fact remains that the animosity his daughter has faced is because she dared challenge the rigid, established and polarized gender system, because she dared enter through a door marked “Girls” while, hidden under her dress, was her penis. Therein lies the unfinished debate: while her gender was certified as “girl,” her body was physically sexed as “male.” Nicole Maines’ long court case saw her ultimately victorious in gaining the right to use the girl’s bathroom, yet the judges who ruled in her favor were left struggling with the problem of how sex related to gender—and especially which of

the two would prevail in a legal contest. Because society and the law have a reflexive relationship, United States jurisprudence has long sided with physical sex—visually verifiable—as the primary categorical determinant. And because, as Nicole’s father surmised, “society forces us to conform,” all measures were taken to insure that Nicole fit neatly within the norms for a young woman. She was one of the first of her generation to take advantage of newly available puberty-blocking medication around age thirteen, to begin a hormone feminization regimen at age sixteen, and to undergo male-to-female genital reconfiguration surgery at age eighteen. Because Nicole has complied so obediently with the State’s requirements, she has hopefully earned and been granted a reprieve for her earlier malfeasance. To some extent, though, she will forever be tainted because of her childhood act of revealing the mutability of gender *and* sex.

Chapter 4

Gender, Church and State

“The ancient Greek assumption that natural differences justify political inequalities nevertheless manages to insinuate itself into the writings of all Enlightenment theorists as well as the constitutions of all the modern democracies in the world.” –Sandra Bem, 1993

“A culture that worships a victorious male God is a patriarchal culture. The Old Testament concept of God deifies sexism by giving religious authenticity to a sociopolitical system.” –John Phillips, 1984

“In the United States religion guides morality and, by regulating family life, it helps regulate the state. It reigns supreme in the souls of women, and women shape morality.” –Alexis de Tocqueville, 1840

“The laws, civil and social, each equally burdensome, are of church origin, and not until the church is destroyed shall women be freed.” –Matilda Joselyn Gage, 1890

This dissertation was prompted in response to the problem posed by Wayne Maines' campaign to fight against the fear he claims many American's have of transgender people. That question is, what are these people afraid of—and what is their fear based upon? While the facile response is “penises in women’s bathrooms,” historical research reveals that the loathing of those who dare challenge the border that divides “man” and “woman” is generated by the tradition and practice of gender segregation and its embeddedness in our political dogma. This chapter examines how the regulation and segregation of gender has historically been an integral part of America’s democratic ideology and political system. We begin in the ante-bellum period by understanding how Alexis de Tocqueville and Catherine Beecher framed women’s submissive role as vital to the success of America’s liberal democracy, and the significant influence they believed women’s relationship with religion had upon it. Moving to the end of the nineteenth century we explore Matilda Joselyn Gage’s rejection of the “Cult of Separate Spheres” and her denunciation of the ways in which church and state collaborated to subjugate and oppress women. Noting how and why Gage held up the matriarchal, egalitarian societies of Native Americans as the ideal our nation should aspire to, we examine the oppositional approaches to and practices of property ownership and concepts of wealth and power held by them and the Euro-Americans who displaced them. We follow with close readings from Gage’s son-in-law L. Frank Baum’s *Wizard of Oz* books, seeing how he made her vision of a matriarchate provocatively palatable to young American readers and subtly revealed the critical role gender-crossers perform in balancing gender and power. The chapter closes by recognizing the gender-crosser, the transsexual and the shamanic gender-journeyer as figures that constantly mediate between the male/female

divide, blurring its borders and rendering essentialist-based arguments for power privilege groundless and moot.

In the preceding chapter we came to understand how sex- segregated bathrooms in the United States of America have historically served to produce, regulate and police cultural norms. When first constructed and operated in the nineteenth century they only admitted “Gentlemen,” thereby excluding people of color, those from the lower working classes and all women. Then, the young nation’s liberal democracy was just one hundred years old and the ideal, average citizen was white, male, and the propertied head of a family. When French political intellectual Alexis de Tocqueville toured the United States in 1831 he was especially struck by how the apparently willing subjugation of women to men apparently served to uphold the nation’s praxis of liberal democracy. In his highly influential book *Democracy in America* he observed that “In no country has such constant care been taken, as in America, to trace two clearly distinct lines of notions for the two sexes” (2009, 150). Tocqueville was convinced that the flourishing and survival of democracy depended on a gendered division of labor that required the strictest compliance to traditional sex roles. He believed this was accomplished by relegating the American woman exclusively to the domestic sphere, where she willingly and proudly served her husband, sacrificing her individual self-fulfillment for the well-being of her children. The family unit, Tocqueville posited, while serving an essential moral function in a democracy *because* of its difference from public life, was also embedded within society and politics as perhaps its most essential building block (Jannara, 2001). He admired women’s willing self-abnegation for the sake of the family, which he said “was the most important reason for the singular prosperity and growing power of Americans”

(152). Her role of prioritizing the family also worked as a tempering factor against unbridled individualism, which Tocqueville felt was the natural inclination of all men. He believed that excessive individualism led ultimately to democratic despotism, observing “No vice of the human heart is more supportive of despotism than egotism” (137). Such an undesirable situation was enabled by men who egotistically pursued only their own private interests to the neglect of their responsible involvement in civic duty. Strict codes of morality served to steer men into voluntary association with others, and as he noted, “women shape morality.” For Tocqueville, American democracy’s ideology of equality did not include or even suggest equality between the two genders, for that would only contribute to a loss of the structures that ordered and gave meaning to the system. Rather, he saw America depending on gender relations that privileged men as a means of ordering and stabilizing democracy.

One of Tocqueville’s most ardent contemporary readers was Catherine Beecher. Daughter of the prominent abolitionist Lyman Beecher and sister to Harriet Beecher Stowe, author of *Uncle Tom’s Cabin*, Beecher was an avid proponent of the doctrine of separate spheres, advocating that woman’s place was in the domestic sphere of the home in the role of wife and mother, while man’s was the public sphere of business and politics. The categories of the two distinctly separate public and private spheres are foundational and essential to the political theory of liberalism. In capitalist economies, the discourse surrounding the two categories operate rhetorically through making them seem like the only way to organize and perceive American social life. The liberal view holds that cultural and political matters of the individual and the family—including gender, race, and class—are relegated to the private sphere, while economic matters are

located in the site of the public sphere, which in its most collective form is the State (Duggan, 2003, 4). The economy and civil society occupy a mixed site which depends on collaboration between the two spheres, though in reality public and private spheres have a much more complex relationship and bearing with one another than their rhetorical separation posits. In her influential *The Twilight of Equality*, Lisa Duggan argues that it is just this obscurity that permits gross inequalities of opportunity to exist—for they are almost always based on differences and inequalities of gender, race, class and sexuality and are hidden away in the private sphere rather than being acknowledged as economic issues. While the State can and does regulate the private sphere through law, liberal thought holds the economy apart from and seemingly out of reach of the spheres.

For Catherine Beecher, the doctrine of separate spheres was the clear solution to what she felt was one of the young republics most vexing social issues: how to justify the subordination of one gender to the other in the midst of an ideology that promoted popular democracy and equal rights. In her 1845 magnum opus, *A Treatise on Domestic Economy*, she wrote,

In this Country, it is established, both by opinion and by practice, that woman has an equal interest in all social and civil concerns; and that no domestic, civil, or political, institution, is right, which sacrifices her interest to promote that of the other sex. But in order to secure her the more firmly in all these privileges, it is decided, that, in the domestic relation, she take a subordinate station, and that, in civil and political concerns, her interests be intrusted to the other sex, without her taking any part in voting, or in making and administering laws (27).

Feeling their participation to be vital for the maintenance of democracy in America, Beecher exhorted all women to accept their submissive role in the domestic sphere. In

the agitated ante-bellum America of the 1840s she believed the removal from competition in the public sphere of half the country's populace and their willing submission to men would be an act of unification. Beecher believed American society should only be divided by gender—not by race, class or region (Sklar, 1973, 156)

Beecher advocated for precisely what Tocqueville observed and commented on: a nationwide social hegemony which would preserve and promote the delicate balance of democracy in America. They were certain such a consensus was predicated on the family unit, which both believed was held together through both strict adherence to the conventions of the hierarchical gender binary and also the regular practice of communal religious association. "Religion," Tocqueville wrote, "guides morality and, by regulating family life, it helps regulate the state" (2009, 85). The family is embedded in the larger social state; as a stand-alone domestic institution it is enmeshed with and reflects the higher political order (Janara, 2001, 554; Elshtain, 1981, 130). This relationship between family, church and state has been held central to the liberal, democratic ideology of American culture through the ensuing 175 years post Tocqueville, though it has been continually threatened by social justice movements. Perhaps its greatest threat is feminism, which embraces a theory of justice and liberal equality that calls on women to abandon her submissive role and to cease to sacrifice for family and husband—but many might consider this as a theory of justice that could ultimately destroy the family. As did Tocqueville and Beecher in antebellum America, social conservatives and the religious right of today ardently believe that a family that fully embraces feminist notions of liberal equality and justice is a family that will cease to be. Because gender justice promises so much to women and so little to the family and less to men, an

ideology that calls on women to sacrifice for children and patriarchs has long relied upon traditional religious and social conventions for survival.

One of those conventions is the ruse of chivalry—which promises that in return for her willing subservience to man, woman will be cherished and protected by him. In 1837 Tocqueville commented on his observation that, “In their daily behavior, [men] attest to her virtue and delicacy, and they have a high regard for women’s moral freedom” (151). He noted that no crime was pursued with greater zeal than rape, “because Americans feel that nothing is more precious than a women’s honor, and no punishment is too harsh for those who would rob her of it.” In his effort to paint America’s liberalism in glowing colors, Tocqueville glossed over the fact that the convention of coverture that classified women as the property of their fathers or husbands was the law of the land. Seen through that widened lens, rape was essentially a crime against another man’s property. When the skin of the socially constructed notion of chivalry is peeled away, the blatant oppression of women is laid bare. Susan Brownmiller addresses this predicament in her 1984 book, *Against Our Will*. “Female fear of an open season of rape, and not a natural inclination toward monogamy, motherhood or love, was probably the single causative factor in the original subjugation of woman by man,” she offered, concluding “it was thus that the bargain was struck” (16). Brownmiller reduced the act and institution of rape to be “nothing more or less than a conscious process of intimidation by which all men keep all women in a state of fear” (15). Rape has been normalized in American culture to the extent that the popular trope of the caveman dragging a woman by her hair raises no eyebrows—it was children’s fare when I grew up and may still be. Rape constantly serves as part of the

process of imposing and regulating cultural norms on our society. Rape upholds hegemonic heteronormativity by reminding all women of the constant sexual threat posed to them by all men. Similarly, the threat of rape is employed to argue for and justify the existence of sex-segregated spaces such as restrooms and locker rooms: they are seen by some as places of refuge where women can be sheltered safely apart from men (Schilt and Westbrook, 2009, 2013).

From the seventeenth through the mid-nineteenth centuries almost all notions of feminism (the term did not exist then) were negated by women's role as mandated by the doctrine of separate spheres.¹¹³ "Nineteenth century...woman, in the cult of True Womanhood...was the hostage of the home," wrote Barbara Welter in her essay "The Cult of True Womanhood, 1820-1860" (43). Concerning herself with the lot of middle-to-upper class white women, Welter's essay further constructs and defines the Cult of Domesticity of which Catherine Beecher was the era's spokesperson. According to Welter the "True Woman" had four attributes, or cardinal virtues: piety, purity, submissiveness and domesticity. Other than what was associated with religion, the "True Woman" should eschew education, says Welter. "The marriage night was the single great event in a woman's life, when she bestowed her greatest treasure upon her husband, and from that time on she was completely dependent upon him, an empty vessel [this plucked from Aristotle's writings], without legal or emotional existence of her own" (46). Continuing, she states, "Submission was perhaps the most feminine virtue expected of women. Man was woman's superior by God's appointment" (50). The "True Woman" was, short of being saleable chattel, in nearly the same state of bondage

¹¹³ Feminism was first used in an English newspaper in 1895 to refer to "advocacy of women's rights;" from French *féminisme* (c. 1837).

as the enslaved Black person. Kept uneducated, at home and in thrall to a man who legally owned her, what choice did the “True Woman” have but to create a mythic structure within which to piously perch? It began to dawn on women like Beecher who took up the cause of abolition that their gender, like most black Americans, did enjoy the promised “liberty and justice for all.” While in apparent violation of her domestic boundaries, women’s involvement campaigning for abolition (and later, temperance) outside the home was tolerated because it fell within the jurisdiction of her role doing righteous deeds in service of moral causes (Ginzberg, 1990; Cott, 1997).

While Catherine Beecher advocated for the True Woman, Matilda Joselyn Gage, 26 years her junior, personified the New Woman.¹¹⁴ Gage did not attend the 1848 Seneca Falls Women’s Rights Convention, but she helped write the book on it. One of the leaders of America’s first wave of feminism, Gage founded the Woman Suffrage Association along with Susan B. Anthony and Elizabeth Cady Stanton and with them co-edited the first three volumes of *The History of Woman Suffrage* (1881-1887). Her own magnum opus *Women, Church and State* was published in 1893 and is arguably the most underappreciated and critically important work in early American feminist writing—yet it is out of print today. Thought too radical by many suffragists because of its attacks on the Church, the book and its author were effectively erased from the women’s movement (Brammer, 2003, Wagner 2011).¹¹⁵ Looking at the Cult of

¹¹⁴ The term “New Woman” was first used by writer Sarah Grand in an article published in the North American Review titled “The New Aspect of the Woman Question” (1894) and thereafter popularized by author Henry James. As an oppositional rebuttal of the “True Woman” who adhered to the Cult of Domesticity, the New Woman exercised control over her life in personal, social, and economic matters and pushed back against the limits which society imposed on women.

¹¹⁵ Matilda Joselyn Gage, and to a lesser extent Elizabeth Cady Stanton, were excluded from the women’s suffrage movement because their fierce advocacy for women’s equal rights—which included outright attacks on institutional, organized religion and the law—too directly challenged the patriarchal norm. Susan B. Anthony offered men a more palatable version, asking only for the right to vote. Most men of the

Domesticity through a feminist lens, Gage's view of the relationship between women and the Christian Church was radically opposite that of Beecher. While Beecher, supporting Tocqueville's patriarchal version of liberal democracy, believed that a woman's duty was to serve Church and husband, Gage was vehemently opposed to this submissive role for women and blamed the Church for woman's subordinate and oppressed status in America.

Gage, born in upstate New York in 1826, was an Americanist with a fierce sense of equality and justice. She regularly cited the superior position of women in the egalitarian societies of many of America's indigenous tribes. "The division of power between the sexes in this Indian republic was nearly equal," Gage wrote. "Never was justice more perfect, never civilization higher" (87). Her extensive knowledge of the Haudenosaunee (Iroquois) people was published in a series of articles in the *Saturday Evening Post* in 1875, and she was so highly regarded by those she wrote about that she was adopted into the Wolf Clan of the Mohawk tribe in 1897 (Wagner, 2001). Gage writes about the Iroquois nation as a perfect example of a matriarchal society in the opening pages of *Woman, Church and State*:

Women had acquired great liberty under the old civilizations. A form of society existed at an early age known as the Matriarchate or Mother-rule. Under the Matriarchate, except as son and inferior, man was not recognized in either of these great institutions, family, state or church. A father and husband as such, had no place either in the social, political or religious scheme; woman was ruler in each. Priority of the mother touched not alone the family, but controlled the state and indicated the form of religion. The tribe was united through the mother;

time assumed their wives, if they did bother to vote, would follow their lead and thus the political system would suffer no change. Stanton only recently regained her place in history through the efforts of feminist scholars, while more radical Gage seems to remain in the shadowy margins.

social, political and religious life were all in harmony with the idea of woman as the first and highest power (2011, 2).

Having clearly established that matriarchal societies had flourished in many cultures across the globe and most recently in America, Gage notes that the egalitarian society Native Americans enjoyed was ended by the sword of Christian settlers in their successful effort to establish a patriarchal state in America.

The balance of *Woman, Church and State's* remaining nine chapters historiographically recount well-cited details of how the church (Gage writes broadly of the Abrahamic faith path and specifically of the Christian church) has oppressed women throughout Western and American history. She argues that Christianity, working from its foundational tenet that woman (Eve) was to blame for The Fall and all the misfortune that has since befallen the human race, is a misogynistic patriarchal institution that supplanted matriarchal, Goddess-centered religions.¹¹⁶ Gage has been joined by many other scholars in this argument. Sandra Bem writes, "In the ancient Greek tradition, just as in the Judeo-Christian tradition, the first woman on earth [Pandora] was thus responsible for the fall of humanity from a state of paradise" (1993, 49). Judaism was established between the seventeenth and fifth century BCE, followed by Christianity between the first and fourth; both religions replaced goddess figures with a single, male god and defined woman as the unclean, failed "other." These faith paths were responsible for "the genesis of two of the guiding symbols of Western male dominance—the patriarchal, decidedly masculine God and the sexual, inferior female who tempts the

¹¹⁶ In Judeo-Christian mythology/theology, The Fall occurred when Eve first ate of the fruit of the tree of knowledge of good and evil in the Garden of Eden, and then persuaded Adam to taste of it. God punished them by driving them out of the Garden of Eden and into the world where they would be subject to sickness, pain and death. Thus, the fall of humankind from a state of grace is blamed on the first woman.

male from the path of righteousness” (Sanday, 1981). Eve and The Fall are thus seen as religious myths constructed to justify the subordinate, shameful and guilt-plagued position of woman in secular Western society. “The story of Eve is at the heart of the concept of Woman in Western civilization,” writes religious scholar J.A. Phillips. “She is a living part of the cultural and social histories of the people touched by her characterization. To follow the path of Eve is to discover much about the identity that has been imposed upon women by Western civilization. If one would understand Woman, one must come to terms with Eve” (1984, 2). Writing a century earlier, Gage summarized the effects of the doctrine of original sin and woman as the original sinner, stating that the “most sacred mysteries of religion...exerted a most powerful and repressing influence upon woman, fastening upon her a bondage which the civilization of the nineteenth century has not been able to cast off” (82). Gage was in complete accord with Phillips. “The most grievous wrong ever inflicted upon woman has been in the Christian teaching that she was not created equal with men, and the consequent denial of her rightful place in Church and State,” she declared in her book’s opening paragraph (1). She was particularly concerned with how the Church effectively blurred the line between canonical and civil or common law and shaped the State’s policies towards women such that they were subordinate to men and deprived of legal and property rights. Arguing that Church and State work together in collusion to maintain the dominant patriarchal social order in America, Gage called for the separation of the two so that an egalitarian society—like that of the Haudenosaunee—which recognized gender parity and respected the civil liberties and dignity of all its peoples could re-emerge.

Both Gage and Lafitau wrote of their observations that, among the Iroquois, the distribution of material property tended largely towards women and accounted for their high social standing. “[Iroquois] women exercised controlling power in peace and war ... no sale of lands was valid without [their] consent” wrote Gage, and the family unit “demonstrated woman’s superiority in power ... in the home, the wife was absolute ... if the Iroquois husband and wife separated, the wife took with her all the property she had brought ... the children also accompanied the mother, whose right to them was recognized as supreme.”

Gage was not the first American woman to notice and comment on Native American women’s power and property ownership status. The *Narrative of the Captivity and Restoration of Mrs. Mary Rowlandson* documents the author’s wonder at the material possessions and authority Indian women held. At sunrise on February 10, 1675 a band of Native American warriors swarmed over the Rowlandson homestead in Lancaster, Massachusetts and set about burning and killing everything before them. Mary and her three children were taken captive and held for ransom, the ensuing saga of which she related in her narrative. Rowlandson, who came to America with about 20,000 mostly Puritan English during the Great Migration of the early-to- mid-17th century, lived on the edge of the western frontier in 1675. The Massachusetts Bay Colony’s charter of 1627 (which, like the Jamestown settlement, originated in a stock company endorsed by King James 1) was granted all lands between the Merrimack River to the North, the Charles River to the South, the Atlantic Ocean to the East and the “South sea on the west parte”- the Pacific Ocean. King James and the entrepreneurs ignored one salient fact: the land they claimed had been inhabited for many thousands

of years. The indigenes that swooped out of the woods that cold morning and destroyed Rowlandson's settlement did so to reclaim their lands from the English settlers who had encroached upon them. When they had first allowed the settlers to occupy and use the land they did so believing the newcomers would behave as their indigenous culture did, sharing the good of the land and taking no more than needed for subsistence. The English had no such concept; for them, the right to occupy and use the land was tantamount to the right of permanent possession of it.

Rowlandson wrote of meeting and receiving kind and considerate treatment during her captivity from the Wampanoag sachem Metacom and his sister in law Weetamoo. Metacom, called King Philip by the English, was the leader of a confederacy of Indian tribes who carried out a campaign to drive the English from their lands.¹¹⁷ King Philip's War is considered by many today to be America's most devastating conflict, with over twenty percent of the colonist's male population killed and a far greater number of Indians lost. A long, albeit uneasy, truce had existed between the Indians and the colonists for decades prior to the eruption of hostilities, during which the indigenes allowed the settlers to use their land in a sharing relationship. The issue that led to war was a practice rooted in ideology: the English concept of private property—of owning land and claiming its exclusive possession through enclosure—clashed directly with the Indian concept of themselves as stewards of the land who shared collective use rights amongst each other. The Indian population was small and mobile at the time the settlers arrived, and their use and abuse (through burning, clearing and hunting) of the land had little lasting environmental impact; the lands had

¹¹⁷ Metacom was the son of Massasoit, the Indian sachem whose generosity saved the *Mayflower* Pilgrims at Plymouth when they were on the brink of starvation.

time to rest and recover through the mobile culture's practice of their version of crop and herd management. This meshed with the Indians spiritual cooperation with the land and the plants and animals they subsisted on. The colonists, however, brought their methods of enclosure, agriculture and town building with them from their world. Laying claim to large areas of land which they fenced and farmed, the Anglo newcomers excluded further Indian usage or occupancy.

For the English colonists (and more so, the stock company shareholders that underwrote the colonies) the ideology of property ownership was critically tied to the concept of wealth: land, when improved, was capable of producing marketable commodities which were able to be traded at a profit. The accumulation of wealth was possible when people were able to produce more than they consumed. Seventeenth century political philosopher John Locke argued it was money- or capital- that allowed people to accumulate wealth beyond the limits of the spoilage of commodities. "It was capital," explains historian William Cronon in *Changes in the Land: Indians, Colonists and the Ecology of New England*, which provides "the ability to store wealth in the expectation that one could increase its quantity that set European societies apart from precolonial Indian ones" (Cronon, 1983, 78). The Indians, of course, wasted no time in trading the commodities at their disposal for the technological goods the settlers had: corn, deer hides and beaver pelts were exchanged for copper pots and pans, iron knives and arrow tips, guns and gunpowder.

However eager the Indians were to enter the market in search of these technological goods, the concept of accumulating large quantities of material goods (thus, wealth) was foreign to their mobile culture. What good would the possession of

more items than one could easily carry from seasonal hunting, growing and gathering sites possibly be? Cronon relates that there was little social status attached to the accumulation of goods because Indian class authority grew out of interpersonal relationships and alliances; material wealth was not considered a reflection of one's worth. While many Native American tribes regularly moved their villages from habitat to habitat in search of maximum abundance through investing minimal work, Cronon notes that "the English believed in and required permanent settlements" (53). Anglo-Americans knew no other way of life, for the population density of their tired homeland required strict parceling of land. Property ownership, then, was the parting point between the two cultures. Indians felt they owned only the commodities they took from the land by the investment of their own labor, such as meat, hides and maize, but not the land itself, to which they gave thanks for its beneficence. They believed that their direct personal involvement gave them the right of possession; before they grew the maize or killed the animal, they had no such claim on the free ranging beast or the soil and water that produced the plant. This, in essence, is what Locke and English law argue: that man owns that with which he mixes his labor. "The labour that was mine, removing them out of that common state they were in, hath fixed my Property in them," wrote Locke about 1680. The concept of "improvement" lay behind the English claim to land: by enclosing, plowing and grazing the land, one might claim right of ownership of it. Though the Indian women planted and harvested their maize, squash and beans with seasonal regularity, they practiced what we consider good ecological stewardship practices today by continually moving their planting locations so as not to exhaust the soil. To the English, accustomed to rigidly defined plots, this practice seemed to reveal

the abandonment of any claim to the land that would have been solidified through practicing continuous improvement upon it.

A critical 1823 Supreme Court decision provided the legal justification for taking America's land from its indigenous inhabitants.¹¹⁸ In *Johnson v. M'Intosh*, Chief Justice John Marshall laid out the tenets of the "Doctrine of Discovery," which held that title to land lay with the government whose subjects discovered and occupied a territory whose inhabitants were not subjects of a European Christian monarch. Much of Marshall's decision reads as a lengthy discussion of America's history: its discovery and colonizing by England, France and Spain, the transfer of title to land as conflicts and treaties between those powers transpired and the attitude towards and treatment of the indigenous Indians. Marshall's words are concise as to the settler's claim to ownership of land:

The British government, which was then our government and whose rights have passed to the United States, asserted title to all the lands occupied by Indians within the chartered limits of the British colonies. It asserted also a limited sovereignty over them and the exclusive right of extinguishing the title which occupancy gave to them. These claims have been maintained and established as far west as the River Mississippi by the sword. The title by conquest is acquired and maintained by force. The conqueror prescribes its limits. (Johnson V. M'Intosh, 1823, 588)

Marshall echoes Locke with the ideology of "improving" the land: "But the tribes of Indians inhabiting this country were fierce savages whose occupation was war and

¹¹⁸ *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823) was a landmark U.S. Supreme Court decision which ruled that U.S. citizens could not purchase land from American Indians. In reaching this opinion, it effectively invalidated any right of the indigenous American peoples to ownership of the land they had occupied.

whose subsistence was drawn chiefly from the forest. To leave them in possession of their country was to leave the country a wilderness” (590). In arguing that American Indians did not practice agricultural land improvement and accordingly had no right to claim ownership of the land they dwelt upon, Marshall also implies the denial of property ownership rights for the indigenous women who actually performed the farming labor.

Marshall next references King Philip’s War, noting that the settlers faced the “perpetual hazard of being massacred” by the Indians and their only option was to enforce their claims to ownership “by the sword.” His opinion describes the 1675-78 conflict:

Frequent and bloody wars, in which the whites were not always the aggressors, unavoidably ensued. European policy, numbers, and skill prevailed. As the white population advanced, that of the Indians necessarily receded. The country in the immediate neighborhood of agriculturists became unfit for them. The game fled into thicker and more unbroken forests, and the Indians followed. The soil to which the Crown originally claimed title, being no longer occupied by its ancient inhabitants, was parceled out according to the will of the sovereign power and taken possession of by persons who claimed immediately from the Crown or immediately through its grantees or deputies (590).

Marshall’s historical summary of how Anglo settlers seized ownership of the land through superior force is profound—especially when one realizes that all succeeding legal title to land in the United States of America springs from this appropriation. Moreover, the forceful theft of America’s land from the indigenes by the settlers also marks the passage of “ownership” of land and real property—i.e., homes—from women to men.

The oppositional ideologies of property ownership between the English settlers and the Indians were reflected in the structures of their gender relationships. The settlers applied the patriarchal dominion mandate equally to their treatment of land and women.¹¹⁹ Common to both King James who granted the charters giving title to the new lands in America and to religious groups such as the Puritans who sought refuge from persecution, patriarchy held that the superiority of the male over the female was a divine God-given fact, that the husband had absolute authority over his wife and the father over his children. The patriarch controlled all his labor and property including his and other men's sexual access to his wife, daughters and dependent female laborers. He was submissive only to the Crown and to God and he maintained his power by exercising dominion over the bodies of all under his control. In England and its colonies social, familial and political order all depended on the subordination of women, whose purpose was to serve men and bear their heirs.

Mary Rowlandson commented how different than her own was the lot of women in the group of Indians that held her as captive. They had autonomy, owned property and shared equal power with the men, often making critical decisions about when and where the tribe should travel in their efforts to escape the English soldiers pursuing them. Rowlandson was particularly impressed by the power and authority exercised by the princess Weetamoo, whom she described as "A severe and proud dame she was, bestowing every day in dressing herself neat as much time as any of the gentry of the land." Cronon writes about the well-defined sexual division of labor among these Indians, noting that what distinguished the work roles was physical strength and work

¹¹⁹ From the Biblical passage in Genesis that gives man dominion over all things: "Be fruitful and multiply; fill the earth and subdue it; have dominion over the fish of the sea, over the birds of the air, and over every living thing that moves on the earth."

that was “most compatible with simultaneous child care” (1991, 44). As did Lafitau and Gage, he notes that women’s work was highly valued; in fact, he argues that for Indians practicing agriculture in southern New England, women were more important than men in providing food, “contributing as much as three-fourths of the family’s total subsistence needs” (ibid). Cronon points out that wigwams—the largest item of material personal property—were owned by women as were all household goods like gardening tools and cooking utensils, and it was women who usually decided when and where to move their campsites. In sum, the distribution of property in accordance with its status as the fruits of one’s labor favored women in most indigenous American societies.

The key to the Indians’ egalitarian society and their fluid view of gender lay in their relationship with the land, which provided for all their needs. While the supreme power of the sword was as highly acknowledged by them as it was by the English, the concept of an absolute gender hierarchy predicated by force of might was foreign to them. Though American Indians clearly employed a sex-based division of labor, they did not necessarily allow that to transfer to a gender hierarchy. This was because every member of their society equally contributed their labor, because everyone owned that which they produced, and because none subscribed to an ideology that valued accumulated material wealth. Rather, the opposite occurred: in their mobile society that followed the changing rhythms and faces of nature, gender was even and also considered quite mutable and adaptable as situation and need dictated. As noted previously in Chapter 2, most Native American tribes allowed for and many embraced movement across and between genders, acknowledging that gender and biological sex were not always aligned. Often third gender people were regarded as gifted beings, even

elevated to shamanic status and called upon to adjudicate contentious issues—especially those involving disputes between differently gendered persons (Dollarhide, 2008; Lang, 1997, 1998; Roscoe, 1998).

The first book to describe a white American undergoing a gender change was published in 1904; appropriately, it was written by Matilda Joselyn Gage's son-in-law. While it was fictional and written as a children's fairy tale, L. Frank Baum's *The Land of Oz (A Sequel to The Wizard of Oz)* was a provocative social and political statement that seemed to fly just under the radar of full censorship. While it, and the first Oz volume that launched the 12-book series four years earlier, followed Baum's rather benign *Father Goose, His Book*—the top-selling children's book in 1899—the author knew all too well what he set out to accomplish.¹²⁰ In the Introduction to *The Wonderful Wizard of Oz* (1900), Baum declares that he is offering a modern version of the fairy tale that dispenses with teaching moral virtues through stories abundant with “horrible and blood-curdling...disagreeable incident;” rather, he states that the story of Oz “was written solely to pleasure children of today” (xix). *The Wonderful Wizard of Oz* certainly did that: becoming a runaway best-seller, the book sold about 90,000 copies in its first two years. It especially delighted young girls; in the Author's Note to *The Land of Oz*, Baum promised “one little girl...that when a thousand little girls had written me a thousand little letters asking for another story of the Scarecrow and the Tin Woodman, I would write the book” (1904). Unlike traditional fairy tales where fair maidens or princesses in distress wait to be rescued by a handsome prince or some other capable

¹²⁰ *Father Goose, His Book* (1899) illustrated by William Denslow (who partnered for all the Oz books), was Baum's second children's book. His first, written at his mother-in-law Gage's urging—who told him that he'd be a fool if he did not write down the tales he told his children at bedtime—was *Mother Goose in Prose*, published in 1897 and illustrated by Maxfield Parrish.

man, in the Oz books Dorothy and other girl protagonists not only solve their own problems, but also help protect the men they have befriended.

Like the first Oz book, the second told of a land where witches—both good and bad—were abundant, where men were, to a person, exposed as humbugs and emasculated to some great degree and where women ruled. These portrayals did not completely escape notice, and they drew some ire. Soon after *The Wonderful Wizard of Oz's* publication libraries across the nation banned it, critics calling its fantasy stories unhealthy for young children and many religious leaders attacked it because it told of good witches (Fussell, 2014). Alison Lurie writes, “For years [the Oz books] did not appear on lists of recommended juvenile literature, and in the 1930s and 1940s they were actually removed from many schools and libraries. As a child [during that period] I had to save my allowance to buy the Oz books, because the local public library refused to carry them” (2000).¹²¹ In the 1950s the series was attacked for depicting the Land of Oz as a communist state, and the 1960s saw many librarians shunning them, calling the books sensational, poorly written and unwholesome. Lurie, in searching for the cause of such backlash against the Oz series, argues that “It seems more likely that in the dark years between the first and the second waves of American feminism, critics recognized the subversive power of Baum’s creation” (2000).¹²² Clearly, the Oz books are all

¹²¹ Lurie (born 1926) is Professor Emerita of American Literature at Cornell. Author of many fiction and non-fiction books, she won the 1984 Pulitzer Prize for her political satire novel *Foreign Affairs*.

¹²² The first wave of feminism, begun with the Women’s Rights Convention at Seneca Falls, NY in 1848 and continuing up to the passage of the 19th amendment to the U.S. Constitution that granted women the right to vote, was largely concerned with legal rights (property and contract) and suffrage. The second wave began coincidentally with the availability of oral contraceptives for women (“The Pill”) and the publishing of Betty Friedan’s *The Feminine Mystique* in 1963. Concerned with gender inequality and discrimination against women, it was a push back against androcentric, patriarchal cultural norms that privileged men and allowed domestic violence and rape to subjugate women. The second wave dissipated with the backlash against feminism—exemplified by the fight to defeat the Equal Rights Amendment (ERA)—brought by the Reagan years in the 1980s.

feminist manifestos. Baum flipped America's established Western gender hierarchy on its head in the Land of Oz. The fictional realm *is* the matriarchate that Gage describes in the first chapter of her major work—it is the vast land of America, peopled sparsely by various tribes where women provide the political and spiritual leadership and where all coexist in a loose confederacy. No organized religions are evident to mandate moral order in the land; rather, witches both good and bad and the Princess Ozma, ruler of all Oz, negotiate a just and equal life for all inhabitants that is based on meritocracy and a simple code of ethics. Gage's notions of democratic socialism (no doubt derived from her extensive research on matriarchal societies) also permeate Baum's descriptions of Oz, where outside the opulent palaces of Good Witch Glinda and Princess Ozma equality reigns. There is no money and hence no capitalistic bent in Oz; instead, food, goods and services are willingly shared with no one going in need. Oz is a Jeffersonian agricultural economy, with no trace of industrialization—the few machines are fantastic contraptions conjured up by Glinda or Ozma.

Baum no doubt modelled Dorothy, the girl protagonist in *The Wonderful Wizard of Oz* and many of the subsequent sequels, after his wife Maud and her mother Matilda Gage: like them, she is a New Woman. Dorothy is much more a Victorian hero than a Victorian heroine, for she is brave, active, independent, sensible, and willing to confront authority (Lurie, 2000). While like most fairy tales the Oz books tell of allegorical journeys, they particularly focus on series of confrontations where justice and equality are the sought after outcomes. Often facing demanding contests that require her to face her fears and struggle for her goals, Dorothy does so courageously and always with good intent. When, in the first book, Dorothy arrives at the Emerald City of Oz, she seeks an

audience with the “Great Wizard” who rules it, in spite of being warned that he “is powerful and terrible” and, easily angered, is quick to destroy all who trouble him (Baum, 2006, 92). Though quite frightened by his visage and threatening voice, Dorothy nonetheless musters courage and requests him to return her to her home in Kansas. The Wizard considers, then says he’ll help her only if she kills one of his enemies—a powerful witch. After managing to do so, inadvertently and quite easily, Dorothy rescues her three male companions from plights that have befallen them and returns to the Wizard to collect her promised trip home.

Once again awed by his fearsome magnitude, Dorothy and her companions tremble in fear of the mighty Wizard. When he wavers and implies that he might default on his word, Dorothy’s companion the lion roars in anger. Terrified at the noise, Dorothy’s dog Toto leaps away in fright, knocking down a screen that has been hiding a little old bald man. He quickly confesses that while he is the Wizard and supreme ruler of all Oz, he is an imposter who admits that he has fooled his subjects for so long, he never thought he’d be found out. Dorothy is furious and demands that “the great and terrible humbug” make good on his promise and return her to Kansas. He attempts to do so, making his own escape from Oz at the same time for fear of his fate when his subjects find he has deceived them, but just as the balloon in which they are travelling takes flight, Dorothy is left behind chasing after her dog.¹²³ In the absent humbug’s stead, Dorothy’s companion the Scarecrow becomes the ruler of the Emerald City. The City’s inhabitants seem pleased, noting “there is not another city in all the world that is ruled by a stuffed man.” Here the narrator—Baum—continues his denigration of men,

¹²³ The balloon was hand sewn by Dorothy, who once again asserted her mastery of her, and others, fate.

suggesting that after being ruled by a weak fraud, a stuffed effigy was a perfectly acceptable replacement.

The sequel to *The Wonderful Wizard of Oz* narrates the story of how Oz was restored to the status of a benevolent matriarchate (and which it remained, under female rule, for the subsequent sixteen volumes of the series). First, though, there is a bit of a junta wherein the male ruler is deposed forcefully. General Jinjur, who commands the Army of Revolt—which is “composed entirely of girls...from all parts of the Land of Oz”—wrests control of the throne of Oz from His Majesty the Scarecrow “because the Emerald City has been ruled by men long enough” (1904, 80). When she is questioned prior to the invasion whether many of her forces will likely be slain, she replies, “Oh, no. What man would oppose a girl, or dare to harm her? And there is not an ugly face in my entire army” (81). And so the Capitol city of Oz was “captured without a drop of blood being spilled... [because] the Royal Army of Oz was too much afraid of women to meet the onslaught” (86). The victors quickly upended the patriarchal culture, and soon “men were sweeping and dusting and washing dishes, while the women sat around in groups, gossiping and laughing” (164). A sad looking man comments that “since women have been running things to suit themselves...doing housework and minding the children is wearing out the strength of every man in the Emerald City.” Asked, “If it is such hard work as you say, how did the women manage it so easily?” the man replied, “I really do not know. Perhaps the women are made of cast iron” (165). Here Baum may well have been drawing on a popular Currier and Ives lithograph of the time that was published as part of a series that satirized the women’s rights movement. It portrayed a scene identical to Jinjur’s post-revolutionary Oz:

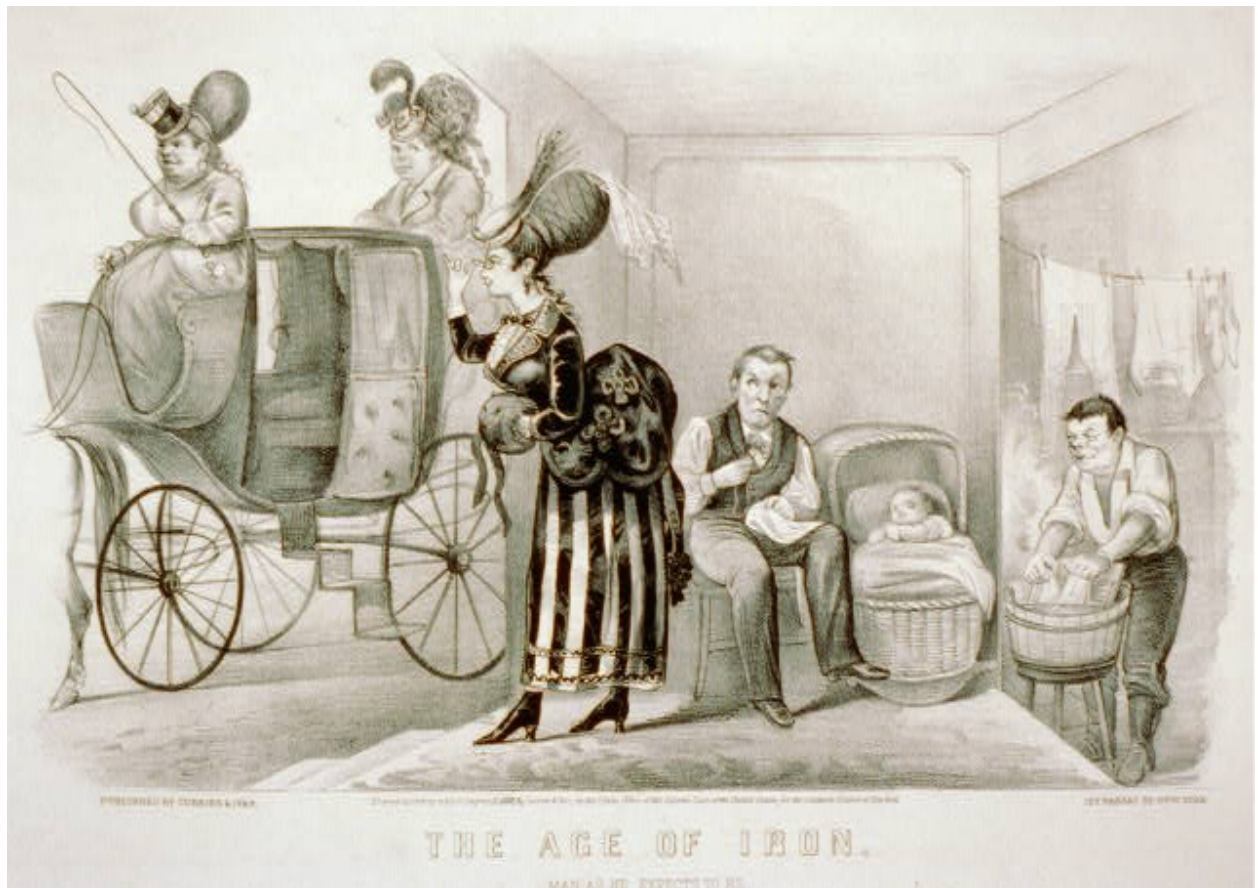


Plate 16: *The Age of Iron: Man as He Expects to be* (Source: Currier & Ives, Library of Congress, 1869).

While there is no doubt that Baum was enjoying a bit of satire, this episodic commentary on gender roles and women's right to and manner of ruling needs to be taken in conjunction with the entire book, and for that matter, the entire series. In an article in the *American Quarterly*, Henry Littlefield claims, "The second book in the series, *The Marvelous Land of Oz*, is a blatant satire on feminism and the suffragette movement" (1964). No doubt plagued with the same anxiety at the launching of the second wave of feminism in 1964 as were the publishers of the Currier & Ives print shown above in the height of the first wave in 1869, Littlefield's reading is highly biased. Rather, writes Michael Patrick Hearn in *The Annotated Wizard of Oz*, "*The Wizard of*

Oz is now almost universally acknowledged to be the earliest truly feminist American children's book" (2000, 13). General Jinjur's successful, bloodless revolution was used by Baum as a convenient device that destabilized the patriarchal society of the Emerald City and prepared it for the coming restoration of a socially democratic matriarchy. But Baum's tour de force, his greatest, most subversive commentary on gender and power is yet to come: the rightful ruler must bridge both genders in a magical, transcendent way.

When approached by the deposed Scarecrow with a request for help to be reinstalled as ruler, the good witch Glinda (Queen of the South Country of Oz) reveals that the throne was stolen by the Wizard from its rightful heir, Princess Ozma. Noting that Jinjur has as much right to the throne as did the Scarecrow and the Wizard, as all claimed it through forceful acquisition or other unrightful means, Glinda is instead intent upon re-instating Ozma as Queen and ruler. She learns that Ozma was somehow sequestered away "in some secret place" in Oz by the Wizard, and she sets out on the task of finding the princess (Baum, 1904, 235). Amazingly, she has been present all along. From the first sentence of the book, and now standing in Glinda's entourage as they search her whereabouts, the "youth called Tip...as strong and rugged as a boy may be" is discovered to be the girl Ozma—transformed, transsexed, transgendered. No surgeries were performed to accomplish Ozma/Tip's gender change, for in 1904 they were as much a fantasy to medical men as they were to Baum; rather than a surgeon's scalpel, it was a witch's wand that rendered the baby girl into a baby boy. In order for the Wizard to claim the throne, the princess had to be removed. What better, more bloodless way to disqualify her from rule than to change her gender? Read thus, one cannot help but notice the similarity to the long practice of surgeries on intersex infants:

the doctor (Wizard) decides what gender/sex the baby will be, and that is what its parents are given, with most such children oblivious to the fact of their altered/determined reality.

Inasmuch as he was given no say in his earlier gender transformation that was decided by adults who held him in their power, Tip is not given any choice in his coming reconstruction as a girl. It is a *fait accompli*: he must undergo GRS and transition, because he—but only as *she*—is the rightful ruler and is therefore compelled, by and for the state, to do his duty. Tip’s predicament remains a familiar situation today, with gender (think “cultural genitals” as discussed in Chapter One) determining subjecthood. Noah Ben-Asher writes in the *Harvard Law Review* that “the shape of genitals often determines legal sex, and this, in many cases, makes sex change necessary for legal recognition. Courts generally will not recognize a transgender person’s chosen sex or gender without the undergoing of sex change surgery, and preoperative transgender individuals are sometimes precluded from legal name change as well” (2006)¹²⁴. Reinterpret “courts” above to mean that of the throne of Oz, and the identity of Tip to a twenty-first century transgender person is made. Essentially their predicaments are identical: access to a sex-segregated space or position is granted only upon compliance with established socio-juridical standards. Nicole Maines, too young to be forced—or even allowed—to undergo the sex/gender-change surgery that would have removed any barrier to her access to the girls bathroom, like a true Oz hero/ine challenged the standards that denied her what she was convinced was rightfully fair and just. For Tip, though, sex-change was a necessity and was unavoidable, irrespective of his own

¹²⁴ Consider the Islamic Republic of Iran, where, in 2016, if a homosexual man agrees to undergo state-provided GRS he/she is accepted as a healthy, privileged female citizen—but, should they refuse they are put to death because homosexual practices are illegal.

feelings: the laws would not bend. Baum, of whom our understanding by now leads us to expect of him, refused to allow such a seemingly unjust demand to go unchallenged.

When told by Glinda that he was born a girl and also a Princess, and that he must assume “[his] proper form, that [he] may become Queen of the Emerald City, Tip protests mightily. “I want to stay a boy,’ exclaimed Tip. ‘I don’t want to be a girl!’”(266).

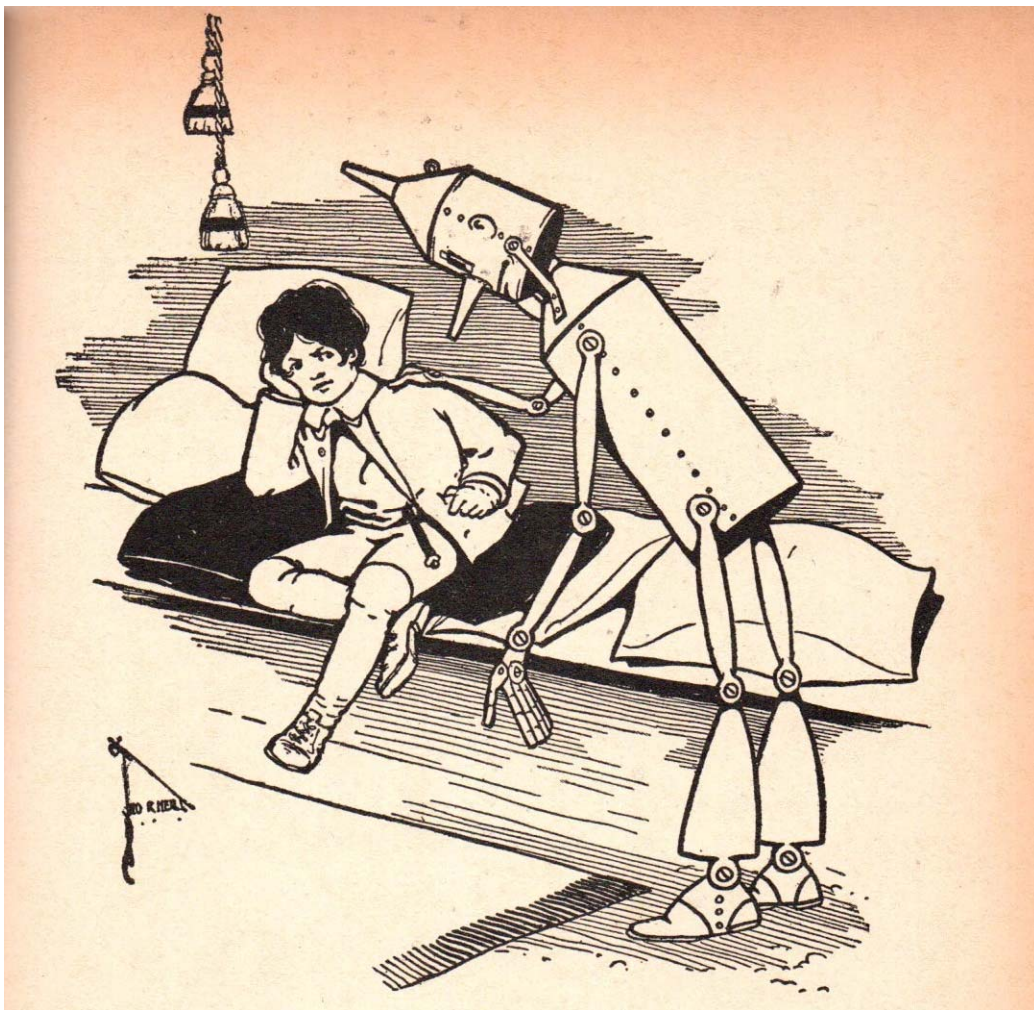


Plate 17: “Never mind, old chap,” said the Tin Woodman, soothingly. “It don’t hurt to be a girl, I’m told”
(Illustration by Wm. Denslow from *The Land of Oz*, Rand McNally & Sons, 1904).

Baum, of course, could not anticipate the arguments transsexuals of the twentieth century employed to persuade psychologists and psychiatrists (the “gate-keepers”) to grant them access to sexual reassignment surgery. Yet his uncanny understanding of the predicament, though reversed, is eerily similar. I say reversed because while Tip does not want to change gender/sex and argues with his counselors against such a procedure, the modern transsexual desires the change and seeks to persuade his counselors to grant it. As Hausman notes in her critique of transsexual autobiographies, the transsexual acted as their own advocate to enlist the support of a psychologist who in turn engaged a surgeon to carry out the gender/sex-change operation (1995). In Tip’s case Glinda is the official who explains to him the necessity of the procedure, the Tin Woodman is the mental health counselor who tries to assuage his apprehension and the old witch Mombi, enlisted by Glinda, is the surgeon who carries out the operation. Tip is despondent after being told by Glinda that he must undergo SRS. When he, seated on a counselor’s lounge, exclaims his antipathy towards changing sex/gender, the Tin Woodman touches his shoulder sympathetically. “‘Never mind, old chap,’ said the Tin Woodman soothingly; ‘it don’t hurt to be a girl, I’m told; and we will all remain your faithful friends just the same. And, to be honest with you, I’ve always considered girls nicer than boys’” (266). When Glinda, Mombi and Tip have successfully negotiated the surgical procedure and assured payment arrangements, “preparations for the event were at once made.”

Baum’s description is reminiscent of a modern surgical procedure. “The first act of the witch was to make the boy drink a potion which quickly sent him into a deep sleep. Then [the attendants] bore him gently to the couch, placed him on the soft

cushions, and drew the gossamer hangings to shut him safely from view” (268).

Anesthetized and recumbent, the witch performed her procedure upon the youth.

Afterward, when the patient was fully awakened, Glinda walked to the bedside, bent over the cushions, reached out her hand,

...and from the couch arose the form of a young girl, fresh and beautiful as a May morning. The girl cast one look into Glinda’s bright face, which glowed with pleasure and satisfaction, and then turned upon the others. Speaking the words with sweet diffidence, she said: ‘I hope none of you will care less for me than you did before. I’m just the same Tip, you know; —only—only—[I’m] different!’(270).

Here Baum senses and acknowledges the pervasive fear of loss that people who change sex/gender endure, and deems it important that they be accepted and supported—especially those who have forsaken privileged manhood for subordinate womanhood. Fortunately for Tip/ Ozma, she is beautiful, loved and well provided for.

So, too, is Nicole Maines. Though separated by one hundred ten years, both these girls are perfect poster children to hold up as fine examples of how gender-crossers might be invaluable negotiants and moderators in America’s gender-dichotomous culture. However, we must quietly admit that their youth and graceful beauty masks their subversive potential; that is, after all, a masked accomplishment/the requirement of an ideal poster child. If they are found to be operative agents in undoing the authority of a system or established institution, their opponents must not be able to easily or successfully label them as perverts rather than subverts.¹²⁵ When challenging gendered

¹²⁵ Consider the slightly older version selected to be the face that would strike down DOMA: Edie Windsor, everyone’s favorite grandmother, claiming to be a lesbian (but whose partner wasn’t alive to make them visible to the public as a hand-holding, sex-performing couple), successful, main stream and oh so polite. The U.S. Supreme Court couldn’t deny her appeal—and did not, ruling in her favor (United States v. Windsor, 570 U.S. (2013) Docket No. 12-307).

systems of power, public opinion is quickly turned against the subversive when “pervert” is applied to that person or group as a noun (as opposed to its use as a verb to describe their action). In such an event, rather than being regarded as someone attempting to change or upend an established practice or set of institutionalized practices, they are instead viewed with derision and framed as degenerate, sexually deviant predators.

Given that Gage’s writings on Native Americans do not reveal any discussion of the third-gender tradition, it is unlikely that Baum, who was so heavily influenced by his mother-in-law, modelled the gender crossing of Tip/Ozma on such anthropological research. Rather, his fertile imagination, solution-oriented approach and sense of justice likely led him to understand why a transsexual/transgender girl was the ideal entity to disrupt androcentric gender hierarchies, bridge differences between the two genders and harmonize and make possible a matriarchal society. Baum’s outlook was certainly shaped by what he saw Matilda Gage endure: the acid reception of her exhaustively researched and documented book, her relentless fight for woman’s rights on the merits of the movement and her forays into the courts to seek justice (Rogers, 2002; Brammer, 2001; Wagner, 2009). It is also likely her ardent encouragement for him to write the Mother Goose tales no doubt led him to choose children’s literature as a very effective means of effecting change, greater in its potential than his previous and numerous newspaper editorials. Gage pointed to the future, too, saying “in the next generation the line of thought...that recognizes...women’s inherent right to share in all the opportunities of life...will be stronger” (329). The flights of fantasy Baum penned for that next generation of America’s women and men opened their minds to the possibilities of an egalitarian world, one where women ruled and men were required to

change their sex to gain full privilege. That he hoped for a world—an America—approximating his mother-in-law's beloved matriarchate is without doubt. Sadly, she died two years before he created it in the pages of Oz.

Matilda Joselyn Gage closed *Woman, Church and State* with the prophetic words,

In no other country has the conflict between natural and revealed rights been as pronounced as in the United States; and in the country where the conflict first began, we shall see its full and final development. During the ages, no rebellion has been of like importance with that of woman against the tyranny of church and state; none has had its far reaching effects. We note its beginning; its end will overthrow every existing form of these institutions; its end will be a regenerated world. (2011, 330)

Such was the world of Oz. Baum, father of four sons with Gage's daughter, clearly needed to mediate the role and function of men in such a matriarchal state. It seems remarkable that he did not discover how Native American third-gender traditions negotiated the occupational, sexual and power differences between men and women, but perhaps his sad resignation to the complete erasure of the American Indian culture led him to seek a creative solution.¹²⁶ The transgendering of Tip provided a revolutionary recapitulation of the sex/gender power dichotomy that even transcended the mundane.

¹²⁶ Baum has been excoriated by many who claim he advocated genocide against American Indians (and who struggle to reconcile that with his message of love and sharing as expressed in his many children's books). They cite this statement from an 1890 editorial he wrote in the *Aberdeen Pioneer* as proof, arguing it contributed to the massacre of Lakota Indians at nearby Wounded Knee that same year: "The *Pioneer* has before declared that our only safety depends upon the total extermination of the Indians. Having wronged them for centuries we had better, in order to protect our civilization, follow it up with one more wrong and wipe these untamed and untamable creatures from the face of the earth." Given Baum's tendencies to use Juvenalian satire as a literary device—General Jinjur's Army of Revolution is an example where he similarly comments on feminism—these words clearly reveal his expression of bitter and caustic disregard for the prevailing attitude of whites and the U.S. Government towards American Indians.

While some might argue—as they have with General Jinjur’s Army of Revolution in *The Land of Oz*—that Baum was satirizing the eventuality of such a process, their analysis might be tainted by androcentric prejudice. As Gage presaged in her closing statement, Jinjur’s army overthrew the patriarchal state that was installed in the Emerald City, paving the way for Ozma to fulfill her prophetic dream of a “regenerated world.” The transformation of Tip resolved the conflict between “natural and revealed” rights that Gage spoke of and warred against, without which accomplishment gender justice could not be attained. Such mediation between the material, physical body and the gendered psyche that gender-crossing people manifest troubles and destabilizes gender/sex hierarchies; therein lies the danger they pose to those who fear them. Baum clearly saw the gender-crosser, the transsexual, the shamanic gender-journeyer as a figure that constantly mediated between the male/female divide, blurring its borders and rendering essentialist-based arguments for power privilege groundless and moot. Embracing this and then considering the vital connection—nay, reliance—that Tocqueville and Beecher made between the family and religion and the stability of the American democratic state, it is understandable how those like Mitch Hall rail against the “transgender agenda.” Wayne Maines is correct in his assumption that they fear change, and it is unlikely that holding his pretty daughter forth, gesturing at her and saying, “how do you think she threatens you?” will ease their concerns.

There is no church in Oz. There is no religion there, at all. The absence of both disturbed many people when the books were published and continues to do so today.¹²⁷

¹²⁷ Baum has been attacked for being anti-Christian and a “Free Thinker” since he began writing. In 1892 Baum and his wife became members of the Theosophical Society, an organization based on occult research and the comparative study of religions. A Society journal opined, “Although readers have not looked at his fairy tales for their Theosophical content, it is significant that Baum became a famous writer of children’s books after he came into contact with Theosophy. Theosophical ideas permeate his work and

Baum, like Gage, saw the elimination of institutionalized religion as a prerequisite to a “regenerated world,” and longed for the day it would come to pass. In an *1890 Aberdeen Sunday Pioneer* article Baum wrote,

The age of faith is sinking slowly into the past; we have a new unfaith...and an eager longing to penetrate the secrets of Nature—an aspiration for knowledge we have been taught is forbidden. As our country progresses, our population increases, the number of churchgoers is gradually growing less. Then people are beginning to think [that] studying science...is the enemy of the church. Science we know to be true. (Leach, 1993, 147).

While the diminishment of the church has taken longer than Baum wished for, the trend continues. An extensive 2015 Pew Research survey of more than 35,000 U.S. adults found that “the percentages who say they believe in God, pray daily and regularly go to church or other religious services all have declined in recent years” (Pew, 2015).

However, the same survey found that those who are religiously affiliated have grown more devout and observant in recent years, becoming more entrenched in their faith.

But, as indicated by such milestones as the 2015 Pennsylvania court case that rebuked advocates of creationism in favor of science, the church’s pervasive influence on

America’s culture is lessening.¹²⁸ Baum’s Oz tales are classical allegories that are at once both entertaining and vehicles of spiritual messages. As such, Baum anticipated and hoped to aid America’s abandonment of Christian dogma. The Oz stories no doubt

provided inspiration for it. Indeed, *The Wizard* can be regarded as Theosophical allegory, pervaded by Theosophical ideas from beginning to end. The story came to Baum as an inspiration, and he accepted it with a certain awe as a gift from outside, or perhaps from deep within, himself” (American Theosophist no 74, 1986).

¹²⁸ In the Federal Court case *Kitzmiller v. Dover Area School District*, Judge John Jones (who ten years later wrote the opinion overturning the ban on same-sex marriage in Pennsylvania) found the “Teaching intelligent design in public school biology classes violates the Establishment Clause of the First Amendment to the Constitution of the United States (and Article I, Section 3, of the Pennsylvania State Constitution) because intelligent design is not science and “cannot uncouple itself from its creationist, and thus religious, antecedents.”

contributed to the decline of traditional religion—and they offered possibilities of a new form of spirituality. Abundant scholarship exists which explores this subject; my interest lies in Baum’s treatment of the triad of gender, feminism and spirituality, and his deployment of the gender-crosser as a device that bridges the three and offers resolution and unity.

“Science is the new great storyteller,” writes Harvard-based neuroscientist and intellectual Gilles Herrada. “Scientific theories are replacing the old religious myths in their fundamental function of providing explanation for all the mysteries human beings are confronted with—where we come from, where we are heading to, and...who we are” (2013, xxv). The mysteries that Herrada writes of are central to everyone’s existence and identity, and the thought that we are each responsible for and can be agents of our own destiny is overwhelmingly frightening to many. Our Euro-American culture is so binary oriented that we fear that which we are not/do not know. Consider a few: life/death, pleasure/pain, youth/old age, agile/crippled, wealthy/poor...and man/woman. The Judeo-Christian religious traditions promise their followers salvation, a better life after death, provided they adhere to patriarchal dogma that regulates their beliefs and behavior. Alternatively, Native Americans lived close to nature and embraced a spirituality that looked to nature for its antecedents; binary thinking was not a part of their world view. They were each charged with seeking their own unique spiritual path—which gave direction, meaning and understanding to their profane, quotidian existence. In most Native American societies, a calling to the third gender was a spiritual journey, though in its secular practice it meant taking on the occupational roles of the gender

opposite one's birth/physical sex. The spiritual and the profane were one: the individual and their vision-quest were united.

Science, as Herrada points out, makes much impossibility possible. Science has allowed people who have changed genders to now change sexes. Many religious devotees consider those who have transsexed in defiance of God, whom they consider to have created us as immutably sexed beings. Perhaps, though, what is most frightening to many is the vast range of possibilities transsexual people present, through their act of re/embodiment and re/creation: a person can change who they are. Gender-crossers who also re-embody sexually not only render the gender binary mutable, but they also throw the curtain off the Greatest Wizard of all, revealing his omnipotent power questionable.

Whether they are Native American third-gender people of the past such as Osh-Tisch, mythical characters like Baum's Tip/Ozma, or twenty-first century transsexuals like Nicole Maines, gender-crossers can be seen as transcendent beings. For many people, they offer the potential for resolution and rapprochement of dichotomous conflicts, while for others they destabilize and threaten traditional beliefs—and even America's liberal democratic political ideology. Because a gender-crosser is at once both a resolution and a contradiction, what is to be done with them? American state and federal laws insist they be ordered—witness the 2016 legal battle between the Governor of North Carolina and the Obama administration over House Bill 2. Sex-segregated spaces are an integral component of a political system that hierarchically categorizes people according to gender, enabling and prolonging a regime of androcentric, patriarchal control. A direct result of the War on Terror—which can be logically framed

as a conflict between two opposing Abrahamic religious ideologies—is the increased policing of identities, ostensibly to protect American citizens from murderous terrorists. Because one of the most primary identifying characteristics of a person is their sex/gender, the regulating and policing of the two categories is argued to be a vital national security concern. As a result, the scrutinization, certification and stabilization of every U.S. resident's gender/sex identity are attended to with greater vigor now more than ever in our nation's history. We are left wondering how to react to the great paradox: because they transcend categorization, gender-crossers defy being ordered. Therein lies both their charm and their threat.

Wayne's Story:**The Great Virginia Bathroom Case**

“Discrimination based on a person's gender identity, a person's transgender status, or a person's nonconformity to sex stereotypes constitutes discrimination based on sex.”—

United States Department of Justice, 2015

“Whenever an individual reports a gender identity at odds with his or her biological sex, gender trumps sex. Sex is a biological reality, unlike subjective or cultural constructions of gender or gender identity.”—Amicus Curiae brief in *G.G. v. Gloucester County School Board*, signed by Maine Governor Paul LePage on November 30, 2015

As a result of the decision in *Doe v. Clenchy* the Maine Human Rights Association, in conjunction with the Maine Department of Education, issued an amendment to their *Education Rule* on January 13, 2016. They had intended to offer a completely revised Rule that would guarantee protection and equal access for transgender students, but were blocked from doing so by Republican Governor Paul LePage. He sidestepped the 2014 Maine Supreme Judicial Court's ruling by insisting that the state legislature needed to pass a law before state agencies could issue rules that would protect transgender students. Holding that position, and in disregard of a statewide 2005 referendum where Maine voters upheld a law banning discrimination based on sexual orientation including gender identity, LePage downgraded the MHRA and Education document to a set of unenforceable guidelines. Without the power and penalty of law to ensure their enforceability, the ruling passed down by the Court and as manifested in the MHRA guidelines may have no effect in protecting transgender students like Nicole Maines.

LePage had earlier made headlines across the State of Maine by joining in an Amicus Curiae brief filed against a transgender teenager in the state of Virginia. "LePage supports wrong side on transgender suit," announced the editorial page of the *Central Maine Sunday Sentinel* on December 14, 2015. "The governor goes out of his way to back an effort that further alienates people already pushed to the margins." The lawsuit he joined was almost identical to The Great Maine Bathroom Case: a transgender boy named Gavin Grimm had been attending school as a boy and using the boy's bathroom there, and was later blocked from further use of the boy's room because of protests from other student's parents. Just as Nicole had done, Gavin filed a federal lawsuit against the

Gloucester County School Board demanding access to the boy's room. He claimed that the school's policy that barred him from using the boy's restroom and locker room because the spaces are not consistent with his "biological gender" is unconstitutional under the 14th Amendment's Equal Protection Clause and also violates Title IX of the U.S. Education Amendments of 1972. The United States Departments of Justice and Education filed a Statement of Interest in support of Gavin arguing that "Title IX's sex discrimination prohibition extends to claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity"(2015, 8). Citing numerous federal and Supreme Court cases, the United States concluded that "discrimination based on a person's gender identity, a person's transgender status, or a person's nonconformity to sex stereotypes constitutes discrimination based on sex. As such, prohibiting a student from accessing the restrooms that match his gender identity is prohibited sex discrimination under Title IX" (ibid). This last statement is nearly identical to the decision reached in *Doe v. Clenchy*. Governor LePage claims that the Obama administration (the United States Department of Justice) is distorting reality by inserting the concept of "gender" into the situation. The brief he cosigned cited the dictionary in arguing that "sex is a biological reality, unlike subjective or cultural constructions of gender or gender identity" (G.G. v Gloucester County School Board, 2015). LePage has said that in addition to violating the privacy of students who might see genitals different than their own, allowing transgender people into bathrooms opens the way for exploitation by sexual predators (Editorial Board, 2015).

Governor LePage made national news again on May 25, 2016, when he joined with the governors of eleven other states in a lawsuit challenging the Department of

Justice's guidance on the rights of transgender students to use sex-segregated spaces. Twelve days previously the U.S. Department of Education and Department of Justice jointly released detailed guidelines explaining the obligations that schools receiving federal public funding owe their transgender students. Citing Title IX of the *Education Amendments of 1972* which prohibits discrimination on the basis of sex in schools, the letter defines a school's responsibilities to its transgender students. Though the letter builds on legal interpretations of Title IX, it is not legally binding and does not change existing law. No doubt LePage saw this as a repeat of what he had dealt with in his own state earlier in the year and felt he needed to take action to stop what he felt was a threatening proclivity. His press secretary said that the Governor believes the president overreached his authority with his directive regarding transgender students with the Department of Justice's recommendation that U.S. public schools must allow [transgender] students to use the bathroom they feel most comfortable with. "The governor believes [President Obama] is trying to create a dictatorship by fiat," she stated (Cangro, 2016).

Wayne Maines responded to this latest action by LePage in an article for *Time* magazine a few weeks later. He said he was sick to his stomach when he heard that Maine's Governor had joined the heads of eleven other states to oppose the guideline. "Over the past seven years my family has asked our state and national leaders to guarantee equality for every American no matter their race, religion, sexual orientation or gender identity," he wrote. "I was so pleased to see that President Obama, the Department of Education and the Department of Justice understood the needs of the transgender community. I am proud of them for having the courage to make a stand for

comprehensive equality, and I am disappointed that others are now taking a wrong turn, and that transgender Americans could be placed in harm's way" (1 June 2016). Wayne again reduced the negative response to one of ignorance and fear. "It is disheartening that these governors have not become more knowledgeable, that they are listening to false truths. If they were true leaders, they would seek out the truth and see that their fears are unwarranted." But people, and leaders of people, have differing notions of truth. For Wayne, the ways knowledge and truth relate to gender identity and sexuality came unavoidably in the embodiment of his transgender daughter Nicole. His love for her transcended his bias against the non-conformity she expressed. He found his fear over her seeming defiance of societal norms evaporate as he struggled to love, understand, accept and then fully support her. Former arch-conservative U.S. Vice President Dick Cheney most likely went through a quite similar process with his lesbian daughter when he was in office. Wayne has reason to worry about prominent leaders—like the eleven state Governors—using the power of their position to promote policies that reflect their personal opinions. One of the reasons stereotypes of mentally ill, deviant, man-in-a-dress, sexually predatory transgender people endure is because many of those in power lend them legitimacy.

For Wayne, the truth reveals that transgender people exist and deserve to have the same rights and freedoms as everyone else. However, for LePage and many others there is no truth at all to the concept of gender identity or even gender. Gender is the issue that sharply divides the worldview and the political views of most American people into two camps. Judge Paul V. Niemeyer summed up the argument against gender quite

articulately in his dissenting opinion in a recent decision on the Gavin Grimm case.¹²⁹ There he insists “the [Obama] Administration’s service of the politically correct acceptance of gender identification as the meaning of ‘sex,’ ... by redefining sex to mean how any given person identifies himself or herself at any given time” dangerously invades the rights, privacy and freedom of others (*G.G v. Gloucester County School Board*, 2016, 3). “Bodily privacy is historically one of the most basic elements of human dignity and individual freedom,” wrote Niemeyer. “Forcing a person of one biological sex to be exposed to persons of the opposite biological sex profoundly offends this dignity and freedom” (*ibid*). While his was the lone voice of dissent in the court’s decision to allow Gavin to use the boy’s bathroom, his argument repeats the common refrain of so many, including the eleven governors suing the United States: sex segregation is critically important to the American political system of liberal democracy, and sex is determined by a person’s biological sex. Because of the long, hegemonic tradition supporting this position, Niemeyer observes that “Virtually every civilization’s norms on this issue stand in protest.” He concluded his opinion by advocating that “the momentous nature of the issue deserves an open road to the [United States] Supreme Court to seek the Court’s controlling construction of Title IX for national application” (*ibid*, 4).

That event just occurred. On July 13, 2016 the Gloucester County School Board filed an emergency appeal with the U.S. Supreme Court asking it to block Gavin Grimm

¹²⁹ The 4th Circuit Court of Appeals (a federal court located in Richmond, Virginia, with jurisdiction over courts in Virginia, West Virginia, North Carolina and South Carolina) sided with Gavin Grimm in April, saying the federal judge who previously rejected Grimm's Title IX discrimination claim ignored a U.S. Department of Education rule that transgender students in public schools must be allowed to use restrooms that correspond with their gender identity. The court reinstated Grimm's Title IX claim and sent it back to the district court for further consideration (CBS News, July 13, 2013).

from using the boy's restroom when he returns to school in September. The School Board intends to file a petition for Supreme Court review by late August. The Great Maine Bathroom Case and what we might now refer to as the Great Virginia Bathroom Case both argue that transgender people exist and that they deserve the same rights as people that are not transgender (i.e., "cisgender"). For the courts to acknowledge someone as transgender is to accept and make legal the concept of gender identity. Because so many people refuse to allow gender to trump sex—as it nearly has, given the outcomes of these two legal cases—the highest court in the nation is being asked to decide conclusively whether "gender" or "sex" has priority as a determinate for an individual's categorization. In essence, the Supreme Court is being asked to erase a binary, to dissolve a dichotomy. The implications are vast and will have momentous impact. Consider that the binary "man/woman," upon which our nation's political system of liberal democracy is built, is predicated on the ability to identify and duly categorize people into one or the other position. But, the categorical determinants themselves exist in a binary configuration: "gender/sex" operate in a reflexive manner, each relying on the other for its own meaning, interdependent at the same time that they cry out for independence. They exist like the legendary Siamese twins or King Solomon's baby: to separate them conclusively, to make them independent from one another and to hierarchically privilege one over the other, is to kill them. Therefore, rather than seeking a solution by choosing one to the detriment of the other, what is needed is a means to mediate between the two. Somewhat ironically, that solution may be offered by the very figure that sparked the fiery debate in the first place: the gender-crosser, the transgender person.

Conclusion

“...remember the ladies, and be more generous and favorable to them than your ancestors. Do not put such unlimited power into the hands of the Husbands. Remember all Men would be tyrants if they could. If particular care and attention is not paid to the Ladies we are determined to foment a Rebellion, and will not hold ourselves bound by any Laws in which we have no voice, or Representation.” – Abigail Adams, 1776

“Traditions are commonly relied upon by those who possess the power to achieve an illusion of social consensus. Such people invoke the legitimacy of an artificially constructed past in order to buttress presentist assumptions and the authority of a regime.” –Michael Kammen, 1991

“What we need is a political and joyous alternative to the behaviorist discourse, the Christian discourse on evil or sin, and the convergence of the two in forms of gender policing that is tyrannical and destructive.” – Judith Butler, 2014

In the preceding chapters I have offered sketches of four Americans who crossed from male to female gender. They were separated from one another by time intervals of about fifty years, and each contextually reflects the cultural and political contentions of gender of their era.

The first, the Crow boté Osh-Tisch (or, Finds-them-and-kills-them), was born in 1854 and lived at a time in America's history when Indian Removal was at its zenith and all Native American traditions, including and especially their non-Western gender practices, were targets for eradication. Osh-Tisch, the last of the Crow botés, and Plenty-coups, the last of the Crow chiefs, were also the last of their tribe to enjoy its traditional nomadic life spent following Bison herds across the northern prairie. In their later years both were cooped up in reservations administered by the U.S. Bureau of Indian Affairs. Osh-Tisch's role as lead boté was critical to his tribe's well-being, for s/he skillfully mediated rapprochement between white American military and his tribe at the same time as s/he negotiated between genders with his own people. Osh-Tisch enjoyed a powerful and respected role in his tribe because of his medicine—s/he was a “mediator of spiritual forces, an in-between person” (Roscoe, 1998, 30). While s/he did woman's work primarily and was highly considered for his skill in making teepee lodges, when the tribe's survival was at stake Osh-Tisch also put on the clothing of a man and engaged in warfare. His ability and willingness to shift gendered occupations to best serve the needs of his people and to protect and preserve their way of life substantiates the high esteem the Crow people held for botés like him.

The story of how s/he earned the name Finds-them-and-kills-them was told by a Crow woman named Pretty-shield to the historian/ethnographer Frank Linderman in

1831(see also footnote #57). She was a young woman at the time she witnessed the event. “A Crow woman fought with Three-stars on the Rosebud...[but] she was neither a man nor a women,” Pretty-shield recalled, “She looked like a man, but she wore woman’s clothing, and she had the heart of a woman.¹³⁰ Besides, she did a woman’s work. She was not a man, and yet not a woman. She was not as strong as a man, and yet she was wiser than a woman” (Linderman, 2003, 131). When a large group of Lakota warriors attacked the bivouacked U.S. Army along Rosebud Creek on June 17, 1876, Osh-Tisch and hir fellow Crows, allied with the U.S. forces against their long-time Sioux foes, met them head on and engaged them in combat.¹³¹ Pretty-shield commented that “Finds-them-and-kills-them, afraid to have the Lakota find her dead with woman-clothing on her, changed them to men’s before the fighting commenced...she did not want the Lakota to believe she was a Crow man hiding in a woman’s clothes” (132). Osh-Tisch fought hard that day according to Pretty-shield, standing hir ground and “shooting at the Lakota as fast as she could load her gun and fire” and bringing home at least one enemy scalp in proof of hir success (ibid). The name bestowed on hir because of that day’s behavior highlights the unusual role s/he fulfilled. When Osh-Tisch was finally made a ward of the U.S. Government s/he, like other botés, was forced to cut hir long hair and wear Anglo male clothing in conformance with Western gender norms. This negated hir ability to cross genders and made impossible the mediatory function with which she had so long served hir matriarchal hunter-gatherer society.

¹³⁰ “Three-stars” is the name the Crows gave Brigadier General (“three star”) George Crook, commander of the Bighorn and Yellowstone Expedition during the Indian Wars (this campaign is best known for “Custer’s Last Stand” at Little Big Horn on June 25, 1876). Osh-Tisch’s Crow tribe had allied with the U.S. Army to fight against their long-term enemy the Lakota.

¹³¹

The second figure was born in the pages of a children's book in 1904. L. Frank Baum created the boy/girl Tip/Ozma to facilitate and enable the shift of gendered power in Oz from a patriarchal political system to a matriarchal model. Tip's transformation from a footloose, aimless boy into a young woman who accedes to the throne mirrors the shift in the political system of Oz from its being ruled by weak, fraudulent men (humbugs and stuffed men) to governance by powerful, benevolent women. Tip/Ozma performs such a tremendous mediatory role that her character functions as a literary device, even as a *deus ex machina* in the classic Aristotelian sense. The suddenness of Tip's gender change, coming as it does near the end of *The Land of Oz*, allows for an immediate and conclusive resolution for the chaos of Oz's headless state. When *he* becomes *she*, the rightful queen is able to take up the scepter of leadership and restore the land to harmony. Baum's egalitarian matriarchate of Oz, resembling as it does the socio-political systems of the Native Americans so admired by Gage, is the antithesis of the capitalist, patriarchal liberal democracy extolled by Catharine Beecher and Alexis de Tocqueville. Because of his central role in effectuating the shift from one form of government to the other through and because of his gender change, we can understand how Tip/Ozma can be seen as a feared and disruptive figure by those who favor a patriarchal regime of governance. The potentiality towards resolution and revolution that the gender-crosser offers—or threatens—gives rise to the fear and loathing some—such as LePage and the other eleven governors—have for them.

Our next figure reveals a conservative swing of the pendulum. Christine Jorgensen transitioned sex/gender and was re-born as a woman in 1953. Her cultural significance lies in how she mediated and shaped the discourse between medicine, the

law, American society and the individual. She was notable for pioneering the movement into a new frontier of sex/gender crossing by harnessing post-Second World War medical technology to the accomplishment of manipulating bodily gender attributes, thereby changing the material aspect to more closely mirror the mental. The post-war period she lived in saw a cultural swing back to a more restrictive, doctrine-of-separate-sphere, 19th century mode of sex/gender ideology which had been disrupted by the roaring twenties and the industrial mobilization of the Second World War. Jorgensen mirrored this conservative trend with her desire to be seen not as a homosexual man but rather as a typical woman, a feat only made possible by recent technology. With her was born the trope of being “trapped in the wrong body” and the transsexual’s urgent plea for deliverance from such a cruel, God-given fate. Jorgensen asked America to see her as an unfortunate victim and her doctors as wonderful healers who made her whole and able to live a normal life. Beginning with her, gender-crossers first became pathologized and their cure made possible by surgically altering their visible primary and secondary sex/gender attributes.¹³² Jorgensen was among the first of many twentieth century white, middle class transsexuals who represented themselves, somewhat apologetically, as good, straight citizens who struggled to successfully overcome their unfortunate handicap. By correcting that problem and conforming to societal standards they sought to fit neatly within the norms for the category “woman.”¹³³

¹³² “Transsexualism” and “Gender Identity Disorder” (“GID”) were included as diagnosable medical disorders/mental illnesses in the 1980 version of the Diagnostic and Statistical Manual, Version III, and remained through three more versions, the last published in 2000.

¹³³ Harry Benjamin, M.D., labelled this apparent surge “the transsexual phenomenon” in his 1966 book of the same title, prompting Janice Raymond’s rebuttal (in *The Transsexual Empire*, 1998) that male-to-female transsexuals simply reinforced oppressive stereotypical gender roles.

Nicole Maines entered first grade fifty years after Christine Jorgensen's sensational cover story in the *New York Daily News*. While, like Jorgensen, her existence spotlighted the problematic relationship between sex and gender, she did so unapologetically, perhaps because of the innocence of her youth. Her guiltless path through the door of the girl's rest room tested the limits and lack of the law in its jurisdiction over gender and sex. As with Christine Jorgensen, contemporary advances in medical technology opened possibilities for her that were not available for her predecessors. Dr. Spack's interventions with newly developed puberty-blocking drugs and with feminizing hormones had a profound effect on her developing body so that it became a young woman's. Her genitals were the only visible vestige of her birth sex, and in accordance with pressing societal norms she also had them reconfigured. One and one-half years after the decision awarded her in the Great Maine Bathroom Case, Nicole Maines was a woman and a female in every way possible except for her chromosomes and her inability to bear offspring. Additionally, she is young, intelligent, graceful and pleasingly attractive, making her not only a woman, but a desirable, ideal woman. So convincingly does she pass that, were she not such a publically visible figure, no one would ever know she was a transgender woman—to the extent that she must announce that she is so to, no doubt, disbelieving beholders. The inherent irony in her case should not be ignored: she is not an apparent gender-crosser who troubles people with her presence; rather, she is a model of absolute and perfect gender conformity. Nicole and Wayne's ongoing activism for transgender non-discrimination legislation and for the acceptance of transgender people by American society seems slightly incongruent in light of this, for she is the antithesis of the ridiculed and feared "man-in-a-dress" stereotype. Perhaps, like Tip/Ozma, that is precisely Nicole's mediatory function: it is

unlikely that one who regards her and hears her story can begin to harbor any fear or revulsion towards her. She is pure and innocent, a child full of hope and promise who inspires others.

In May 2013, one year before the *Maines* case was decided, the act of gender-crossing was depathologized. The pivotal moment occurred when the diagnosis “gender identity disorder” (GID) was struck out of the American Psychiatric Association’s Diagnostic and Statistical Manual (“DSM”). This event opened the door for a successive series of challenges to gender controlling practices that were predicated upon the legal position—as supplied by the medical discourse—that transgender people were mentally ill. Many, if not most, arguments that seek to discredit or outright deny the existence of transgender people are based on previous editions of the *DSM* that so categorized them. As an example, the grounds for barring transgender people from serving in the military was based on their former pathologization; once that stigma was removed, it was clear there could be no legal argument for further exclusion of this group. The process of striking GID from the *DSM* involved a heated internal debate, however. Because the diagnosis was necessary in order to access hormone treatment and surgery, for these procedures were considered the treatment, or cure, for the disorder, the problem arose as to how transgender people who desired these procedures be granted access to them, once “being” transgender was depathologized.¹³⁴

¹³⁴ Psychologist Arlene Lev observed, “Utilizing a mental illness model leaves no room for the recognition of mentally healthy and functional transgender and transsexual people who may desire sexual reassignment treatments” (2005, 48). Judith Butler illuminated the dispute saying, “. . . those who want to keep the diagnosis want to do so because it helps them achieve their aims and, in that sense, realize their autonomy. And those who want to do away with the diagnosis want to do so because it might make for a world in which they might be regarded and treated in non-pathological ways, therefore enhancing their autonomy in important ways” (2004, 77). Finally, the removal of the mental illness diagnosis raised the question of whether insurance would have reason to pay for the high costs of the procedures. If it did

This dilemma leads to and raises the question, why do so many transgender people desire to dramatically alter their bodies? The answer proves to be circular and is rooted in the ways that the law reflects and maintains our society's hegemonic, heteronormative and hierarchical sex/gender system. The most apparent reason is that the law has insisted that people undergo GRS in order to change their sex/gender markers on essential identity documents. However, the law is now arcing away from such requirements, recognizing their inherent discriminatory operation. Indeed, with the erasure of GID the medical profession is no longer in the position of determining and labelling a person's gender: the ultimate source of gender identity categorization has been recognized as being rightfully left to the individual to self-identify. Such was the brave new world that the revision of the DSM and the decision reached in the Great Maine Bathroom Case exposed in the space of one calendar year. The heated debate surrounding North Carolina's 2016 Public Facilities Privacy and Security Act, Gavin Grimm's ongoing dispute and the national uproar over the Department of Education's directive can be seen to trace to these two events.

I have provided cultural evidence and arguments that supports a vision of gender-crossers as beneficial mediators and even angelic, shamanic figures. However, many others see them as subversive harbingers of disorder and devilish, disruptive anarchists. The function by which gender-crossing people can be seen to destabilize the hierarchical gender binary and at the same time mediate and make possible a more egalitarian society has not gone unnoticed by those who favor America's current neo-liberal political system. Stella Morabito, a regular columnist for the popular conservative

not, then only wealthy people could avail themselves of bodily gender transition, thereby inserting the contested issue of wealth distribution into the debate.

on-line magazine *The Federalist*, warns that what she terms “the transgender agenda” is bent on destroying the American family and our system of liberal democracy.¹³⁵ “The transgender movement has strong totalitarian overtones that Americans don’t fully understand,” she wrote in a June, 2016 article. Describing the transgender phenomenon as a crusade to destroy U.S. Constitution First Amendment rights, she claims “The legal destruction of gender distinctions will inevitably dissolve family autonomy, thereby uprooting freedom of association.” Her dire warnings refer and trace back directly to the fundamental concepts of liberal democracy, gender and the family as expressed by Tocqueville and Beecher in ante bellum America. Morabito blames the substitution of the term “gender” for “sex” as a primary cause of the dissolution of the traditional American family, and says it “has its roots in gender ideology, which cultural Marxists pushed for many decades.” She says the “transgender lobby” is bent on destroying the legal basis for sex/gender categories which, if they succeed, “will obliterate the template for the family as a unit.” Morabito argues that the transgender movement serves as a convenient cover for the consolidation and centralization of State power, and as that occurs “the State, inevitably flawed, will end up owning our personal relationships.” Sounding as if she were quoting directly from Tocqueville, Morabito warns that “With weakened mediating institutions—family, churches, private associations—we lose the buffer zones that stand between individuals and an encroaching state.” In sum, Morabito believes that sexual segregation, as sex relates to reproduction, is essential to defining people’s roles and identities and in maintaining the autonomous family unit.

¹³⁵ Morabito holds a BA in journalism and an MA in Russian and Soviet history, both from the University of Southern California.

Others who share Morabito's general view do so in a more religious context. Henry Makow echoes Morabito and acknowledges the bond between Church and State in his claim that "transgenderism and the attack on male/female are steps in a long-term satanic plan to make human reproduction a function of the State" (2016).¹³⁶ Friar Dwight Longenecker takes Satan's involvement further, arguing that Satan *is* transgender.¹³⁷ In a July 27, 2015, essay in the religion journal *Patheos*, he refers to an old illustration of Baphomet and notes "I saw that the Devil is portrayed as transgender... the figure not only has male genitalia, but breasts. Furthermore, when you look closely you'll see that the beast has two arms—one male and one female."¹³⁸

¹³⁶ Henry Makow earned a PhD in English Literature from the University of Toronto in 1982.

¹³⁷ Longenecker, a graduate of Bob Jones University, is an ordained Catholic priest and a prolific religious writer and blogger.

¹³⁸ According to its website, Patheos.com was founded in 2008 and "is the premier online destination to engage in the global dialogue about religion and spirituality and to explore and experience the world's beliefs. Patheos is the website of choice for the millions of people looking for credible and balanced information about religion. Patheos brings together faith communities, academics, and the broader public into a single environment, and is the place where many people turn on a regular basis for insight, inspiration, and stimulating discussion. Patheos is unlike any other religious and spiritual site on the Web today."



Plate 18: Baphomet (Source: Eliphas Levi's *Dogme et Rituel de la Haute Magie*, 1854. Public domain).

Citing the American population's fascination with celebrity Caitlyn Jenner (whom he suggests is the devil incarnate) and its growing acceptance of transgender people, Longenecker concludes that "feminism, transgenderism, homosexuality, gender confusion and 'identifying' as whatever gender a person wants" are erasing traditional distinctions between male and female and allowing for radical and dangerous new possibilities. He writes that the illustration of Baphomet the Transgender is "the proper image for America's current passion for total tolerance and the embrace of every kind of weirdness and perversion under the sun. You now know who is behind all the sexual depravity, perversion, confusion and fear." With such a conclusive analytical

identification of the gender-crosser as s/he who is to blame for the grave threat to America's social and political fabric, Wayne Maines is presented with the answer to his quest for the source of the fear many Americans have of transgender people.



Plate 19: The Maineses, 2015—an American family (*The Portland Press Herald*, October 18, 2015; photo by Kelly Campbell) .

The Republican National Committee recently entered the fray surrounding transgender student's use of sex-segregated bathrooms. Unanimously approving a resolution that calls the Obama administration transgender guidelines a federal governmental overreach and a misinterpretation of Title IX policies, they called for "state legislatures to enact laws that limit the use of restrooms, locker rooms and similar facilities to members of the sex to whom the facility is designated" (Counsel's Office, 2016). In response to the adoption of the resolution at the recent Republican National Convention in Cleveland, Ohio, Wayne Maines wrote an article in the July 20, 2016, *Time* magazine titled, "I Left the GOP For the Sake of My Daughter." For many years

Wayne was barely able to endure watching the agony his daughter suffered from being framed as Baphomet. It hurt him terribly that he was unable to protect Nicole “from bullying, harassment and discrimination from adults, from peers and, yes, from politicians.” When he read the words of the RNC resolution, he wrote, “It saddens me that anyone might support a platform that hurts any family.” Morabito would find Wayne’s statement incredulous and incongruous, as her anti-transgender position argues that gender mutability is destroying the family. And yet for Wayne, just as for Morabito, Beecher and Tocqueville, the autonomous family unit is the center of America’s socio-political system, centering as it does the child as the future of the nation. So, too, it was for matrilineal Native Americans, as Gage and Lafitau observed and commented. However, because those whose world view tends to gender parity are seldom materialistic monists, they are open to less static, confined interpretations and practices of the family unit than the patriarchal tradition allows. I have shown how Judeo-Christian theology has shaped America’s capitalist patriarchal political ideology from the time of first contact. As argued so decisively by Chief Justice John Marshall, it has guided the pens that have written the laws of the land and have allowed or withheld access to property and wealth. Today we find that ideology in question and the nation in turmoil, for it has not resulted in any approximation of an egalitarian society with equality and justice for all.

This dissertation has shown that the controversy over transgender people’s access to sex-segregated spaces has long roots. The debate about sex and gender that has been focused upon by the Great Maine Bathroom Case, the Great Virginia Bathroom Case and the series of lawsuits between the United States Departments of Justice and Education

and the Governors of twelve states traces back to the Republic's liberal, democratic beginnings and is reducible to that of the classic Cartesian mind/body dualism. My argument, to repeat, finds that the gender-crosser is the incarnation of dualism, the living manifestation of contradiction and resolution at once. S/he is a gift to all who are torn by the need to choose between the materiality of "sex" and the consciousness of "gender" would they only recognize hir potential. Through hir continual demonstration of the malleability of gender and sex s/he also upends any justification for androcentric privilege or an hierarchical configuration of gender. S/he is *both* sex *and* gender, *both* male *and* female, *both* man *and* woman, *both* mind *and* body and s/he is *both* god *and* goddess.

Osh-Tisch changed clothing to suit the needs of hir culture while Nicole Maines changed bodily appearance to suit hers. Though unavailable to Osh-Tisch but imagined by Baum, with modern technology Nicole's body could be manipulated at will in order to relieve the contradiction that maintains the dualistic mind-body opposition. What the materialist camp demands today—no penises in woman's bathrooms—can be and is being accomplished with medical and surgical intervention. One can sense that the current trend of pro-transgender-children activism as pioneered by Wayne Maines actually serves to underwrite and endorse the neo-liberal agenda through medically and surgically forcing young bodies to conform to the State's regulations. However, I argue emphatically that s/he will always be *both/and*, and never either/or: therein lies hir magic and power as s/he continually transcends and negotiates dichotomies. To force hir compliance to social gender norms through bodily intervention, and in so doing repair any seeming disruption of the male/female dyad, is to render hir impotent to

subvert, trouble and mediate paradigms of power that are perpetuated by dualistic conflicts.

I propose, therefore, that the resolution of the debate between gender and sex, and between man and woman, that so sharply divides America socially and politically is offered by the very figure who is often blamed for causing it. As Baum achieved with Tip-becoming-Ozma, I offer the gender-crosser is the ideal *deus-ex-machina*, but only if s/he will be permitted to be lowered onto the stage so that s/he can mediate and resolve the standoff.

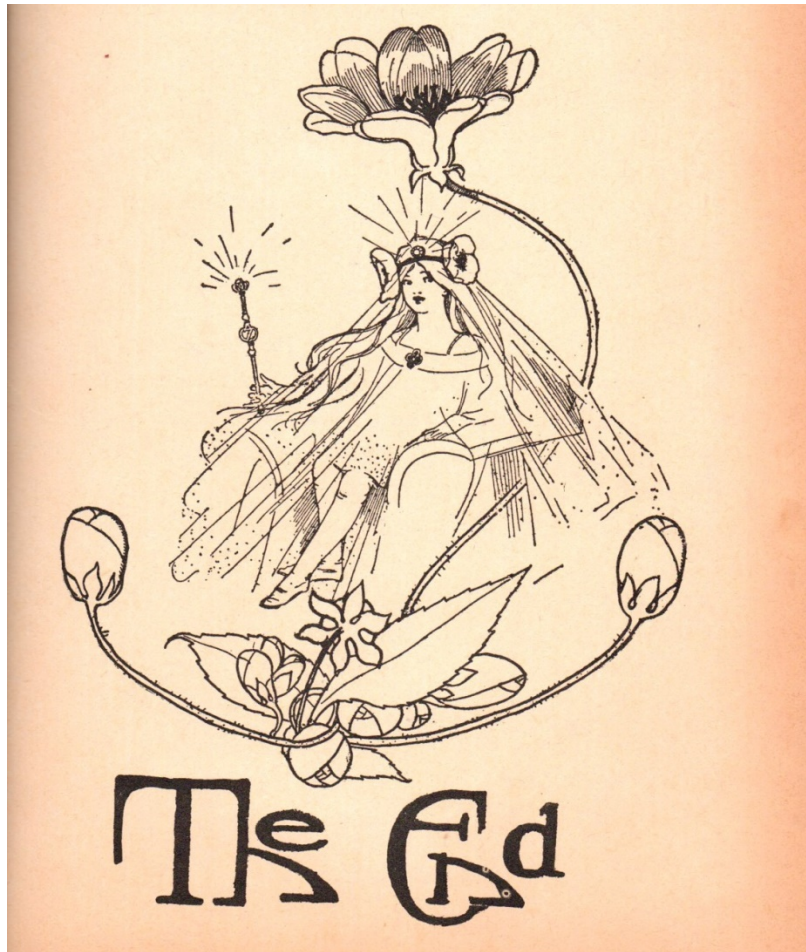


Plate 20: The final page of *The Land of Oz* (1904) showing Tip-become-Ozma, the boy/girl Queen of The Emerald City of Oz upon her throne. (Source: *The Land of Oz* by L. Frank Baum, Rand McNally, 1904).

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