Instant (Gender) Messaging: Expression-Based Challenges to State Enforcement of Gender Norms

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Recommended Citation
INSTANT (GENDER) MESSAGING: EXPRESSION-BASED CHALLENGES TO STATE ENFORCEMENT OF GENDER NORMS

by TAYLOR FLYNN*

INTRODUCTION

Statements of identity, without more, have long been a potent form of demand for inclusion and equal treatment. Consider the signs carried by workers, most of whom were African American, during the 1968 Memphis sanitation strike during which Dr. Martin Luther King, Jr., was assassinated. They read, quite simply, "I AM A MAN." Or, consider the rhetorical question posited more than one hundred years earlier at the 1851 Women's Convention by Sojourner Truth, "Ain't I a woman?" Both deploy statements of identity as a demand for racial equality. Nor is it coincidental that both are framed in terms of gender: to be gendered as male or female is to be considered fully human. It is one's humanity that serves as a point of access to demand equal treatment.

As the terms "gender" and "identity" suggest, most challenges to state-enforced conformity with gender norms are almost solely status-based equality claims. Given that a common term deployed by members of the trans community

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3. Id. at 465.


5. See Green, supra note 2, at 468 ("Most broadly, 'I AM A MAN' drew on a political language that considered manhood a universal signifier of humanity and independence, rejecting racist images that cast blacks outside humanity or marked them as household dependents."); HOOKS, supra note 4, at 1-13.

6. See, e.g., Qz'etax v. Ortiz, 170 F. App'x 551, 552 (10th Cir. 2006) (Trans prisoner asserted equal protection claim against state department of corrections because it treated inmates diagnosed and treated for gender identity disorder prior to their incarceration differently from those diagnosed after their incarceration.); Barnes v. City of Cincinnati, 401 F.3d 729, 735 (6th Cir. 2005) (Trans plaintiff who suffered adverse employment action asserted Title VII and equal protection claims against state employer.); Pinneke v. Preisser, 623 F.2d 546, 547 (8th Cir. 1980) (Trans Medicaid claimant asserted equal protection and due process claims against state department of social services after it denied her
and in antidiscrimination laws is "gender identity and expression," situating such challenges in expression may, at first glance, appear to be little more than linguistic legerdemain. An understanding of gender as expressive, however, helps capture an often unarticulated, yet central aspect, of the harm enforced conformity inflicts on trans persons—compelled expression of the state's gender message over their profound objection. Consider governmental insistence that a trans student or employee present herself, through dress and grooming, in accordance with her sex assigned at birth. The state is enforcing a selective message, which this Article refers to as "the ideology of the binary." Unsurprisingly, it reflects the prevailing view: there are two (and only two) distinct sexes with congruent gender identities, fixed by nature and immutably different.8

This coerced conformity, moreover, concerns an aspect fundamental to us all. Our gender identity is central to the ways we understand as well as present ourselves to the world; it is crucial to our health and well-being. Gender, and what it presumptively says about us—our sexuality and sexual orientation, our place in the multilayered hierarchy ranging from gubernatorial aspersions cast on "girlie-men"9 to a female presidential candidate denominated "one of the boys"10—touches a raw nerve because it provides a myriad of social meanings about our position(s) in the world.

It remains true, of course, that the binary model of sex captures the experience of most people, who identify comfortably with the sex assigned them at birth. In the majority of cases, the state's enforcement of this model is an unremarkable use of legislative and administrative generalizations, necessary to enable the state to govern effectively. In addition, the categories "male" and "female" importantly enable the government to recognize and redress, through mechanisms such as Medicaid benefits for sex reassignment surgery. I am not a betting person, but I would venture my (albeit meager) savings that when the government (for instance, as employer or educator) requires an individual to conform, over her objection, to gender norms, a lawyer's initial reaction is likely to be framed in terms of gender role stereotyping rather than freedom of expression.

7. See, e.g., N.Y., N.Y., ADMIN. CODE § 8-102(23) (2008) ("The term 'gender' shall include actual or perceived sex and shall also include a person's gender identity, self-image, appearance, behavior or expression, whether or not that gender identity, self-image, appearance, behavior, or expression is different from that traditionally associated with the legal sex assigned to that person at birth."); R.I. GEN. LAWS § 28-5-7 (2008) (prohibiting employment discrimination based on "gender identity or expression"); see also Transgender Law & Pub. Policy Inst., Non-Discrimination Laws that Include Gender Identity and Expression, http://www.transgenderlaw.org/ndlaws/index.htm# (last visited May 13, 2009) (listing the number of jurisdictions that prohibit discrimination on the basis of gender identity).

8. See, e.g., Littleton v. Prange, 9 S.W.3d 223, 230 (Tex. Ct. App. 1999) ("The male chromosomes do not change with either hormonal treatment or sex reassignment surgery. Biologically a postoperative female transsexual is still a male.").


antidiscrimination laws or affirmative action, harms created by the privileging of male over female, including efforts to punish gender nonconformity. This Article does not argue that the state cannot categorize people as “male” or “female,” nor that the state is required to create additional categories to accommodate individuals whose gender identity falls outside of those descriptors (though the latter, in my view, is normatively desirable).

The focus of this Article is on compelled expression over an individual’s objection, which is of particular concern given the state’s role as enforcer. Not only does the state have sole authority to legally categorize people by sex, but it also uses those categories as the basis for distributing rights and goods, such as marriage and its associated benefits, over which it maintains a monopoly of power. The state likewise controls access to the countless protections that flow from the wide-ranging use of government identification in our private interactions, such as the ability to get a job, use a credit card, or interact with the public and government authorities without fear of harassment, discrimination, or violence. Case law, furthermore, reveals that state enforcement of gender norms over one’s objection is inextricably intertwined with additional messages concerning the subordination of gender outgroups. This messaging has as its foci the dehumanization of trans people, the insistence on traditional gender roles for women, and the disapprobation of homosexuality. 11

Gender expression challenges also may have the potential, albeit over the course of years, to benefit non-trans identified claimants. Sex role stereotyping cases by trans plaintiffs at times meet with greater success than do those involving what some might view as “garden variety” sex discrimination, such as the requirement that female employees conform to a feminine gender presentation by wearing makeup. 12 It may seem ironic that such claims can fail where those by trans litigants have succeeded. 13 However, it is precisely because gender norms and anatomical sex are for most persons congruent and binary that the decidedly non-congruent and non-binary nature of sex and gender is invisible to the majority. Referring to this apparent paradox as seeing “pink on pink,” this Article draws on insights from critical race theory and argues that courts have difficulty reading the expression of and, crucially, harm to non-trans identified women because their message is rendered invisible against the background norm of gender conformity.

Expression claims are neither a panacea nor substitute for challenges based in autonomy or equality. A legal claim is but a jurisprudential approximation of the constitutional values at stake, whether of equality, liberty, or free expression. And, as with all rights- and identity-based claims, each of the three has serious flaws. Flaws notwithstanding, the normative prescription proposed in this Article can be encapsulated in a single word: more.

11. See infra text accompanying notes 69-98 (discussing consequences of state-enforced sex-gender ideology).
12. See infra text accompanying notes 69-98.
13. See infra notes 209-229 and accompanying text.
This Article proposes a long-term vision. Today, a person can identify herself as female, have breasts, a vagina, a woman’s body mass and muscle strength, have no measurable amount of testosterone in her body, and be otherwise indistinguishable in social interactions from any other woman, yet the vast majority of jurisdictions will declare her legally to be male. As an initial matter, there needs to be more understandings of gender reflected in the law. This Article focuses on expression because it offers the opportunity of more. In contrast to the most common jurisprudential vehicle—equality—expression may better reflect the complex and flourishing diversity of experiences that make up gender. In particular, while equality claims tend to rely almost solely on a medical model of gender identity, expression claims are also suited to non-medicalized claims by trans persons, especially those for whom dissent from traditional norms is integral to their gender identity.

Part I considers gender within the context of the interwoven nature of equality, autonomy, and expression, and asserts that First Amendment claims have the potential to more fully represent a range of gender identities not comfortably captured by the predominant rubric of equality. Part II discusses the ideology of the binary. First, it examines ways in which state enforcement—not only of gender roles but also the state’s view of sex itself—constitute expression. Part II then demonstrates through case law that while the overarching message sent by the state is its insistence on sex as a fixed binary, this message is often interwoven with a tapestry of a prescriptive ordering, one that subordinates women, trans individuals, and gay persons.

Part III considers two highly schematized accounts of claims for inclusion by trans individuals. The first represents the bulk of legal challenges and relies on a binarized, medicalized understanding of gender variance. The second are claims for inclusion outside of, and often in resistance to, a binarized and medicalized experience of gender. The normative aspiration proposed in this Article is for advocates to pursue expression-based claims within and outside of a medical model. Part IV considers “the stuff of lawyers’ work,” examining obstacles to potential symbolic and compelled expression challenges.

Lastly, Part V draws on what has been referred to as the “transparency phenomenon” in critical race theory: the understanding that the background, majoritarian norms associated with whiteness are transparent to the white majority because of their ubiquity. Applying this to the failure of gender claims by non-trans identified women, this Part suggests that courts fail to recognize the harm in some traditional “pink” gender role stereotyping cases because that harm is invisible when viewed against the “pink” background norm of feminine gender conformity. I conclude that trans expression claims may offer the possibility, over time, of making the invisible (more) visible, enabling courts to better see, for trans and non-trans identified persons, the harms of state-enforced conformity with gender norms over an individual’s objection.
I. GENDER AT THE CROSSROADS: EQUALITY, AUTONOMY, AND EXPRESSION

It would be hard to capture the intertwined nature of equality, autonomy, and expression in a Venn diagram: three circles with a common ground of overlap would be far too neat to capture the complexities of this relationship. A rich, scholarly literature examines many of these interconnections; it suggests, and I agree, that the constitutional values underpinning these guarantees are not easily severable, and that the doctrinal drive to do so has lead to significant drawbacks. 14 Nan Hunter, for instance, identified the development of a "new branch of equality law" that she called "expressive identity" claims, which she described as "an equality challenge in which the identity cannot easily be separated from a message." 15 Central to Hunter's analysis is the inseverability of identity from expression inherent in these claims: expressive identity claims are at once 100% status and 100% expression. 16 Similarly, Kenneth Karst described the right of intimate association as an "organizing principle" that "reflect[s] various hues on the constitutional spectrum" of free expression, equal protection, and both procedural and substantive due process. 17

The normative desirability of taking a more synthetic, intratextual approach to the Constitution often accompanies a discussion of the hybrid nature of such rights. 18 Although I endorse such an approach, it is unnecessary to consider here: First Amendment claims can be brought as a supplement to or in place of equality or autonomy claims; each basis is sufficient in se. For the purposes of this Article, this tripartite interconnection is significant because the underlying values are precisely those at stake in gender recognition cases. Chief among these values are the development of autonomy and self-actualization; protection of minorities (whether based on viewpoint or status); encouragement of diversity (among individuals, groups, and views); and corresponding protection of the democratic process 19 (as in Justice Stone's most famous of footnotes). 20

14. For in-depth, thoughtful analyses of the inter-related nature of these protections, see, for example, Nan D. Hunter, Escaping the Expression-Equality Conundrum: Toward Anti-Orthodoxy and Inclusion, 61 OHIO ST. L.J. 1671 (2000) [hereinafter Hunter, Escaping the Expression], analyzing the relationship between the right to equality and freedom of expression, and Kenneth L. Karst, The Freedom of Intimate Association, 89 YALE L.J. 624 (1980) [hereinafter Karst, Intimate Association], discussing the constitutional and social issues involved with establishing a "freedom of intimate association." See also Kenneth L. Karst, Equality as a Central Principle in the First Amendment, 43 U. CHI. L. REV. 20, 23 (1975) ("The principle of equal liberty of expression underlies important purposes of the first amendment.").
16. See, e.g., Hunter, Escaping the Expression, supra note 14, at 1672.
18. See, e.g., id. (discussing the "pliable quality" of the freedom of intimate association and its relationship to other constitutional doctrines).
19. See generally Hunter, Escaping the Expression, supra note 14, at 21 (discussing interests at stake in expression cases); Karst, Intimate Association, supra note 14, at 629-47 (analyzing the values that intersect the freedom of intimate association).
20. See United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (suggesting the need for heightened scrutiny for all three clauses when necessary to check majorities' attempts to hijack the
While gender-based expression claims face some substantial jurisprudential hurdles and present difficulties of their own, they obviate others that are entrenched in liberty- and equality-based claims.21 Because the bulk of gender claims rely on an antidiscrimination, rather than autonomy model, this Part considers common failings of an equality approach only. Importantly, though, this Part does not argue that First Amendment challenges should supersede those based in equality or autonomy. Determinations such as whether and upon what ground or grounds to bring a claim are at the heart of lawyering. The suitability of, say, an antidiscrimination claim in conjunction with, or separate from, an expression-based challenge turns on familiar considerations, such as the interaction of fact and doctrine, the venue (administrative or judicial), and the wishes of the client. Encompassed within these, however, is a consideration that may be less familiar: the role of a client’s gender identity. In attempting to address the basis of her claim, it is inestimably important that the claims brought and the manner of discussing them best reflect the client’s self-understanding. While far from perfect, expression-based claims have the potential to more fully represent a range of gender identities not comfortably captured by the predominant antidiscrimination rubric.

In a growing minority of jurisdictions, an antidiscrimination framework for gender recognition claims has met with considerably greater success relative to other doctrinal accounts.22 Significantly, however, such wins have primarily benefited trans persons whose bodies and lives most closely resemble traditional norms—heterosexual individuals whose gender identity reflects a binary understanding of sex and who have undergone surgical reconstruction so that anatomy and identity are in alignment. Because the limits of equality claims have been analyzed extensively elsewhere,23 this Subsection briefly sketches three shortcomings: first, a jurisprudential rejection, by and large, of an antisubordination approach to equality in favor of an insistence upon an Aristotelian model; second, the paradox that a plaintiff must claim a particular (fixed) identity even if her identity is more fluid or if the heart of her claim is a rejection of categorization in toto; and third, equality’s presumption of a formal disavowal of state-enforced discrimination,24 in contrast to the First Amendment’s distrust of government political process at the expense of minorities).

21. See infra Part V.


23. See generally Andrew Gilden, Toward a More Transformative Approach: The Limits of Transgender Formal Equality, 23 BERKELEY J. GENDER L. & JUST. 83 (2008) (discussing various paradigms to view discrimination claims raised by trans persons); Romeo, supra note 22 (discussing the models by which trans persons may raise claims for discrimination and the barriers to redress they encounter).

power with respect to claims of state-enforced orthodoxy. For each, these difficulties may be minimized by a shift in focus to expression.

A. An Aristotelian Approach Particularly Fails Trans Individuals

As feminist scholarship has emphasized, the Aristotelian "sameness/difference" approach of ensuring that similarly situated individuals are treated similarly means that there is often no protection for those deemed "different"—frequently the very people most likely to be targets of discrimination. The command of treating "likes" alike can be especially damaging for trans persons. Among courts refusing to recognize a person's identified gender, a common (and dehumanizing) rationale is that trans individuals are neither truly male nor truly female, and hence not "like" non-trans men and women. In denying a marriage application where one party was trans, an appellate court summed it up succinctly, stating, "[The court below] violated neither of the applicants' equal protection rights. Rather, it was treating like cases alike and unlike cases accordingly. . . . In other words, this case was not the usual case . . . ." Precisely because an understanding of trans identity is based on individuals' variance from gender norms, the Aristotelian approach all but ensures that claims by trans persons will rarely, if ever, be deemed "the usual case."

The polarity of difference, moreover, is presumed to mean something, and that something often has an hierarchical cast. An Aristotelian methodology not only fails to protect those deemed different, but it also glosses over a larger question—different from whom? As Catharine MacKinnon argued, the framework assumes as its baseline the norms of the dominant group, against which the claims of the subordinate group are measured. This is particularly true when it is a sex-based difference, understood within the prevailing account of essentialized binarism—what the Supreme Court has termed the "inherent differences" between men and women.

These differences were framed as a "cause for celebration" by the Court in striking down the ban on women attending the all-male Virginia Military Institute in United States v. Virginia (VMi). The Court's celebration of these differences, however, reflects a deep cultural investment in policing the gender lines.

26. See infra notes 70-74 and accompanying text.
29. For an in-depth discussion of the naturalized, binary model of sex, and my argument that it represents a form of ideological expression, see infra notes 37-49 and accompanying text.
30. See, e.g., United States v. Virginia, 518 U.S. 515, 533 (1996) ("'[I]nherent differences’ are no longer accepted as a ground for race or national origin classifications. Physical differences between men and women, however, are enduring . . . .") (internal citation omitted).
Following on the heels of VMI, just four years later, the more oppressive aspects of this investment were revealed in Tuan Anh Nguyen v. Immigration and Naturalization Service. There, the Court deployed “our most basic biological differences” to justify unequal access to citizenship. As this result suggests, a legal framework ostensibly dedicated to sex equality, but one that permits reliance on the purportedly exogenous fact of natural differences, is, to put it mildly, a porous one.

An Aristotelian approach obscures the extent to which the purportedly neutral baseline in fact reflects the very norms a claimant may be challenging. When a norm is so ubiquitous, it ceases to look like a norm; it simply becomes part of the background—part of “the way things are.” With respect to sex discrimination, MacKinnon explained, “Concealed is the substantive way in which man has become the measure of all things. Under the sameness rubric, women are measured according to correspondence from man . . . . Gender neutrality is the male standard.” The dominant norm is rendered invisible; the markedness of masculinity has disappeared. Similarly, enforced compliance with gender role stereotypes may be especially likely to disappear for non-trans identified individuals. Consider, for instance, the gender norm of women wearing make-up. While not all women wear make-up, a walk into any drugstore or five minutes of television will attest to the norm’s robustness. As discussed in Part II, expression-based gender recognition claims may help bring the background norm into relief.

B. Fixed Identity Categories, Fluid Identities

Another shortcoming of an equality model is especially relevant for trans individuals who identify as agendered or bi-gendered, or for whom their gender identity is in other ways fluid. Postmodern scholarship contends that the demands of equal protection jurisprudence reify identity—to make a claim, a litigant must identify herself in a way that corresponds to the pre-ordained confines recognized by the law. Trans plaintiffs in successful sex discrimination cases typically identify as transsexual and as either (uniquely and solely) male or female, an identity that conflicts with their sex assigned at birth. For those whose identity is not fixed, making a claim as only “male” or “female” could require a plaintiff to

33. Id. at 73.
35. See infra notes 210-219 and accompanying text (discussing a Ninth Circuit case in which the court rejected the plaintiff’s Title VII discrimination claim, unable to take seriously the harm experienced by the plaintiff in being forced to conform to traditional gender norms).
36. See infra notes 53-68 and accompanying text (explaining the use of gender and sex as forms of expression and advocating for increased-use of expression-based challenges because doing so captures an important element of the harm experienced by the transgender individual making the claim).
37. Gilden, supra note 23, at 85-86.
undergo an injury similar to the one she is attempting to redress. Postmodern scholarship posits that the process of asserting identity-based claims is not merely Machiavellian: although she may adopt an identity for the purpose of a lawsuit, the very act of adoption and the understanding of oneself as wronged based on that identity is arguably disciplinary and constitutive.39

Related to the reliance on a fixed, binarized assertion of gender, successful cases typically rule in favor of trans litigants based on a biologized or medicalized identity.40 These rulings frequently emphasize the medical profession’s designation of gender dysphoria as a medico-mental health condition.41 In addition, these cases often also focus on the extent, if any, of surgical intervention.42 For persons wishing to have the law recognize their identified gender under an equality model, there is a pragmatic drive towards reliance on a medical model.43 As discussed below, expression claims with the greatest likelihood of success are those that likewise rely on a medical model. Nonetheless, I argue that expression claims offer claimants who reject reliance on a medical model an opportunity for success that is effectively foreclosed by status-based claims.

In addition to any individual harm, the process of claiming a biologized and medicalized identity may serve to re-inscribe the very categories the plaintiff is seeking to challenge. Consider an example that may be more familiar—the law’s classificatory response to and re-inscription of race-based difference.44 Homer Plessy’s suit, for instance, was not framed as a direct challenge to segregation, but rather, as a claim of mis-categorization: in essence, he argued that he was white and not black; therefore, he belonged in the whites-only car.45 Homer Plessy’s claim can be read, particularly through a contemporary lens, for more radical meanings. It may be seen not only as a challenge to segregation, but also as a rejection of state-enforced racial categorization as well as the biologized construction of race.


41. See Enriquez, 777 A.2d at 370 (explaining plaintiff’s gender dysphoria by reference to her own mental impressions in addition to current medical research relating to the development of the brain).

42. See, e.g., id. at 368-69 (discussing the plaintiff’s transition from male to female as beginning with her external transformation in appearance and ending with her surgical procedure).

43. See Romeo, supra note 22, at 724-30 (noting courts’ increasing reliance on the medical model to grant at least some basic legal protection for transgender litigants and attributing such reliance on medical regulations becoming more visible and uniform); see also infra notes 98-124 and accompanying text (discussing expression identities that both reject and rely upon the medical model).

44. The oppressive history of race discrimination raise challenges that are at once distinct from and importantly intersect with the oppression arising from discrimination based on sex or gender, with severe violence and marginalization inflicted on trans people of color. See, e.g., Paulette M. Caldwell, A Hair Piece: Perspectives on the Intersection of Race and Gender, 1991 DUKE L.J. 365, 372-76 (1991). My focus here is on the vicious circle created by the state’s creation of, and litigants’ challenges to, race and sex-based classification systems.

45. Plessy v. Ferguson, 163 U.S. 537, 538 (1896).
Significantly, the law's structure meant that Mr. Plessy had to frame his claim within the confines of racial identity as envisioned by those in power at the time. He thus was required to run the risk that a successful claim would reproduce even (and ever) more intricate levels of racial apartheid, as courts determined how much "whiteness" was "white enough" to fit the racial identity standards of the day. History revealed that such rulings, nonetheless, became part of the legal landscape as courts adjudicated whiteness and blackness for others who did not fit neatly into a racial binary.  

In a similarly biologized fashion, trans men, for instance, are asked highly intrusive questions concerning penis length in an attempt to determine how much "maleness" is "male enough." And the many trans individuals whose gender identity does not fit neatly into a male-female binary must nevertheless frame their claims within the confines of this model. An expression claim does not eradicate the need for sex-based categorization, and I do not argue that the state is required to supplement or otherwise change its binary rubric: I assume, arguendo, that plaintiff ultimately seeks recognition as either "M" or "F." Deploying expression as the means to achieve that end, however, shifts the focus to the particular message that the trans person was sending regarding her gender identity. A shift of this nature may allow for a more encompassing discussion of the claimant's individual gender variance. Particularly given that law and identity tend to act over time as a "feedback loop," this may, in turn, slowly raise awareness that there are many possible narratives and experiences of gender.

C. Equality's Search for the "One Bad Apple"

First Amendment law is arguably more suspicious of government power than are the vast majority of cases involving sex discrimination claims. For the latter, where there is no facial sex-based classification, but where discriminatory impact is overwhelming, the law is disturbingly unsuspicious of government power. As critical theorists have discussed, equality law in disparate impact cases in effect
presumes that there has been a formal disavowal of gender discrimination by the
government. Instead, applying what is often called by critics a "perpetrator
perspective," the law attaches liability only in those rare cases where the plaintiff
can point to the presumably exceptional evildoer who acted with conscious
discriminatory intent.51 Gender discrimination thus is portrayed as an anomalous
rather than as an on-going threat.

Expression jurisprudence, in contrast, reflects a deep and abiding skepticism
of governmental regulation of expression. Inherent in the structure of the First
Amendment is concern with the use of state power to coerce conformity, and a
corresponding reliance on the amendment's guarantees as a bulwark against
totalitarianism.52 As discussed in greater detail in Parts II and III below, expression
claims may help move the analysis away from equality's status-based conflation
of anatomy as designated at birth with gender identity and expression. Instead, First
Amendment challenges have greater potential to shift the focus to the reasons
for the government's regulation of the plaintiff's gender expression, including the
imposition of the state's own sex-gender ideology.

II. THE IDEOLOGY OF THE BINARY

A. Gender and Sex as Expression

As the scholarly literature attests, the understanding of gender as expressive is
anything but new.53 A person's gender presentation (as masculine, feminine,
androgynous, multiple, or fluctuating) occurs against a backdrop of shared social
and cultural understandings of what it means to be male or female. The words
"sissy" and "tom-boy" are a testament to our collective ability to "read" gender
and interpret failures to conform to gender norms. Central to any consideration
of gender theory is Judith Butler's preeminent work on the performativity of gender.54
Butler argued that we all perform our gender: gender exists through the repeated
performance of it, which legitimizes and substantiates it through its continual

(setting forth a limited number of situations in which a plaintiff may be able to prove invidious intent);
Washington v. Davis, 426 U.S. 229, 245-48 (1976) (holding that a showing of disparate impact would
not be sufficient to establish an equal protection claim, instead requiring discriminatory intent on the
part of the state actor); see also Lawrence, supra note 24, at 324-25 (discussing the requirement that
there must be discriminatory intent to bring a claim for equal protection).

52. See, e.g., West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) ("If there is any
fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall
be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by
word or act their faith therein.").

53. See Dylan Vade, Expanding Gender and Expanding the Law: Toward a Social and Legal
Conceptualization of Gender that Is More Inclusive of Transgender People, 11 MICH. J. GENDER & L.
253, 276 (2005) ("Gender is expression—physical, mental, spiritual, sexual, inter-relational, connective
expression .... Gender is that expressive, relational, embodied self.").

54. See supra note 39 and accompanying text (discussing Judith Butler's theory of gender
performativity).
Gender norms, moreover, are ideological expressions. Some may object to the characterization of gender as ideology. However, with its focus on the societal roles expected of men and women, the content and contours of concepts like "masculinity" and "femininity," and the gender identity and presentation of persons who transgress gender norms, gender itself is a study of ideology, precisely in the sense contemplated by Merriam-Webster.

The dominant view of sex as binarized and essentialized likewise is ideology. Gender theory has long understood this. Butler argued that it is through the performance of gender that our notion of sex is produced: these repeated gender performances instantiate sex as "natural," binary, and heterosexual. Sex and gender thus function as norms which themselves produce the bodies that are governed. As Butler states, sex is not a "static condition of a body, but a process whereby regulatory norms materialize."

Those skeptical of gender theory may find a medical evaluation of sex to be more convincing. If asked to explain sex differentiation, most of us would refer immediately to biology, drawing perhaps on the filmstrips we saw in sex or health education class in junior high school—a discussion of boys and girls, distinguished by chromosomal make-up, genital and other reproductive anatomy, the development of secondary sex characteristics—all presumed to line up, along with one's gender identity, unproblematically. As an initial matter, medical and scientific communities overwhelmingly would corroborate this view: as we all know, the first governmental record of our lives begins with a doctor's genital check of a newborn and the "M" or "F" on our birth certificates. Because this view is deceptive in its apparent ubiquity, it is important to note that sex and gender dualism has not been the sole method of ordering our world: cutting across cultures and time-periods, more capacious views of sex and gender, often characterized by inclusion of a third sex, have emerged.

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55. BUTLER, supra note 39, at 140.
56. See generally David B. Cruz, Disestablishing Sex and Gender, 90 CAL. L. REV. 997, 1001, 1007, n.44 (2002) (describing "gender fundamentalism" as the belief that men and women are, and should be, fundamentally different and noting that "[t]he sex/gender system then is something of a misnomer, as a sex/gender system might be regarded as just another term for a gender ideology"); Ariela R. Dubler, In the Shadow of Marriage: Single Women and the Legal Construction of the Family and the State, 112 YALE L.J. 1641, 1644 (2003) (describing the traditional model of marriage as premised on the gendered model of male providers and female dependents); Susan Etta Keller, Operations of Legal Rhetoric: Examining Transsexual and Judicial Identity, 34 HARV. C.R.-C.L. L. REV. 329, 339-52 (1999) (discussing gender as ideology).
57. See MERRIAM-WEBSTER'S ONLINE DICTIONARY, http://www.merriam-webster.com/dictionary/ideology (last visited May 13, 2009) (defining "ideology" in one definition as "a manner or the content of thinking characteristic of an individual, group, or culture").
59. Julie A. Greenberg, Defining Male and Female: Intersexuality and the Collision Between Law and Biology, 41 ARIZ. L. REV. 265, 275-78 (1999). From the Native American recognition of persons known as two-spirit or berdache, to Hirjas in India, to the recognition of intersex children in certain regions of the Dominican Republic and Papua New Guinea, societies have recognized and continue to recognize what is frequently referred to as a third sex, persons typically possessing both male and
In spite of contemporary western society's initial narrative of sex, however, these same doctors, when pressed for a more detailed explanation of sex, would convey a picture that is far less tidy. Millions of people do not fit neatly into an "M" or "F" category. Experts, for instance, estimate that one in every 1500 to 2000 babies is born intersexed, having some combination of anatomical, hormonal, and/or chromosomal characteristics that are neither clearly male nor female.60 For infants born with ambiguous genitalia, the ability of social norms to literally construct sex is at its most stark. In a practice that denies intersex children the ability to identify their own gender later in life and to control their reproductive capacities and sexual functioning, many doctors continue to routinely undergo surgery on the newborn. The child's sex is determined by the medical establishment's heterosexist assumption that men must have a penis capable of penetrating a vagina: if the infant has a developed but undersized penis, the child is often surgically constructed into a girl and given female hormones.61

For these intersexed children, women are constructed (figuratively and literally) as "men minus." As one specialist stated, "In the absence of maleness, you have femaleness."62 While precise numbers are not known, due in part to a fear of exposing oneself to discriminatory treatment, estimates concerning the incidence of intersexuality and transsexualism range from one-half of one percent of the population to four percent; there are, in addition, many other individuals who identify as transgender or are in some way gender variant.63 This essentialized tale of two sexes with congruent gender identities is ideological because it is a selective slice that ignores what is known about the larger understanding of sex. Although many people fall within a binary model, the full range of sex differentiation is anything but binary—with some researchers, positing multiple sexes or describing sex as a continuum along a male-female spectrum.64 Still others, particularly those

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61. See generally Julie A. Greenberg, Deconstructing Binary Race and Sex Categories: A Comparison of the Multiracial and Transgendered Experience, 39 SAN DIEGO L. REV. 917, 934 (2002) [hereinafter Greenberg, Deconstructing Binary Race] ("Therefore, if an XY infant is born with a penis that is less than 2.5 centimeters when fully stretched, the XY infant is surgically and hormonally turned into a girl, despite the fact that this treatment may deprive the person of the ability to reproduce as an adult male and the fact that the child's eventual gender identity may well be male."); Suzanne J. Kessler, The Medical Construction of Gender: Case Management of Intersexed Infants, 16 SIGNS 3, 9-17 (1990) (discussing how doctors should proceed when determining the sex of an "intersex" baby); Catherine L. Minto et al., The Effect of Clitoral Surgery on Sexual Outcome in Individuals Who Have Intersex Conditions with Ambiguous Genitalia: A Cross-Sectional Study, 361 LANCET 1252, 1256-57 (2003) (discussing negative effects of intersex surgeries on women including inability to orgasm).


63. Greenberg, Deconstructing Binary Race, supra note 61, at 927 n.53.

64. Some researchers, for instance, have posited that there are five sexes; others refer to sex as a continuum, an infinite number of points along a male-female spectrum. See ANNE FAUSTO-SterLING, SEXING THE BODY 78-79 (2000) (describing five sexes: traditional male, traditional female, herm (true hermaphrodite with both an ovary and a testis), merm (pseudo hermaphrodite with ovaries but
who focus on gender identity as the determinant of sex, view sex not as a binary or
continuum, but as an infinite number of points in a three-dimensional world, a kind
of “hyper-space” of sexual identities that includes, among many others, persons
who are bi-gendered, non-gendered, and androgynous.65

While my own view is most aptly conveyed by the latter, I am not concerned
with arriving at a definitive understanding of sex, if such a thing were even
possible. Nor do I do not mean to imply that the rights of trans individuals turn on
the number of people affected or on whether there may be some biologic basis for
an individual’s gender variance. In fact, even the understanding of what constitutes
biological sex is contested, particularly with respect to the etiology of gender
identity.66 To the contrary, the common understanding of the distinction between
sex and gender, in which the former is privileged as natural and more authentic or
“real” than gender, is itself ideological. For my purposes, the most important
distinction concerning sex and gender is precisely that the two are not distinct. Our
conception of what constitutes a biological male or female is as socially
constructed, contingent, and laden with political and cultural meaning as our
conceptions of masculinity, femininity, and “appropriate” gender roles. An
understanding that dichotomizes sex and gender, privileging the former, in
conjunction with the insistence on (an again hierarchical) male-female binary, is
what I refer to as “sex-gender ideology.”67

While in the majority of cases, the state’s enforcement of this model is an
unexceptional use of administrative generalizations, my focus is on instances in
which an individual is legally categorized as male rather than female, or vice versa,
over that person’s objection. I urge an increased use of expression-based
challenges both because expression captures an important element of the harm to
trans individuals and because it properly directs attention to the role of the state in

65. See, e.g., Dean Spade, Resisting Medicine, Re/modeling Gender, 18 BERKELEY WOMEN’S L.J.
15, 29-30 (2003) (advocating for policy which would recognize “diverse gender expression and
identities”); Vade, supra note 53, at 273-78 (describing a non-linear “gender galaxy”).

66. Researchers are increasingly rejecting an older model that posits intersexuality as more
biological in origin than transsexualism, which is typically described in terms of a person’s
psychological discomfort with her anatomical sex, based on a gender identity different from that
assigned at birth. See generally Peggy T. Cohen-Kettenis, Henriette A. Delelmarre-van de Waal &
Louis J. G. Gooren, The Treatment of Adolescent Transsexuals: Changing Insights, 5 J. SEXUAL MED.
(describing the changing policy relating to gender identity disorders as a response to the changing
understanding of the biological basis for such understanding). While the precise etiology of gender
identity is not known, many experts point to a significant biological basis, influenced by a complex
mixture including pre-natal hormones, genetics, and fetal brain development. Id. As a result,
researchers are increasingly characterizing transsexualism as an intersex condition. Id.

67. For these reasons, I at times use the terms “sex” and “gender” interchangeably (most typically
employing the term “gender” in ways that may sometimes encompass what some may understand to
constitute anatomical sex) as well as in combination.
enforcing a selective message about sex and gender. Trans people of course face difficulties created by private as well as state power. Nor is "the state" a monolithic entity; it consists of judgments by individuals that reflect, by and large, the social narrative of sex. The state, however, not only maintains a monopoly of power to legally categorize people by sex, but also uses those categories to distribute benefits such as those related to marriage over which it likewise maintains monopolistic authority. Furthermore, it controls access to government identification, affecting an infinite array of private and governmental interactions, and placing trans individuals with non-conforming I.D. at risk of harassment, discrimination, or violence.68

B. State-Enforced Sex-Gender Orthodoxy and the Subordination of Outgroups

Federal, state, and local government agencies enforce their own selective sex-gender ideology on a daily basis, deeply touching all aspects of an individual's life—from the issuance of passports, driver's licenses, and birth certificates, to petitions for legal name changes, to the enforcement in forty-six states of the mixed-sex requirement for marriage, and the determination of legal parenthood.69 Judicial opinions illustrate the myriad ways in which refusal to recognize a person's identified sex is expressive, and the pronouncements are remarkably consistent. The overarching statement is insistence on sex as a fixed binary. Intertwined within this is a message of subordination (and superordination) with respect to three gender-based outgroups: persons who are trans (rather than gender-conforming); female (rather than male); and gay or bi (rather than heterosexual). The first is typically communicated through a portrayal of trans people as non-natural, dehumanized, and "other." The subordinate position of women is frequently expressed by an emphasis on whether a trans woman can adequately be sexually receptive to a penis. The last is an anti-gay insistence on heterosexuality as an integral component of one's identification as male or female. The result is a tapestry of a prescriptive ordering, with the same threads often communicating a message of disapproval of these outgroups simultaneously.

The expression of trans people as a non-natural and de-humanized is the corollary to the view of sex as immutably created by nature or, as implied in a few decisions, by divine authority. As David Cruz argued, "gender may effectively be conceptualized on the model of religion," each functioning as ideology, with resort to extra-human authority as an underlying justification for the particular form of social organization for each.70 One appellate court, for instance, framed the recognition issue before it as whether "a person's gender [is] immutably fixed by our Creator at birth,"71 responding in the affirmative by concluding, "There are

68. Romeo, supra note 22, at 715.
69. See id. at 715-16 (noting that government aid programs are designed to condition assistance on personal decisions of recipient, including job choice and family structure, based upon what legislatures define to be socially desirable).
70. Cruz, supra note 56, at 1005-06.
71. See Littleton, 9 S.W.3d at 224 ("The deeper philosophical (and now legal) question is: can a
some things we cannot will into being. They just are.”\textsuperscript{72} Whether from God or nature, this essentialized view of sex leads almost ineluctably to a comparative portrayal of persons outside this schema as unnatural or non-human. As the sanitation workers’ claims to manhood\textsuperscript{73} and Sojourner Truth’s assertion of her womanhood\textsuperscript{74} powerfully convey, to be gendered is to be fully human.

An Ohio appellate decision refusing to issue a marriage license to a trans man and his female partner, \textit{In re Marriage License for Nash},\textsuperscript{75} illustrates the way in which assertion of sex-gender ideology almost inescapably involves intertwined messages of subordination with respect to trans persons, women, or gays.\textsuperscript{76} The court opened by fleetingly acknowledging that a fixed, binary view of sex does not represent the complete picture, stating: “[w]e recognize that there are people who do not fit neatly into the commonly recognized category of male or female,”\textsuperscript{77} but insisting nonetheless on the fixed, essentialized view that “one’s gender at birth is one’s gender throughout life.”\textsuperscript{78} The court then quite literally portrayed trans women and men as neither male nor female by reading them out of Ohio’s marriage statute, finding it inapplicable on the ground that “the ‘words’ . . . ‘male,’ and ‘female’ . . . do not encompass transsexuals.”\textsuperscript{79} The court, as have others, further treated gender transition as a matter of humor or ridicule, noting that, for male-to-female genital surgery, “amputation is a pretty important step.”\textsuperscript{80}

In a circular move that perpetuates heteronormativity, the \textit{Nash} court reasoned that Nash’s original female-designated birth certificate was evidence sufficient to rebut the prima facie case of maleness established by his amended, male-designated birth certificate, even though the amended certificate was issued \textit{for the very purpose} of replacing the original.\textsuperscript{81} Then, after relying on the original birth certificate as conclusive evidence of his sex, the court invoked Ohio’s anti-gay marriage ban as a shield. The court refused to grant full faith and credit to the amended birth certificate on the ground that to do so would violate Ohio’s public policy against same-sex marriage, thereby simultaneously asking and answering the question before it.\textsuperscript{82}

\begin{flushleft}
\textsuperscript{72} \textit{Id.} at 231.
\textsuperscript{73} \textit{See supra} notes 2-3 and accompanying text.
\textsuperscript{74} \textit{See supra} note 4 and accompanying text.
\textsuperscript{75} Nos. 2002-T-0149, 2002-T-0179, 2003 WL 23097095.
\textsuperscript{76} \textit{Id.} at *9.
\textsuperscript{77} \textit{Id.} at *7 (quoting \textit{In re Estate of Gardiner}, 42 P.3d 120, 137 (Kan. 2002)).
\textsuperscript{78} \textit{Id.} at *9 (quoting Gajovski v. Gajovski, 610 N.E.2d 431, 433 (Ohio Ct. App. 1991)).
\textsuperscript{79} \textit{Id.} at *6 (quoting \textit{Gardiner}, 42 P.3d at 135).
\textsuperscript{80} \textit{Id.} at *8 (quoting \textit{Littleton}, 9 S.W.3d at 230-31); \textit{see also} Kantaras v. Kantaras, 884 So. 2d 155, 160 (Fla. Dist. Ct. App. 2004) (“Assuming . . . that defendant was a male entrapped in the body of a female, the record does not show that the entrapped male successfully escaped to enable defendant to perform male functions during marriage.” (quoting Frances B. v. Mark, 355 N.Y.S.2d 712, 717 (N.Y. Sup. Ct. 1974) (internal quotation marks omitted)).
\textsuperscript{81} \textit{Nash}, 2003 WL 23097095, at *5.
\textsuperscript{82} \textit{Id.}
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Unlike the cases discussed below, the majority in *Nash* does not directly express messages that place women in a subordinated role. The *Nash* dissent, however, rather bluntly got to the heart of the majority's sex-gender ideology by comparing the majority's decision to infamous cases upholding sex discrimination based on the view of women as inherently different from men. Referring to the majority's conclusion that trans individuals are neither truly male nor female, the dissent likened it to the statement in *Muller v. Oregon*\(^{83}\) that a woman "[d]ifferentiated . . . from the other sex . . . is properly placed in a class by herself . . . ."\(^{84}\) This status as immutably different is what made legally acceptable the "plethora of paternalistic legislation and judicial decision making based on 'indisputable' natural law and thinly veiled religious dogma that portrays women and other folk as fragile and somewhat moronic creatures incapable of protecting or thinking for themselves."\(^{85}\) For the dissent, it is the notion of essentialized "otherness" that perpetuates subordination.

Even some courts that recognize a person's identified gender may do so in a way that perpetuates sex role stereotypes. Particularly for cases challenging the validity of a marriage in which one spouse is trans, courts typically consider the parties' ability to engage in heterosexual intercourse, grounded in notions about the proper role and use of women's and men's bodies.\(^{86}\) It may initially seem unproblematic for a court determining the validity of a heterosexual marriage to consider the parties' ability to engage in heterosexual intercourse. That determination, however, presents a highly troubling use of state power, fraught with threats to equality and liberty. The state must posit what heterosexual sex looks like, which is rife with potential for gender role stereotyping and, when applied to the couples before the court, is breathtakingly invasive.

Courts that adopt an essentialized sex-gender binary are uniform in their insistence on a "missionary" model of heterosexual sexuality—one in which the man's role is distilled to penetration and the woman's role to passive receptivity. Moreover, the court's sensationalist and prurient prying into the couple's sex life is reminiscent of the oppressive wielding of state power through sodomy laws, ruled unconstitutional in *Lawrence v. Texas*.\(^{87}\) Transgender marriage trials have included weeks of testimony—some of which have been broadcast nationwide—on the sexual positions and practices of the couple, detailed descriptions of the trans

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83. 208 U.S. 412 (1908).
85. *Id.* at *10 (citing Radice v. New York, 264 U.S. 292, 294 (1924)).
person’s genitalia, and questions such as whether he or she urinates while seated or standing. This intrusion into the deeply personal aspects of one’s intimate relationship is compounded by the enforcement of prescribed gender roles. For trans women, the focus, as framed by one court, is whether she has a “normal” vagina that could “function as any female vagina,” which the court defined as being for the purpose of “traditional penile/vaginal intercourse.” For trans men, courts inevitably focus on whether the man has a penis deemed large enough for penetration, such that intercourse with his wife could be adjudicated sufficiently heterosexual. The state’s insistence on male penetration and female penetrability sends messages, respectively, of activity and passivity, dominance and subordination. In short, the use of state power to intrude into one’s intimate life, with its insistence that sexuality be performed within the confines of traditional gender roles, targeted solely at an unpopular group, is a stark reminder of the interconnected nature of autonomy, equality, and expression.

In an unusual case, one court reversed itself on rehearing, directly acknowledging that it had overstepped in these realms. At issue was a trans woman’s petition for a name change. Cynthia Frank was caught in an all-too common catch-22 for people who are transitioning: she sought the name as part of her gender reassignment protocol—a protocol typically required by the medical “gatekeepers” who control access to gender reconstructive surgeries, but the court denied her petition until “completion” of surgery. This left Frank in gender transition purgatory, unable to get a name change until she transitioned and unable to transition without the name change. To this the court added a second requirement—that Frank get divorced as a prerequisite to the name change. The court stated, “It would . . . be inconsistent for this court to grant the relief requested,

88. See, e.g., Littleton, 9 S.W.3d at 227 (comparing the sexual habits and history of the trans defendant and her plaintiff husband with those described in previous trans cases).
90. Id.
92. See, e.g., id. at 71 (noting that “[w]hile the court includes a discussion of [plaintiff’s] life experience with (relative) sensitivity, its exaltation of male penetration of women has the effect of reducing [plaintiff] to little more than a receptacle for intercourse and her marriage to little more than the missionary position”).
93. See In re Guido, 771 N.Y.S.2d 789, 790-91 (N.Y. Civ. Ct. 2003) (noting that the court’s previous inquiry into sex-reassignment surgery and the status of the petitioner’s marriage was “misplaced”).
94. Id. at 789-91. Trans people who desire surgery typically must undergo a protocol that includes the so-called “real life test,” in which the person must live and work full-time in their identified gender for one year. In addition to the courts, other “gatekeepers” may include employers, who may insist on a legal name change before allowing the person to present herself at work in her identified gender. I put “completion” in quotes to highlight the fact that courts often require multiple surgeries to consider gender reassignment to be complete—surgeries that can be far more extensive, costly, and medically risky than the treatment a particular trans person deems appropriate for herself.
95. Id. at 790 (quoting the earlier, unpublished order).
to permit the applicant to appear and represent himself as female, while in fact he remains in a legal relationship with his wife premised on his being male. In an impressive turnaround (albeit two years later), the same judge overturned her prior ruling and granted the petition—not because Frank had fulfilled either requirement (surgeries and divorce), but on the ground that these requirements were beyond the scope of a name change petition. Most importantly, the judge acknowledged that one function of her prior decision had been to send a message about appropriate gender roles: “The law does not distinguish between masculine and feminine names . . . . Apart from the prevention of fraud or interference with the rights of others, there is no reason—and no legal basis—for the courts to appoint themselves the guardians of orthodoxy in such matters.”

III. ASSIMILATION, DISSERT, AND THE MEDICAL MODEL

This Part examines the tensions at play in a trans person’s assertion that state enforcement of gender conformity over her objection violates her right of free expression. While there is some reference to the doctrinal argumentation that is the focus of Part III, my emphasis here is on two highly schematized accounts of gender non-conformity as expression. Drawing on a tension historically (and I believe inevitably) at play in generations of civil rights movements, these are struggles of, respectively, assimilation and resistance. Mapping these broadly onto gender identity, the first are claims of inclusion, largely within a binarized understanding of gender. These constitute the bulk of legal challenges—plaintiffs, typically transsexual, whose claim and/or self-understanding can loosely be described as one of mis-categorization within the binary. The second are claims for inclusion outside of (and often in resistance to) a binarized understanding of gender. Not surprisingly, given the law’s Aristotelian approach, there are no equality challenges (to my knowledge) that encompass the latter. As even a glancing familiarity with expression jurisprudence would suggest, however, an experience of one’s gender identity that is simultaneously an assertion of resistance has the potential to be characterized as dissent, a value preciously guarded by the First Amendment.

A. Assimilation and Resistance as Dissent

Although protected expression need be neither political nor a form of dissent, protection is at its highest for political speech, with the closely related notion that a primary purpose underlying free expression is the protection of dissent. The

96. Id. (internal quotation marks omitted) (quoting prior order). Frank’s wife had already submitted to the court a sworn statement of consent to the name change. Id.
97. Id.
98. Id. at 791.
100. See supra text accompanying notes 101-108 (explaining how an individual’s resistance against the binary gender model is an expressive form of dissent).
expression of gender-nonconformity, as a pragmatic matter, is likely to be deemed too far afield from speech traditionally considered to be “political.” By contrast, as suggested by the often hostile and at times viciously violent reactions of others to an individual’s non-conforming gender expression, a court could find that this expression fulfills a principal function of free speech [which] is to invite dispute[,] . . . induce[ ] a condition of unrest, create[] dissatisfaction with conditions as they are, or even stir[] people to anger.” Gender presumptively positions us in the world along a variety of axes, including sex, sexuality, and sexual orientation; its power to invoke a visceral, almost primitive hostility when non-conforming is a testament to gender’s instant messaging of myriad meanings about our place(s) in the social hierarchy.

Both models posited above can be conceptualized as dissent. Consider a self-understanding that perhaps most closely tracks the dominant view of sex and gender: a binarized mismatch of sex and gender identity, biological in origin and medically diagnosable. This is a claim for inclusion arguably at its most assimilationist. Rather than characterizing the claim as one of resistance, it might be understood simply as an assertion of belonging. Most trans individuals seek nothing more (and nothing less) than access to the gender privileges enjoyed and usually taken for granted by non-trans persons. These privileges can include having the sex marker on their driver’s license or birth certificate reflect their gender identity or the right to marry in accordance with their identified gender. In short, what many trans persons seek looks little like dissent: they seek access to norms and privileges, many of which are accessible only through the state and which are a prerequisite for individuals to function smoothly in society. Their claim is one of assimilation and they seek the legitimizing power of the state.

As others have argued, when a member of a marginalized group asserts her right to be accepted within mainstream norms on an equal basis, that claim for equality is at once assimilative and an expression of dissent. Discussing occasions “when [subordinated] groups or identities seek inclusion or equal treatment and are resisted,” Nan Hunter argued that this effort “is intrinsically a move against orthodoxy because they challenge the patterns of stratification and the ideology of dominance that undergirds those patterns.” In short, she asserted, “Claims of equality based on identities of difference are intrinsically a kind of protest.”

103. See S.F. HUMAN RIGHTS COMM’N, GENDER NEUTRAL BATHROOM SURVEY (2001), http://www.transgenderlawcenter.org/pdf/sbac_survey.pdf. I in no way mean to suggest that gender variant people are somehow “inviting,” or are in any other way responsible for the discrimination, harassment, and violence perpetrated against them.
105. For a more in-depth discussion of the implications of reliance on a medical model, see infra Part III.B.
106. Hunter, Escaping the Expression, supra note 14, at 1720.
107. Hunter, Expressive Identity, supra note 1, at 5.
Although the simultaneity of assimilation and dissent may appear paradoxical, it is in fact a combination that may augur for success in the courts. Courts may more readily accept a message of "dissent"—particularly a transsexual's medicalized claim—precisely because it does not dissent "too much." In other words, the plaintiff's gender identity in such cases, while non-conforming, is—for better and for worse—comprehensible to the court because it fits within the mainstream sex-gender rubric.

B. Expression Encompasses Identities that Rely on and Reject a Medical Model

The mainstream understanding of gender non-conformity is often conveyed via a medicalized model; in court, this typically consists of a claimant's reliance on a diagnosis of gender identity disorder (GID). Whether advocates should rely on a medical model is hotly contested within the trans community, and while I advert to the arguments briefly, an in-depth discussion is beyond the scope of this Article. For my purposes, the most important point is that a First Amendment approach may provide a greater opportunity for success for cases in which a medical model is not used and provides the flexibility of reliance on a diagnosis if that approach is preferred. Because First Amendment claims are predicated on the expression of views rather than directly based in identity, there is at least less of a doctrinal (as opposed to pragmatic) drive to prove the underlying "truth" or reality of one's views. My normative aspiration is for advocates to pursue expression claims both within and outside of a medical model. As discussed below, the decision whether to rely on a medical model may depend on a variety of factors, particularly the individual's level of comfort or disagreement with such a model.

There are significant reasons to be wary of reliance on a medical model, particularly given that such reliance historically has been a source of oppression for subordinated groups—the American eugenics movement, Nazism, and the involuntary sterilization of people of color and/or the poor via welfare programs in the 1970s are sadly but a partial list. Mental health diagnoses, such as


109. Compare Spade, supra note 65, at 23-26 (discussing the dangers of the medical model of transsexuality), with Jennifer L. Levi, Clothes Don't Make the Man (or Woman), but Gender Identity Might, 15 COLUM. J. GENDER & L. 90, 104 (2006) (advocating for bringing disability claims with gender discrimination claims writing that "[b]y incorporating a medical claim associated with one's gender . . . courts can distance themselves from the particular facts . . . and take seriously the dysphoria experienced by a plaintiff's forced conformity to gender norms.").

110. See, e.g., Buck v. Bell, 274 U.S. 200, 207 (1927) (upholding involuntary sterilization of teenager claimed to be mentally disabled on the ground that "three generations of imbeciles are enough"); Matthew Lippman, The 1948 Convention on the Prevention and Punishment of the Crime of Genocide: Forty-Five Years Later, 8 TEMP. INT'L & COMP. L.J 1, 4 n.20 (1994) (noting that World War II provided Nazi Germany with an "opportunity to exterminate, enslave, or Germanize various European nationalities which were viewed as biological inferiors" (citing RAPHAEL LEMKIN, AXIS RULE IN
homosexuality, gender identity disorder, and gender identity disorder in children, arguably reflect little more than political horse-trading of marginalized identities in an attempt to enforce gender and sexual orientation conformity. Some argue that reliance on a medical model, particularly as a mental health diagnosis or disability, embraces and re-inscribes the notion that gender nonconformity is a stigmatic “sickness” to be “cured.” Trans people, moreover, are particularly vulnerable, whether to being kicked out of their homes at a young age, fired from their jobs, or subject to stranger or intimate violence, resulting in a disproportionate number who are homeless, living in poverty, or caught in a cycle of sex work for survival followed by periods of incarceration. Multiply marginalized, many may not have access to healthcare, which some argue is an impediment to reliance on a medical model. For others, reliance on a medical model does not reflect their lives, as their gender identities are not experienced as tied to biology or as otherwise essentialized; moreover, there is a risk that non-essentialized experiences of gender identity may be devalued or dismissed as inauthentic, particularly against the backdrop of medicalized claims. As discussed below, a claim based in expression may offer greater potential for success than equality-based claims for cases in which there is no reliance on a medical model.

There are likewise significant reasons to rely on a medicalized model. For some, a medical model—whether through a GID diagnosis, experienced as a form of disability, or simply as biological in etiology—reflects their lived experience.

OCCUPIED EUROPE 80-82 (1944)); Ian F. Haney López, “A Nation of Minorities”: Race, Ethnicity and Reactionary Color Blindness, 59 STAN. L. REV. 985, 997 (2007) (noting that throughout the 1920s and into the 1930s courts and legislatures were committed to biological theories of inherent differences among different races in order to justify legal oppression).

111. See generally PHYLLIS BURKE, THE “PREHOMOSEXUAL” AGENDA 100 (1996) (discussing the increased use of GID for children suspected of being gay). By “horse-trading of marginalized identities” I mean to say that one marginalized identity—being transgender (and being diagnosed as such through GID)—is replacing another marginalized identity—being gay.

112. See, e.g., Levi, supra note 109, at 104-06 (arguing in favor of the use of disability claims for trans plaintiffs, but acknowledging the social stigma of being “disabled” as the primary objection to raising these disability claims); Spade, supra note 65, at 34 (expressing concern that “trans people do not want to be seen as ‘disabled’” because it implies that to be transgendered is to be flawed).

113. See Spade, supra note 65, at 17 n.5 (describing his own experience in witnessing the gravity of transgender vulnerability).

114. Id. at 35 (arguing that lower income individuals will be denied protections available to wealthier individuals because they lack the resources necessary to access a GID diagnosis as a “diagnosable condition,” which is necessary when courts utilize the medical model approach). But see Levi, supra note 109, at 107-08 (arguing in support of adding a disability claim to a gender discrimination claim and responding to the argument that a medical approach to claims of gender discrimination denies protection to lower-income individuals by stating that medical diagnosis is not necessary to prove the existence of a disability in most states).

115. See, e.g., Spade, supra note 65, at 19-23 (discussing author’s experience of his gender identity, for whom resistance to a medical model is an integral part of his self-understanding, and who had difficulty accessing medical treatment because of his non-essentialized gender identity).

116. I do not mean to argue that a medical model necessarily entails agreement with, or reliance on a disability model; what they share in common is some degree of reliance on a medical or biologized understanding of gender non-conformity.
One of my former transsexual clients, for example, is hearing impaired; in his self-understanding, both his deafness and transsexualism are experienced as biologically-based and as disabilities. In his view, “disability” simply refers to variances from the norm that may (or may not) require accommodation by those within the norm, and he urges that the term be embraced by those who so identify: “The most disabling part of a disability,” he said, “is other people’s reactions to it, so I have no problem relying on disability anti-discrimination laws; I want to take the stigma out of the term ‘disability,’ rather than reject it because it is stigmatizing.” Others have made similar arguments in the context of the language and jurisprudential interpretations of disability nondiscrimination laws.

Another reason, most likely the primary drive towards reliance on a medical model, is that it can assist a court in comprehending the nature of the harm of enforced conformity to gender norms—a harm that that may otherwise be unrecognizable or devalued by a judge for whom such conformity comes seamlessly, with no discernable cost and no experience of harm. Jennifer Levi, for instance, argued that litigation wins for trans sex discrimination claims owe their success to the introduction of medical evidence that enabled the court to understand the deeply-rooted nature of gender identity and provided the “judge a basis for removing . . . herself as the evaluator of the harm,” making it possible for the judge to more fully comprehend “the sincere reasons why the plaintiff could not conform to a sex-differentiated dress requirement.”

Consider first an expression challenge relying upon a GID diagnosis. *Doe ex rel. Doe v. Yunits,* one of the few cases to consider an expression claim, demonstrates the potential for success. Pat Doe, a trans teenage girl, designated male at birth and diagnosed with gender identity disorder, was effectively prohibited from enrolling in the eighth grade if she wore “girls’ clothing or accessories” to school. Undertaking a traditional symbolic speech analysis on a motion to dismiss, the court determined that there was a likelihood of success on the merits, given that testimony at trial would likely establish that her message was one of gender nonconformity. The court concluded, “[T]here is strong evidence that plaintiff’s message is well understood by faculty and students. The school’s vehement response and some students’ hostile reactions are proof of the fact that the plaintiff’s message clearly has been received.”

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117. Phone conversation with my former client, who requests anonymity (Jan. 30, 2009).
118. *Id.*
119. See, e.g., Levi, *supra* note 109, at 105-107 (arguing, inter alia, that the legal meaning of “disability” in non-discrimination laws describes a health condition that does not preclude an individual from performing the essential elements of a job with or without accommodation, and that many such laws provide a cause of action for persons “regarded as” disabled, even if not in fact disabled).
120. *Id.* at 104.
121. *Id.* at 101.
123. *Id.* at *1-2.
124. *Id.* at *3-4.
125. *Id.* at *4.
The *Yunits* court was strongly influenced—maybe even moved—by the fundamental role that gender identity plays in our lives. It is evident, moreover, that the court came to its understanding of the integral nature of gender identity based, at least in part, on the diagnosing therapist’s testimony.126 The court made multiple references to the therapist’s testimony, focusing in particular on the evidence that expression of Pat’s gender identity is essential to her health and well-being.128 While I urge that claims also be brought without reliance on a medical model—and argue that First Amendment may be particularly well-suited for such claims where appropriate—the *Yunits* opinion suggests that clinical evidence can help judges understand that gender expression is, in the court’s words, integral to an individual’s “selfhood” and “a necessary symbol of [one’s] very identity.”130

Now consider, for instance, Dean Spade’s description—which, importantly, is not a description in any static, binarized sense—of his gender identity. In discussing his difficulty accessing chest reconstruction surgery, Spade explained that the medical community’s resistance was in reaction to his rejection of an essentialized identity and his refusal to be identified within that paradigm.131 Spade explained, “The fact that I don’t want to change my first name, that I haven’t sought out the use of the pronoun ‘he,’ that I don’t think that ‘lesbian’ is the wrong word for me, or, worse yet, that I recognize that the use of any word for myself—lesbian, transperson, transgender butch, boy, mister, FTM fag, butch—has always been/will always be strategic, is my undoing in their eyes.”132 Spade’s experience of his gender fits relatively neatly into jurisprudential protection of expression, as his self-understanding is inextricably bound with opposition to the canonical account. Paradoxically, while the highly politicized and strategic nature of his self-understanding may make his expression more of a piece with that traditionally safeguarded by the First Amendment, it is precisely these qualities that may, as a pragmatic matter, result in rejection of protection by courts.

Imagine Spade’s statement within the symbolic speech rubric employed in *Yunits*. There is no real dispute that he had the intent to convey a particularized message, one of the two principal elements of symbolic speech.133 The question is

126. *Id.* at *3.
127. While this Article typically refers to plaintiffs by their last names, because “Doe” is a rather ubiquitous and hence more impersonal pseudonym, I refer to the plaintiff in *Doe v. Yunits* by her pseudonymous first name, “Pat.”
128. See, e.g., *Id.* at *1* (“Plaintiff’s treating therapist . . . determined that it was medically and clinically necessary for plaintiff to wear clothing consistent with the female gender and that failure to do so could cause harm to plaintiff’s mental health.”); *Id.* at *3* (“[P]laintiff’s ability to express herself and her gender identity through dress is important to her health and well-being.”).
130. *Id.* at *3.
132. *Id.* Spade now uses male pronouns and no longer uses his given first name. *See id.* at 19 n.14. FTM is an abbreviation for “female-to-male.”
133. See *Johnson*, 491 U.S. at 404 (finding that in determining whether conduct is sufficiently “communicative” the two principal elements are “[a]n intent to convey a particularized message was
whether there was a great likelihood that the message was understood, given the arguable complexity of his expression. Case law, however, provides that the focus is simply on whether the overall theme or meaning of the expression as a whole is understood, rather than its particularities. In this case, one need not ever have heard the terms “transgender butch” or “FTM fag,” or understand that Spade’s inclusion of terms related to sexual attraction is an indicator of a multi-dimensional understanding of gender; all that needs to be understood is the primary message of gender non-conformity. As an initial matter, then, Spade’s expression seems to be (and I would argue that it is) exactly the kind of symbolic expression that best serves the First Amendment’s “high purpose” by inviting dispute and hence worthy of protection.

A primary obstacle faced by persons who experience their gender identity as grounded in opposition to the sex-gender paradigm, however, is the risk that courts may overlook precisely that which made Yunits successful—the court’s understanding that the plaintiff’s gender identity is a deeply felt and integral aspect of one’s “selfhood.” In contrast with a medicalized account of gender, a court may dismiss the harm to Spade by discounting his experience as “mere” expression (cast, perhaps, as disruptive rebelliousness) rather than recognize that, as with Pat Doe, the harm to Spade is equally profound. This is due to the ubiquity of the binarized, essentialized view of gender: that view is so widespread that it becomes canonical. As a result, a judge may be unable to recognize that her beliefs about gender are simply that—beliefs—a partial and incomplete view of gender rather than the sum total of gender itself. I do not believe this will be fatal in all cases, however, particularly over time. Importantly, Spade’s gender expression, in which

present, and [whether] the likelihood was great that the message would be understood by those who viewed it” (quoting Spence v. Washington, 418 U.S. 405, 410-411 (1974)); see also infra notes 140-145 (discussing symbolic speech more in depth).

134. Johnson, 491 U.S. at 404.
135. Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557, 568 (1995) (finding that the message disfavored by parade organizers—that some Irish are gay, lesbian, or bisexual—was a “collective point” inherent in the “expressiveness of marching”); Yunits, 2000 WL 33162199, at *4 (finding that the plaintiff’s fellow students would likely understand the plaintiff’s overall message: that she was more comfortable wearing clothes consistent with her female gender identity).
136. Hurley, 515 U.S. at 568; see infra notes 149-158.
137. Johnson, 491 U.S. at 408-09 (quoting Terminello, 337 U.S. at 4).
138. See Yunits, 2000 WL 33162199, at *7 (“This court cannot allow the stifling of plaintiff’s selfhood merely because it causes some members of the community discomfort.”).
139. See Barbara J. Flagg, “Was Blind, but Now I See”: White Race Consciousness and the Requirement of Discriminatory Intent, 91 MICH. L. REV. 953, 957 (1993) (discussing what the author terms the “transparency phenomenon,” in which white persons’ race is experienced as invisible to them because it is the presumed racial norm); see also Frances Raday, Culture, Religion, and Gender, 1 INT’L J. CONST. L. 663, 669 (2003) (noting that gender is a social construct and that social gender identity, resulting from this construct, is a product of the norms of behavior of men and women as defined by culture and religion); supra notes 25-27 and accompanying text (discussing how trans identity is based on being different from common understandings of gender norms, which begs the question as to what the norm is).
dissent from the norm is an integral part of his gender identity, directly implicates core First Amendment values.

For my part, my normative aspiration is for advocates to pursue claims both within and outside of a medical model. Given the widespread resistance to and reactivity against gender variance, the vast majority of gender identity claims by trans individuals are unsuccessful; neither form of expression challenge is likely to change that course any time soon. All expression claims, but perhaps particularly those that directly reject a medical, binarized model may in the long-run serve a powerful purpose: chipping away at the dominant view of gender. Counsel must take care not to bring claims at the expense of the client by failing, for example, to make clear the barriers to success. But throughout social movements, individuals, particularly when represented by advocacy organizations, have recognized the value of taking the long view where civil rights and liberties are concerned. My hope is not only that some expression claims will succeed, but also that the act of bringing such claims over time will increase informed public understanding concerning the multi-faceted aspects of gender identity and the harms of state-enforced gender orthodoxy.

IV. LAWYERS’ WORK: SYMBOLIC AND COMPELLED EXPRESSION

In this Part, I address some of the doctrine-wrangling that is an inevitable component of expression claims, examining challenges based on symbolic and compelled expression. Both claims present significant challenges. I argue that they are important to bring nonetheless, because both accurately reflect the real life experience of many trans persons. The first—suppression based on the state’s disagreement with the gender message expressed—is most likely to arise in the context of education and employment. The second—compelled expression and the forced disclosure of one’s identity—is most likely to arise in the context of sex designations in government documentation over the individual’s objection. Although there have been a handful of claims made on the former basis, I am not aware of any based on the latter. Again, assuming that the potential litigant is fully informed that such claims face (to put it mildly) an uphill battle in the courts, I argue that they are worth bringing. Both challenges articulate the nature of the injury that many persons currently endure in silence.

A. Symbolic Expression

Although the First Amendment has long protected a wide range of symbolic conduct, it is unsurprising that symbolic expression doctrine incorporates numerous gatekeepers, lest every form of conduct that has expressive implications (a political assassination, for instance) be protected by the First Amendment. Because the framework for making a symbolic expression claim is fairly straightforward, this Subsection focuses on three such gatekeepers: the assertion that the audience is unlikely to have understood plaintiff’s message; the determination that the state’s action was not aimed at suppressing expression; and the protection afforded employers and schools with respect to grooming and dress restrictions.
1. Gender as a Message Instantly Sent and Received

Return for a moment to Pat Doe in *Yunits*, who made a symbolic speech claim.140 Pat’s expression of her gender identity (through means including wearing skirts, jewelry, and other accessories deemed feminine) is not that different from symbolic expression already protected by the Supreme Court, such as wearing a black armband141 or flag patch on the seat of one’s jeans.142 In those cases, the Supreme Court emphasized the importance of protecting views which may make others uncomfortable or angry, as well as the First Amendment’s role in guarding against state-enforced efforts to coerce conformity.143 Under a symbolic speech analysis, a court must determine whether the claimant had “[a]n intent to convey a particularized message” and whether there is a great likelihood that the message “would be understood by those who viewed it.”144 As mentioned in Part III, the *Yunits* court found, with little apparent difficulty, that Pat was likely to succeed at establishing both elements at trial.145 Before proceeding further, however, I would like to briefly address the contention made by the state in *Yunits*, and likely to be encountered in any symbolic expression challenge, that the plaintiff’s message was not specific enough and that it was not understood.146

In contrast to wearing a black armband as a war protest, which has a relatively specific, pre-defined meaning, messages sent through gender expression may be complex. Was Pat, for instance, sending a message that she’s female? Or transgender? Or merely rebellious? As noted in Part II, similar questions may be even more likely to arise with respect to persons whose gender identities are non-binarized (and therefore arguably less familiar to the general public).147 Such arguments are particularly likely in a school setting, given the young age of the students. The school in *Yunits* seized on this potential for complexity, as well as the students’ youth, to argue that the students did not understand the complicated nature of gender identity.148

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140. See supra text accompanying notes 122-130 (discussing a trans teenage girl, designated male at birth and diagnosed with gender identity disorder, who was effectively prohibited from enrolling in the eighth grade if she wore “girls’ clothing or accessories” to school).
143. *Tinker*, 393 U.S. at 508-09 (“Any departure from absolute regimentation may cause trouble ... [and any] variation from the majority’s opinion may inspire fear. ... But our Constitution says we must take this risk ... and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength ... [to] grow up and live in this relatively permissive, often disputatious, society.” (citing *Terminiello*, 337 U.S. at 4)).
145. See supra note 125 and accompanying text (discussing court’s conclusion that “plaintiff’s message clearly has been received”).
147. See supra note 65 and accompanying text (discussing Dean Spade’s declaration of his gender identity as an acceptance of a multitude of descriptors along intersecting axes of sex/gender and sexual orientation).
The responses to this are at once doctrinal and pragmatic. The Supreme Court has determined that an overall message may be undeniably comprehensible even when not every component of the message is clearly communicated.\textsuperscript{149} In the day-to-day world, this conclusion is a sensible one. Consider \textit{Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston},\textsuperscript{150} in which the Court upheld a Saint Patrick's Day parade organizer's exclusion of an openly-gay Irish American organization from the contingents of marchers, despite a state law prohibiting discrimination based on sexual orientation.\textsuperscript{151} Even when there are smaller, and seemingly disparate pieces to a message—in \textit{Hurley}, for instance, contingents ran the gamut from Miss Ice-O-Rama to "McGruff the Crime Dog",\textsuperscript{152} the Court's statement that "though the score may not produce a particularized message, each contingent's expression in the [organizer's] eyes comports with what merits celebration on that day"\textsuperscript{153} seems to be spot on. In \textit{Hurley}, the overall message ("what merits celebration") was clearly expressed by the organizer's choice of that which it determined did not merit celebration.\textsuperscript{154}

Even though consideration of the individual components of the parade organizer's message was not easily comprehensible, the message expressed by excluding the openly-gay contingent is undeniable. The contingent consisted of people marching behind a banner that read, quite simply, "Irish-American Gay, Lesbian and Bisexual Group of Boston."\textsuperscript{155} This assertion of identity—much like the sandwich boards straightforwardly stating, "I AM A MAN"—is at once disarming in its simplicity and militarizing in its unvarnished demand for equality. As the majority in \textit{Hurley} recognized,

\begin{quote}
[A] contingent marching behind the organization's banner would at least bear witness to the fact that some Irish are gay, lesbian, or bisexual, and the presence of the organized marchers would suggest their view that people of their sexual orientations have as much claim to unqualified social acceptance as heterosexuals . . . .\textsuperscript{156}
\end{quote}

In gender expression cases, the "particularized message" likewise need not rise to the level of conveying a sophisticated understanding of gender identity or the more subtle aspects of an individual's identification.\textsuperscript{157} Instead, the message typically conveyed is simple, direct, and one we are attuned to immediately recognize. As in \textit{Hurley} or as with the statements "I AM A MAN," or "Ain't I a

\textsuperscript{149} \textit{Hurley}, 515 U.S. at 574.
\textsuperscript{150} 515 U.S. 557.
\textsuperscript{151} \textit{Id.} at 573-75.
\textsuperscript{153} \textit{Id.}
\textsuperscript{154} \textit{Id.} at 570.
\textsuperscript{155} \textit{Id.}
\textsuperscript{156} \textit{Id.}
\textsuperscript{157} For an example of more nuanced understandings of trans identities, see supra text accompanying notes 25-49.
Woman," the statement in gender expression cases is one of identity. Pat Doe, for instance, was asserting, "I'm female," a message that is gender non-conforming. Trained as we are from an early age to categorize people as boys and girls, our reading of gender—and particularly gender variance—happens at the speed of light: instant messaging. As researchers explain, this process is automatic:

When we come upon a person, many features of the target are rapidly encoded—size and shape, facial features and expression, clothing, and more. These features and the inferences drawn from them, allow, even require, perceivers to make quick assessments . . . . Among the most basic of such "person" features that are automatically communicated is a person's gender . . . .

Returning to the school's arguments in Yunits, while onlooking students may never have heard the term "transgender" or be familiar with the complexities of gender identity, the eighth grader was not attempting to convey an understanding of the intricacies of gender identity; she was simply communicating her identity as female. Significantly, it was not skirt or bra-wearing to which the school objected—students designated female at birth could wear these items as a matter of course. Instead, much like the "I AM A MAN" sandwich boards worn by sanitation workers (all, crucially, male), it is the juxtaposition of the sign—whether sandwich board or skirt—in conjunction with the bearer's presumed anatomical sex that creates the message that is instantaneously sent and received. As discussed in greater detail in Part III, moreover, the state attempted to compel a counter-message—a sign that in effect reads, "I'm male," expressed through the coerced wearing of pants as a condition of attending school.

Especially in school settings, the government is likely to make the nested argument that even if plaintiff's message is understood, it is disruptive; in addition, the government may attempt to re-characterize gender expression as inappropriate sexual conduct. As I have argued elsewhere, trans people, like those in other

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158. See Hurley, 515 U.S. at 570 (commenting that GLIB wanted to participate in the parade "in order to celebrate its members' identity as openly gay, lesbian, and bisexual descendants of the Irish immigrants").
162. Id.
163. Id.; see discussion supra Part III.B (discussing facts of Yunits).
164. See, e.g., Morse v. Frederick, 127 S. Ct. 2618, 2622 (2007) (stating school officials argued that a student held banner that read "BONG HiTS 4 JESUS" was disruptive because it promoted illegal drug use); Tinker, 393 U.S. at 504-05 (presenting school official's argument that students' wearing of armbands as symbols of objection to conflict in Vietnam constituted a disturbance of school discipline); Yunits, 2000 WL 33162199, at *4-5.
marginalized groups, are hyper-sexualized. Judicial opinions are replete with the fetishizing of trans individuals, typically adults; given the social anxiety about "protecting" children from sexual minorities and the school's judicially accepted role in instilling values, the risk of such conflation is presumably even greater in the context of minors. To the extent possible, I suggest confronting these issues in advance—perhaps in the complaint's discussion of gender identity (for example, by distinguishing it from punishable lewd conduct and by emphasizing the fundamental nature of gender identity to all persons); the Yunits opinion does a nice job of making these distinctions in an accessible manner.

2. Aiming at (and Devaluing) Expression

It is likely that the following quote from the Supreme Court's opinion from United States v. O'Brien will appear prominently in any state briefing, whether in an education or employment setting: "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." Given the necessity of line-drawing, this statement is seductive. O'Brien itself, however, is cautionary. With the first two prongs of the Court's test for symbolic expression met—David O'Brien sent, and there was a great likelihood that onlookers understood, the message expressed by the burning of his draft card on the courthouse steps—the Court asked whether the government's action was "directed at the communicative nature of [the] conduct," and rather facilely determined that it was not. A response in the negative serves a sorting function by reducing rather dramatically (in effect, if not in articulation) the standard of review, all but ensuring that the state's action will be upheld.

165. See Flynn, supra note 91, at 37-39 (discussing hyper-sexualization of transgender claimants).
166. See, e.g., Gay-Straight Alliance Network v. Visalia Unified Sch. Dist., 262 F. Supp. 2d 1088, 1092-93 (E.D. Cal. 2001) (involving a student-led organization of gay, lesbian, bisexual, transgender, and heterosexual students and the hostile environment created by teachers and administrators of the school district); Yunits, 2000 WL 33162199, at *4 (evaluating school officials’ argument that transgender student’s choice of attire was disrupting to other students); see also Anthony Niedwiecki & William E. Adams, Jr., Introduction, The Florida Example, 32 NOVA L. REV. 515, 516-17 (2006) (presenting Anita Bryant’s arguments against homosexuality that focused primarily on preventing harm to children).
169. Id. at 376; see also Spence, 418 U.S. at 409 (acknowledging this language from O'Brien as part of the protected expression analysis).
170. The first two prongs are whether there was "[a]n intent to convey a particularized message" and whether there is a great likelihood that the message "would be understood by those who viewed it." Johnson, 491 U.S. at 404 (quoting Spence, 418 U.S. at 410-11).
171. Id. at 406.
172. O'Brien, 391 U.S. at 382. For instance, the Supreme Court accepted at face value the government’s assertion that the draft card itself served an important government function in the administration of the draft, even though one could be inducted if the card itself was lost. Id. at 377-78.
173. While the language of the standard to be applied when a court finds that the government’s action was not aimed at expression appears to be strong—for instance the incidental restriction on an
As arguably occurred in *O'Brien*, a court that devalues the expression at issue can fairly easily find that the government's action was not aimed at expression simply by adopting the government's articulated reason for its suppression. In gender expression cases, the best counterarguments are likely to be educational and factual. Concerning the former, the most important education for the court is for plaintiffs to convey the fundamental nature of gender expression and its centrality to one's well-being. Concerning the latter, it is rarely the case that the state is implementing a pre-existing policy; rather, it is more likely that an employer or school administrator has created an impromptu, one-of-a-kind policy in direct response to the plaintiff's non-conforming gender expression. Even if the government can point to a longstanding sex-differentiated dress code, its application to the plaintiff is usually far from evenhanded. The school district's reaction in *Doe v. Yunits* is illustrative. The district required Pat (and only Pat) to submit to daily clothing checks before being permitted to attend class, and subsequently implemented a policy prohibiting her from wearing girls' clothing or accessories.  

The school district argued that it was impartially enforcing its prohibition of disruptive conduct. Even assuming that the district would apply the same policy to others designated male at birth, however, it remains a policy aimed at non-conforming gender expression. As the court noted, those designated as female are permitted to wear the same items considered contraband for students deemed to be male.

3. The "Appearance" Cases

While the law has long protected a wide range of symbolic conduct, it routinely denies First Amendment protection to a subset of symbolic expression in the so-called "appearance cases," those challenging grooming or dress restrictions. In the appearance cases, courts have sometimes undertaken the symbolic speech analysis above, but most frequently have circumvented it. In *Kelley v. Johnson*, for instance, the Supreme Court rejected an officer's challenge to the police department's hair and sideburn length regulations, discussing First Amendment concerns only briefly. The majority opinion focused solely on the individual's First Amendment rights must be "no greater than is essential," *O'Brien*, 391 U.S. at 377, in practice this standard has been applied deferentially. For a critique of *O'Brien*, see *Pinard v. Clatskani School District 6J*, 467 F.3d 755, 759 n.1 (9th Cir. 2006), declining to apply *O'Brien* finding it inapplicable in the Ninth Circuit with regards to school uniform cases. See also, e.g., *Keith Werhan, The O'Briening of Free Speech Methodology*, 19 ARIZ. ST. L.J. 635 (1987) (criticizing the application of the *O'Brien* test to situations outside of its initially intended and narrow scope of application).

175. Id. at *4.
176. Id.
177. See *Kelley v. Johnson*, 425 U.S. 238, 245 (1976) (briefly discussing First Amendment issues); *Tinker*, 393 U.S. at 507-08 (briefly discussing the expression related to dress and appearance).
178. *Kelley*, 425 U.S. at 245 (focusing on power to regulate state employees); *Tinker*, 393 U.S. at 507-08 (focusing on the need to maintain order and limit disruptive behavior in schools).
179. 425 U.S. 238.
180. Id. at 245. The Supreme Court primarily addressed the officer's Due Process claim, which the
state’s power to regulate government employees’ speech, without undertaking any analysis of the expression at issue—in fact, the message sent by the plaintiff was apparently so inconsequential to the Court that it never even mentioned what message the officer claimed he was expressing—gender non-conformity? affiliation with the youth counter-culture movement? religious belief? fashion?\textsuperscript{181} Similarly, the Supreme Court in Tinker v. Des Moines\textsuperscript{182} protected the right of students to wear black armbands, but in an undeveloped analysis distinguished those facts from the “regulation of the length of skirts or the type of clothing, . . . hair style, or deportment.”\textsuperscript{183} While not commenting further, the Court cited, with apparent favor, a Fifth Circuit decision that denied a First Amendment claim by male students who had been prohibited from enrolling in school because of their “Beatles” type haircuts.\textsuperscript{184} The Court has not elaborated on the distinction, but implicit in its reasoning is a devaluing of appearance expression as unworthy of heightened First Amendment solicitude.

As a robust body of scholarship has emphasized, appearance cases may implicate the expression of deeply-held identities, including those based on race, gender, sexual orientation, and religion.\textsuperscript{185} The appearance cases, however, systematically devalue appearance as a mode of expression, despite—and perhaps because of—its centrality in our lives. As Karl Klare and others have noted, “[J]udges create a peculiar dissonance by trivializing appearance claims while at the same time asserting the need for the authorities to possess vast powers to enforce conventional attitudes and prejudices.”\textsuperscript{186} The apparent paradox is easily explained. As their emphasis on the need of employers to enforce an orderly learning or work environment suggests, judges seem to realize the power of appearance expression to cause upset, disagreement, or tension. Trivializing appearance, then, serves two purposes: it allows the Court to avoid possible disruption and to maintain formal adherence to First Amendment principles—both without requiring the Court to make the difficult commitment of allowing potential disputes to arise.

\textsuperscript{181} Ed. at 247.
\textsuperscript{182} 393 U.S. 503.
\textsuperscript{183} Ed. at 507-08.
\textsuperscript{184} Ed. at 508 (citing Ferrell v. Dallas Indep. Sch. Dist., 392 F.2d 697, 701 (5th Cir. 1968)).
\textsuperscript{185} See, e.g., Price Waterhouse v. Hopkins, 490 U.S. 228, 255-56 (1989) (holding that sex discrimination was demonstrated by employer’s suggestion, inter alia, that female employee dress more femininely to be considered for partnership position); Jespersen v. Harrah’s Operating Co., 444 F.3d 1104, 1111-12 (9th Cir. 2006) (en banc) (holding that grooming policy of forcing female employees at casino to wear makeup did not constitute sex or gender discrimination); Marshall v. District of Columbia, 392 F. Supp. 1012, 1015 (D.D.C. 1975) (rejecting argument that police department requirement that officers be clean-shaven and have short hair infringed officer’s First Amendment right to the free exercise of religion based on his religious vow not to cut his hair or shave his beard).
\textsuperscript{186} Karl E. Klare, Power/Dressing: Regulation of Employee Appearance, 26 NEW ENG. L. REV. 1395, 1401 (1992) (citing Mary Whisner, Comment, Gender-Specific Clothing Regulation: A Study in Patriarchy, 5 HARV. WOMEN’S L.J. 73, 74 (1982)).
The function served by the trivialization of appearance claims is evident, for example, in *New Rider v. Board of Education*. The Tenth Circuit was able to ignore the school board’s censorship of the students’ expression of their Native American identity, as well as the political message inherent in their assertion of pride and equality, by characterizing the regulation as one that was simply about hair length, devoid of expressive meaning or impact. In their dissent from the denial of certiorari, Justices Douglas and Marshall asserted that the students’ message of “their pride in being Indian” was akin to pure speech, presaging the Court’s recognition three decades later that an assertion of pride in gay and lesbian identity is expressive. By taking seriously the message expressed by the students, Douglas and Marshall shifted the focus to the State’s use of its power to censor, referring to the school board’s regulation as a “coercive assimilation policy” and an impermissible “effort to impose uniformity.” While the significance of the students’ speech in *New Rider* was evident to Justices Douglas and Marshall, the plaintiffs failed to convince the Court that the issue warranted Supreme Court review, just as the police officer in *Kelley* was unable to convince the Court that his expression through hair length warranted First Amendment protection. Although trans plaintiffs certainly face an uphill battle, those who are able to convey to the court the fundamental nature of gender identity and its centrality to our health and well-being may be able to succeed where other so-called “appearance” claimants have failed.

**B. Compelled Expression**

Just as the First Amendment protects the right to speak, it also protects the right to refrain from speaking. This does not mean that the government can never compel speech. It does so routinely, for example, by requiring citizens to speak through the filing of tax forms or court documents. But the Supreme Court’s jurisprudence has created a zone of protection for an individual’s “sphere of intellect and spirit” by prohibiting compelled “affirmation of a private belief [or] attitude of mind.” While an in-depth analysis is beyond the scope of this Article, I argue that when a state requires trans people to express a particular gender over their objection, it may in some instances constitute compelled expression of an idea with which they vehemently disagree.

188. *New Rider*, 480 F.2d at 698 (reaffirming holding in earlier case which “explicitly held that the wearing of long hair is not akin to pure speech” (citing Freeman v. Flake, 448 F.2d 258 (10th Cir. 1971))).
189. *New Rider*, 414 U.S. at 1099 (Douglas, J., dissenting); see *Hurley*, 515 U.S. at 574 (acknowledging the expressive elements of identity).
191. Id. at 1101.
192. Id. at 1099.
194. Id. at 633.
Consider *Wooley v. Maynard*, 195 which involved a form of expression about which many of us would never give a second thought—Mr. Maynard’s right to cover the words “Live Free or Die” on his New Hampshire license plate.196 The Supreme Court recognized that an individual’s First Amendment interests are more deeply implicated if compulsion occurs on a repeated basis, and emphasized that the infringement caused by compelling Mr. Maynard to express a message with which he disagreed was more severe because of the ongoing nature of automobile use.197 Calling Maynard’s car a “mobile billboard” for the government, the Court stated, “[W]e are faced with a state measure which forces an individual, as part of his daily life—indeed constantly while his automobile is in public view—to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable.”198

Since, for the majority of persons, gender identity is congruent with our sex as designated at birth, most of us likewise do not give compelled gender expression a second thought. Just as Mr. Maynard was required to express the state’s message as a pre-condition for the routine use of his car, so trans people are required to express the state’s sex-gender message as a pre-condition for engaging in a multitude of transactions that make up daily life. When the state requires that a student or one of its employees adhere to appearance standards based on that person’s sex assigned at birth, she must spend eight hours a day interacting with her classmates or colleagues expressing a gender identity with which she deeply disagrees. Similarly, if the state prohibits changing the sex marker on a trans person’s driver’s license, she must express a gender message she opposes each time she engages in everyday transactions, such as opening a bank account, securing employment, purchasing alcohol or items by credit card, cashing a check, or responding to a traffic stop by the police.199 In such situations, it is the trans person herself who has become the “mobile billboard” for the state’s expression of its gender orthodoxy.

One jurisprudential obstacle trans plaintiffs may encounter is the Supreme Court’s distinction in *Wooley* between the use of government mottos (such as “In God We Trust,” on American currency) from the one on Mr. Maynard’s license plate. The Court suggested that the former do not pose constitutional concerns because the purpose of state seals “is not to advertise the message it bears but simply to authenticate the document by showing the authority of its origin.”200 In

196. Id.
197. Id. at 715.
198. Id.
199. I am not arguing that the state is categorically prohibited from including sex markers on identification documents. It is likely that the state’s interests (such as record-keeping, affirmative action programs, etc.) are sufficiently strong to allow it to record a sex designation, but that the interest fails in those circumstances in which the government insists on a particular sex marker over an individual’s objection. It is not clear what potential remedies may be required by the First Amendment—the easiest resolution in the vast majority of cases is simply to utilize the sex designation with which the person identifies.
trans cases, the State may argue that the purpose of a sex designation in a birth certificate or driver's license is not to advertise a message, but to accurately identify the individual. The State's position would be that the gender marker does not constitute expression and is merely the recordation of a fact. As discussed in Part II, however, the state is engaged in expression: it has selected one particular view of sex—as immutably fixed by one's birth designation—ignoring the large body of evidence demonstrating that gender identity (rather than genitalia) is the primary determinant of sex.

The message of a state motto such as that found on currency, moreover, is far removed from whatever the item's purpose may be (for example, to purchase goods). The Court in *Wooley* distinguished the use of a motto on a license plate from currency by emphasizing that a license plate motto is more likely to be associated with the car's owner because of an owner's frequent, personal, and public use of her car, whereas "currency . . . is passed from hand to hand . . . and need not be displayed to the public." Identification documents, in contrast, are uniquely associated with their bearer: their central purpose, in fact, is to identify the individual to the world. Documents such as a driver's license, moreover, must frequently be displayed to members of the public as a pre-condition to engaging in many transactions that constitute part of daily life.

Finally, trans plaintiffs may be able to draw on the Supreme Court's anonymous speech cases. The Court has consistently struck down prohibitions on anonymous speech (such as leafleting), as well as state attempts to compel public disclosure of the identity of members of organizations (such as the NAACP) that are engaged in expression. Calling anonymity "a shield from the tyranny of the

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201. See *supra* text accompanying notes 76-82 (discussing an insistence on a fixed, essentialized view that one's gender at birth is one's gender throughout life).


203. Given the purpose of identity documents, the state is likely to assert its interest in preventing fraud. See, e.g., *Bowen v. Roy*, 476 U.S. 693 (1986) (rejecting free exercise challenge to assignment of social security number based in part on state's interest in fraud prevention). Notably, however, the Supreme Court in *Bowen* ruled that there was no government compulsion in that case, emphasizing that assignment of the social security number was for the state's internal use, and distinguishing instances of compelled speech. *Id.* at 704-06. As discussed *supra* at notes 197-199, trans claimants have a strong argument that the government is engaging in direct compulsion of expression, similar to New Hampshire's insistence that Mr. Wooley express "Live Free or Die" whenever he would drive his car. Reliance on fraud prevention is further undercut by the ability to change the sex designation on many state and federal documents, combined with the less intrusive alternative of prohibiting fraud directly. See, e.g., *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995) (applying exacting scrutiny, the Court invalidated a statute prohibiting distribution of anonymous campaign literature); *Talley v. California*, 362 U.S. 60, 63 (1960) (overturning ordinance forbidding the distribution of any handbills in any place under any circumstances if the handbills did not contain the name and address of the person who prepared, distributed, or sponsored it).

204. See, e.g., *McIntyre*, 514 U.S. 334 (prohibiting distribution of anonymous campaign literature); *Talley v. California*, 362 U.S. at 63 (overturning ordinance forbidding the distribution of any handbills in any place under any circumstances if the handbills did not contain the name and address of the person who prepared, distributed, or sponsored it); *Bates v. City of Little Rock*, 361 U.S. 516, 523-24 (1960) (holding that ordinance requiring disclosure and publication of NAACP membership lists violated the NAACP members' freedom of association); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462
majority,” the Court emphasized the crucial role served by protecting the right to refuse to disclose one’s identity when leafleting or as a member of a private (and typically unpopular) organization. In *McIntyre v. Ohio Elections Commission*, a 1995 decision striking down a ban on anonymous campaign literature, the Court stated, “[Anonymous speech] exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation—and their ideas from suppression—at the hand of an intolerant society.” Although political speech was at issue in *McIntyre*, the Court made clear that the motivation underlying an individual’s refusal to disclose her identity need not be expressly political; it may be “motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one’s privacy as possible.” A trans person may be able to successfully argue that by requiring her identification to indicate her designated birth sex when it conflicts with her gender expression, the state is forcing her to disclose an unpopular identity that may subject her to harassment, discrimination, and violence.

V. PINK ON PINK: NON-TRANS IDENTIFIED CLAIMANTS AND THE INVISIBILITY OF COERCED EXPRESSION

It may at first seem paradoxical that gender claims (whether based in equality or expression) by non-trans plaintiffs at times fare worse than those by persons who are trans-identified. Consider a situation that one might believe is precisely the kind of harm that Title VII of the 1964 Civil Rights Act would capture—an employer’s insistence that women conform to traditional gender role stereotypes as a condition of employment. In *Jespersen v. Harrah’s Operating Co.*, the employer required female employees to undergo a makeover (with extensive requirements for make-up application, along with hair teasing and styling) and then held them “accountable,” in essence, to their makeover photo through daily appearance checks; male employees were subject to minimal grooming standards (consisting of trimmed hair and nails) and were not required to conform daily to a makeover photo. The Ninth Circuit—which had been the first federal court of appeals to apply a gender role stereotyping rationale, albeit in dicta, to a trans person’s claim of gender discrimination—rejected Darlene Jespersen’s claim,

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(1958) (holding that because the State failed to show a controlling justification for the deterrent effect on the freedom to associate, which disclosure of the membership lists was likely to have, the immunity from state scrutiny of membership lists, which the association claimed on behalf of its members, was so related to the right of the members to associate freely with others, it was well within the protection of Fourteenth Amendment).

205. *McIntyre*, 514 U.S. at 357.
206. 514 U.S. 334.
207. *Id.* at 357.
208. *Id.* at 341-42.
210. 392 F.3d 1076 (9th Cir. 2004), *aff'd en banc*, 444 F.3d 1104.
211. *Jespersen*, 392 F.3d 1076.
212. *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000) (ruling Gender Motivated Violence Act
twice, in its panel opinion213 and subsequently in a rehearing en banc.214 Unmoved by Jespersen's claim of harm—she testified that it made her feel "dolled up" and objectified, interfering so greatly with her ability to perform her job that she felt compelled to quit—and arguments that the requirements imposed on female employees were far more burdensome, the court ruled that although the burdens imposed were "different," they were not "unequal."215

The majorities in both the Ninth Circuit's panel and en banc opinions appear to have been unable to take seriously the harm experienced by Jespersen, even though she quit her job of many years, for which she had consistently received glowing recommendations.216 The court stated, "This is not a . . . requirement . . . tending to stereotype women as sex objects."217 Instead, the court dismissed Jespersen's degradation as mere idiosyncrasy, concluding, "The only evidence in the record to support the stereotyping claim is Jespersen's own subjective reaction to the makeup requirement."218 The impediment for the court, I argue, is that make-up wearing for women is so ubiquitous—such a part of the background—that its coerced expression, along with its power to objectify, are rendered invisible. As the dissent noted, "If you are used to wearing makeup—as most American women are—this may seem like no big deal."219 The majority appears unable to conceptualize make-up wearing as subordinating precisely because it is something that many of their wives, daughters, sisters, mothers (or, if female, perhaps themselves) wear routinely. The majority, in effect, is trying to read pink lettering against a pink background.

The notion of losing sight of ubiquitous norms is a familiar one in critical race theory. Barbara Flagg, for example, discussed what she calls the "transparency phenomenon," in which white people do not view themselves in racialized terms because "whiteness" is the prevailing paradigm.220 The Second Circuit addressed the notion of the legibility of prevailing norms in a case evocative of a contrived law school hypothetical—a situation in which a female plaintiff wanted to conform to gender norms, but the government would not let her.221 In Zalewska v. County of Sullivan,222 Grazyna Zalewska, who had never worn pants at any time during her life, was a van driver required to wear pants; the state argued that it instituted the requirement in part because pants were less likely to get caught in the van's chairlift mechanism.223 After having been told that no exception to the uniform applicable to trans plaintiff by analogy to Title VII of the 1964 Civil Rights Act, which court reasoned applies to claims by trans individuals).213 Jespersen, 392 F.3d at 1083.
214 Jespersen, 444 F.3d 1104.
215 Id. at 1106.
216 Id. at 1117-18 (Kosinski, J., dissenting).
217 Id. at 1112 (majority opinion).
218 Id.
219 Id. at 1117-18 (Kosinski, J., dissenting).
220 Flagg, supra note 139, at 957.
221 Zalewska v. County of Sullivan, 316 F.3d 314 (2d Cir. 2003).
222 316 F.3d 314.
223 Id. at 317-18.
policy would be made for her, Zalewska nonetheless specially ordered a customized uniform with a skirt; when her employer ordered her to return the skirt, she refused. She was suspended for insubordination and ultimately was involuntarily transferred; she filed a claim alleging, inter alia, violation of her right of expression under the First Amendment.

The Second Circuit rejected the employee's claim, reasoning that her message was not understood because it was not sufficiently particularized. Why was her message lacking in specificity? Because, the court reasoned, Zalewska wanted to conform to gender norms, and gender conformity fails to send a message that others are likely to notice or understand: "[I]t is difficult to see how [the employee's] broad message would be readily understood by those viewing her since no particularized communication can be divined simply from a woman wearing a skirt." In fact, the Second Circuit distinguished gender non-conforming expression, which it characterized as distinct and easily identifiable. Discussing the trans teen's claim in Yunits, the court stated that the teen's message "was readily understood by others ... because it was such a break from the norm." Returning to Flagg's terminology, Zalewska's gender-conforming message, the court determined, is transparent against the backdrop of gender conformity.

The facts of Zalewska, however, belie the notion that the employee's message was not understood. Zalewska's initial objection—combined with her special order of a skirted uniform and her subsequent refusal to return it, followed by her suspension for insubordination—leaves little doubt that her message was clearly communicated and understood. Zalewska, like Jespersen, sacrificed her job rather than conform to a gender presentation at odds with her identity. The difference in outcome from Yunits is that Pat Doe's gender identity was easy for the court to "read" because it stands out in contrast to the background norm. As discussed in the preceding Subsection concerning reliance on a medical model, Jennifer Levi suggested a somewhat different, although related, explanation of the same phenomenon: Levi attributed the relatively greater success of trans cases to humanizing the plaintiff through reliance on disability claims. I recognize, as did Levi, that reliance on a medical model may provide a vehicle that enables a court to understand the magnitude of the harm experienced. I additionally argue that shifting the focus to expression may open the door for non-medicalized claims as well. My hope is that expression claims by trans plaintiffs (whether or not medicalized) will assist courts in "reading" the background norms and hence the harm to all persons (whether or not transgender) when we are forced to express gender in a manner inconsistent with our gender identities.

224. Id.
225. Id. at 318.
226. Id. at 319-20
227. Id. at 320 (emphasis added).
228. Zalewska, 316 F.3d at 320.
229. See supra text accompanying notes 112-114 (discussing the humanizing effect of reliance on disability claims as a reason for the greater success of trans cases).
CONCLUSION

Expression challenges, like all gender claims by trans litigants, present significant obstacles with minimal expectation of success. When appropriate for the plaintiff, however, I urge that such claims be brought. The most important reason for bringing such claims is, as the gendered claims for racial civil rights suggest, that expression of our gender is a fundamental aspect of our humanity. First Amendment claims, moreover, shift the focus to the state's reason for suppressing expression—often that the state itself is expressing contrary messages of gender subordination. In addition, expression may provide a more apt framework than equality for claims by trans individuals who experience gender outside of, and in resistance to a binarized, medicalized model. Finally, an understanding of gender as expression may make the harms of enforced gender conformity to non-trans claimants visible as well.