A GOOD REASON TO BE SUSPICIOUS: THE U.S. LEGAL HISTORY OF TRANSGENDER DISCRIMINATION

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Introduction

In the Supreme Court's recent *United States v. Skrmetti* (2025) decision, Justice Amy Coney Barrett raised the novel question: Does the United States have a long-standing history of de jure discrimination against transgender people, perpetrated by state actors through the force of law?

This Essay provides the beginnings of an answer to Justice Barrett's inquiry, demonstrating that throughout the history and geography of the United States, government actors have used the law to discriminate against people who deviate from narrow, essentialist notions of sex and gender. The examples highlighted in this Essay are far from comprehensive, and many more remain to be found. Yet even this preliminary sketch shows how widespread this discrimination has historically been and continues to be today.

The Essay explores various forms of discrimination that have either been codified in the law or perpetrated by government officials acting under color of law. Each example below stems from government discrimination against people who diverged from state-regulated ideas of sex and gender, and each person was subject to legal consequences based on that divergence. Notably, the targets of this discrimination have been described in varying ways over time. Some of the terms used by lawmakers, administrative agents, and by gender diverse people themselves have since fallen out of popular use, including "female or male impersonator," "transvestite," and "transsexual." Other terms, such as "sexual invert" encompassed both gender diversity and same-sex desire, and were used in part to describe people who would likely be considered transgender today.

Whenever possible, this Essay uses the terms people used for themselves. When a person's self-identification is coerced or unclear, or when referring to the broad category of people targeted for discrimination for failure to adhere to the government-mandated

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gender binary, this Essay will borrow Kate Bornstein's term "gender outlaws," as used by cross-dressing scholar Kate Redburn, to "trace[] how diverse gender experiences translated into a trans legal subject."[2] As Professor Greta LaFleur suggests, "[W]e start with the conditions . . . in which the person lived in order to understand what might have constituted our present-day sense of their gender, or gender nonconformity." For example, while a nádleehi person of the Navajo Nation cannot be understood as nonconforming within a precolonial culture that embraced them as an institutionalized third gender, they can be understood as a gender outlaw in their historic and present relationship with the binary gender mandates of the United States government.[3] This analysis reveals a long history of government discrimination against diverse forms of gender expression and identity, a history the government draws from in present-day classifications based on transgender status.

Section I provides the legal background behind Justice Barrett's inquiry into de jure discrimination. Section II traces government discrimination against gender outlaws back to its treatment of gender diversity among Native peoples. Section III discusses local cross-dressing ordinances passed in towns and cities across the nation, while Section IV describes harsh policing tactics employed against establishments known to serve gender outlaws. Sections V and VI discuss the institutionalization of gender outlaws in asylums and their exclusion from immigration, respectively. As Section VII shows, gender outlaws could have their marriage licenses invalidated and could lose custody of their children because of their gender. Section VIII discusses military exclusions on the basis of both cross-dressing and medical transition. As discussed in Section IX, various federal and state civil rights statutes have carveouts, preventing gender diverse people from accessing protections. Section X describes government acts of

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[2] Despite the diversity of personal experiences with gender described in this article, "we don't need to get bogged down in teasing out individual motivations in order to realize that [many people with diverse experiences] disrupted gender . . . their stories still show that there is a long, cross-cultural history of understanding gender as not binary, not fixed, and not tied to the body." KIT HEYAM, BEFORE WE WERE TRANS: A NEW HISTORY OF GENDER 60–61 (2022).

[3] Midnight Sun, *Sex/Gender Systems in Native North America*, *in* LIVING THE SPIRIT: A GAY AMERICAN INDIAN ANTHOLOGY 35, 40–41 (Will Roscoe ed., 1988). *See also* ANDY MATZNER, VOICES FROM HAWAI'I'S MĀHŪ AND TRANSGENDER COMMUNITIES 39 (2d ed. 2020) ("For me, the difference between being gay and māhū is that there is a place for me in my culture, in my society. There was a role which we once played and still play.").

censorship in reaction to media involving gender outlaws. Finally, Section XI describes the flimsy legal rationale employed by some government actors in the mid 20th century to deter surgeons from providing gender affirming care. Taken together, these examples demonstrate a pervasive project of government discrimination that stretches across the nation's history and geography, impacting every area of life for transgender people.

I. Legal Background

The evidence of de jure discrimination detailed throughout this Essay, in Justice Barrett's view, is necessary to conclude that transgender people are a suspect class that deserves heightened judicial scrutiny under the Equal Protection Clause. Although Justice Barrett's requirement has not been explicitly adopted by the Supreme Court,[4] this legal background section will help establish why historical de jure discrimination matters.

Before determining whether a government action is constitutional under the Equal Protection Clause of the Fourteenth Amendment, courts must decide which level of scrutiny to apply. The U.S. Supreme Court has yet to determine whether classifications based on transgender status must withstand heightened scrutiny or rational basis review. While government actions can be struck down even under rational basis review, a growing number of courts have correctly determined that classifications based on transgender status deserve heightened scrutiny.

Lower courts have applied heightened scrutiny on two bases. As the Supreme Court found under Title VII in *Bostock v. Clayton County* (2019), courts analyzing Equal Protection claims have found that antitransgender discrimination inevitably implicates sex discrimination. Alternatively or additionally, courts have applied heightened scrutiny after finding that transgender people satisfy the suspect classification test, which asks if (1) the targeted characteristic generally bears no relation to a person's ability to contribute to or perform in society; (2) the characteristic is distinguishable, or immutable in the sense that it cannot be changed through

[4] However, in oral arguments for *Little v. Hecox*, a case about equal access to educational opportunities for transgender students that was heard roughly six months after the *Skrmetti* decision, Justice Gorsuch asked defendants/petitioners to address the history of de jure discrimination evidence compiled by plaintiffs/respondents. In response, the council conceded there was "significant discrimination against transgender people in the history of this country." Transcript of Oral Argument at 16–17, Little v. Hecox, No. 24-38 (*argued* Jan. 13, 2026).

intervention, or is so central to a person's identity that government should not be permitted to require that it be changed; (3) members of the class historically have been subject to discrimination; and (4) members of the class are a minority or politically vulnerable.

In her *Skrmetti* concurrence, Justice Barrett observed that this analysis is intended to provide the Court with a strong justification before it undertakes the potentially antimajoritarian task of applying heightened scrutiny to state actions typically deserving deference under the principles of federalism or the separation of powers. Relatedly, Justice Barrett noted that the Equal Protection Clause limits the actions not of private actors but of government actors, whose actions are presumed to be constitutional. She thus argued that "the fact of private discrimination . . . does not provide a basis for inferring that state actors are also likely to discriminate and thereby violate the Constitution." Instead, evidence of "a widespread history of state action that reflects animus or stereotyping gives courts good reason to be suspicious of the government's motives." Based on the history discussed below, there is ample reason to be suspicious of classifications based on transgender status today, and it is the province and duty of the courts to carefully scrutinize such classifications to protect transgender people, as a persecuted minority group, from the tyranny of the majority. As Justice Barrett herself put it, when "[d]emocratic majorities are tempted to violate the rights of minorities . . . the provisions of the constitution, to which all government officials swear fidelity, are designed to hold them back."[5]

II. Indigenous Gender Diversity Persecution

The United States government's persecution of gender diversity can be traced back to its treatment of the original inhabitants of the land.

As respected historian Joe Medicine Crow said: "We don't waste people the way white society does. Every person has their gift." Many Indigenous understandings of gender have dramatically differed from settler-imposed, binary gender norms. Two-spirit people have long existed and continue to inform dynamic Indigenous gender norms and spiritual practices, which often hold a special appreciation for the spiritual and cultural enrichment that gender diversity can offer the community. State actors have historically responded to two-spirit people with extreme violence, punishing them for "deviant" behavior and enforcing their assimilation through violence, incarceration, and

[5] AMY CONEY BARRETT, LISTENING TO THE LAW: REFLECTIONS ON THE COURT AND CONSTITUTION 104 (2025).

targeted starvation, while destabilizing Native communities by removing important spiritual leaders and eradicating traditional cultural knowledge.[6]

For example, Bureau of Indian Affairs (BIA) agent E.P. Briscoe "launched a campaign of terror" against Osh-Tisch and other *badé* people, a valued gender minority within the Crow Nation.[7] In the late 1890s he "incarcerated the *badés*, cut off their hair, made them wear men's clothing. He forced them to do manual labor. . ."[8] While the Crow Nation successfully drove agent Briscoe off the reservation, other BIA agents continued to come and subjugate the badé people for decades.[9] The BIA's ongoing demonization of the badé was documented, with one BIA physician stating, "Of all the many varieties of sexual perversion, this, it seems to me, is the most debased that could be conceived of."

Violent residential boarding schools further endangered the existence of two-spirit people and gender diverse traditions. Two-spirit youth were among the thousands of Native children who fell victim to federal Indian boarding schools, a form of cultural genocide intended to sever tribal ties by violently assimilating Native youth into settler society. One central element of boarding school assimilation was imposing and enforcing U.S. government-sanctioned norms, including those around gender.

While forced cross-dressing of non-two-spirit children often served as a form of "psychological punishment,"[10] two-spirit children "were quickly identified" and punished for their own gender nonconformity.[11] An Office of Indian Affairs physician recorded that

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[6] GREGORY D. SMITHERS, RECLAIMING TWO-SPIRITS: SEXUALITY, SPIRITUAL RENEWAL & SOVEREIGNTY IN NATIVE AMERICA 140–41 (2022); HEYAM, *supra* note 2, at 205.

[7] *Id.* at 139–140.

[8] WALTER L. WILLIAMS, THE SPIRIT AND THE FLESH: SEXUAL DIVERSITY IN AMERICAN INDIAN CULTURE 179 (1986).

[9] SMITHERS, *supra* note 6, at 140–41.

[10] DAVID WALLACE ADAMS, EDUCATION FOR EXTINCTION: AMERICAN INDIANS AND THE BOARDING SCHOOL EXPERIENCE, 1875-1928, 133, 290-91 (2d ed. 2020); Clyde Ellis, *We Had a Lot of Fun, but of Course, That Wasn't the School Part*, *in* BOARDING SCHOOL BLUES: REVISITING AMERICAN INDIAN EDUCATIONAL EXPERIENCES 75, 77 (Clifford E. Trafzer et al., eds., 2006); DAN SASUWEH JONES, STEALING LITTLE MOON: THE LEGACY OF THE AMERICAN INDIAN BOARDING SCHOOLS 116–17 (2024).

[11] WILL ROSCOE, CHANGING ONES: THIRD AND FOURTH GENDERS IN NATIVE NORTH AMERICA 35–36 (1998).

"one little fellow while in the Agency Boarding School was found frequently surreptitiously wearing female attire. He was punished, but finally escaped from school and became a boté." In another example, a Navajo child was initially assumed to be a girl and treated like the other children. Though fellow Navajo students tried to protect the child from discovery, officials eventually realized the child was nádleehi and "male" according to the settler-imposed binary. The child went missing, and school officials refused to tell the family what happened to the child, leaving them to wonder whether the child was sent to another school, imprisoned, or killed and buried in one of the many mass gravesites left in the wake of the U.S. boarding school system.

Sadé Heart of the Hawk recounts a conversation she transcribed with an older relative, who remembered that teachers would pressure students into abusing their two-spirit classmates verbally and physically. "Pretty soon, we began to believe that there was something very wrong with these children because that's what the priests and nuns told us every day, and we kept up the abuse even when the priests and nuns weren't there. There were always a few who were receiving this kind of abuse, throughout our entire time there... They taught us to hate ourselves, but they taught us to hate these children even more." One enduring consequence of centuries of genocidal practices waged against two-spirit people is the present-day rejection of gender diversity within some Native communities.[12] Former Secretary of the Interior Debra Haaland, who is of Laguna Pueblo descent, thus stated,

> It wasn't until colonization, it wasn't until the assimilation policies, it wasn't until boarding school that we learned to hate people, that we learned violence, that we learned all of these horrible things . . . I think it's just incredibly important that we are a welcoming community . . . that we accept the LGBT community as part of who we are.

III. Cross-Dressing Bans

When Dick/Mamie Ruble was arrested in 1890 for wearing men's clothing, they defiantly told the judge, "I'm neither a man nor a woman and I've got no sex at all." Ruble argued that they should not be forced to wear women's clothing because they "couldn't pass for a woman anywhere, even if [they] tried." Ruble's insistence on their gender identity was taken as evidence of insanity, and they were

[12] *Id.* at 101–02.

committed to the state-run Stockton Asylum, where they spent the remaining eighteen years of their life before dying of tuberculosis.[13]

Ruble was arrested under one of the numerous cross-dressing ordinances that became ubiquitous during the nineteenth century. Although gender outlaws had been arrested for wearing certain clothes even in the absence of a specific law, the codification of policies regulating gendered attire aided the state in enforcing gender norms across an expanding country. Cross-dressing laws enacted from the 1840s to the 1980s explicitly prohibited wearing "a dress not belonging to [one's] sex." Over 650 such ordinances were identified while researching this article, and many more likely remain undiscovered. Other ordinances prohibiting disguises, masquerades, indecent dress, and vagrancy were also used to criminalize gender outlaws' public expression of gender. On the state level, a 1963 Hawaii statute prohibited cross-dressing "with intent to deceive other persons by failing to identity his or her sex,"[14] while New York's state-wide masquerade ban, originally targeting disguised mid 19th century anti-rent vigilantes, was repurposed to criminalize cross-dressing through the 19th and 20th centuries.[15]

Cross-dressing for entertainment was common during the nineteenth and early twentieth centuries. Though often neglected in modern depictions of the Old West, cross-dressing was "very much a part of daily life" on the American frontier, where people would commonly cross-dress in masquerades and miners' dances.[16] The stars of the "widely popular" vaudeville variety shows often cross-dressed on stage. But while some cross-dressed only for entertainment or temporarily to fulfill a specific purpose, people from frontier and cosmopolitan communities alike also cross-dressed permanently as an expression of their gender. Local newspapers commonly issued sensationalized reports of "women" who lived their entire lives

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[13] CLARE SEARS, ARRESTING DRESS: CROSS-DRESSING, LAW, AND FASCINATION IN NINETEENTH-CENTURY SAN FRANCISCO 74–75 (2014).

[14] THE MAHELE OF OUR BODIES 11 (Stephanie Nohelani Teves ed., 2025); Matzner, *supra* note 3 at 66.

[15] RISA GOLUBOFF, VAGRANT NATION: POLICE POWER, CONSTITUTIONAL CHANGE, AND THE MAKING OF THE 1960S at 168–170, 186 (2016).

[16] SEARS, *supra* note 13, at 23–32.

"disguised as men" until their secrets were revealed upon their demise.[17]

Many communities refused to refer to these men as women even after their genitalia were revealed. Some who were still alive when discovered refused to stop wearing male attire and living as men. Regardless, gender outlaws were more likely to be arrested than those cross-dressing for entertainment, and faced harsher punishment from authorities.

A. Disparate Enforcement

In the early 1900s, after concluding a performance in San Francisco as a female impersonator, Charles Harrington stepped offstage "to join two sailors in the audience" and was promptly arrested. Although bans did not distinguish between various purposes for cross-dressing, the judge told Harrington that "you must confine yourself strictly to the footlights." In other words, it was acceptable to cross-dress for entertainment but not to genuinely express one's gender. This was part of a larger pattern: "As audiences packed vaudeville theaters and local newspapers published glowing reviews of female and male impersonators [on stage], people who cross-dressed on San Francisco streets continued to be arrested and thrown in jail."[18]

This disparate enforcement continued into the twentieth century. On August 13, 1971, the North Carolina Police Executives Association met at a hotel in Winston-Salem to be entertained by a male comedian wearing "lipstick, rouge, a red cocktail dress and blonde wig." The audience roared with laughter as the comedian "planted kisses on bald pates and sat demurely on the knee of the head of the Winston-Salem vice squad." The same day, a different person was given the maximum sentence for "impersonating a female" under Winston-Salem's cross-dressing ordinance.

Cross-dressing laws did not outlaw particular clothing, but instead outlawed the "mismatch" between the clothing a person wore and their sex as defined by the government. While some people were quickly assigned a sex by the arresting officer, other people were more difficult to categorize, justifying invasive state actions to "verify" their sex. Unsure of Dick/Mamie Ruble's sex, the judge had them "examined," which likely involved a strip search. It was only after the police surgeon declared Ruble female that they were found to be in violation of the law. In contrast, Helana Castle was arrested for

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[17] VERN L. BULLOUGH & BONNIE BULLOUGH, CROSSDRESSING, SEX, AND GENDER 158 (1993).

[18] SEARS, *supra* note 13, at 78, 99.

wearing women's clothing but was found not to be in violation of the law after an examination decided she was a woman.[19]

Some gender outlaws were not safe from cross-dressing laws no matter what they wore. Arthur J. Baker simply could not seem to fit within the legally mandated gender binary and was arrested for cross-dressing multiple times while wearing men's clothing *and* women's clothing. Effie Smith, who was assigned male at birth but lived as a woman, occasionally attempted to comply with cross-dressing laws by wearing men's clothing but was instead arrested three times for impersonating a man.[20]

Like many gender outlaws who experienced repeat arrests, Ava Betty Brown was a Black woman. Brown was arrested for female impersonation for standing outside while wearing women's clothing. At the police station, she was "undressed and found to be physically a man." Her attorney argued her arrest was unconstitutional and that "the police were 'picking' on her," but the jury still found her guilty. Twelve years later, Brown filed a complaint asking for an internal investigation after she was attacked by two officers while walking down the street. This was her second arrest of the day. Ava Betty Brown's repeated police harassment demonstrates the disparate enforcement on gender outlaws.

In an attempt to prevent such violence, Dr. Harry Benjamin, an early pioneer of gender affirming care in the United States, tried to write "certificates" for his patients to carry with them, explaining to the police that they were receiving medical treatment and should not be arrested for cross-dressing. But after one of his patients was convicted, he "was politely but firmly asked by two [state] attorneys not to write such certificates anymore. They may be adjudged illegal and therefore 'unethical.'"

B. Disparate Punishment

After their arrest in 1903, two women explained that they wore men's clothing during a "slumming tour" in San Francisco's Chinatown because their tour guide advised it. Their punishment was merely an admonishment to wear gender-appropriate clothing next time they went to Chinatown.[21] Similarly, a woman in Kansas was apprehended wearing men's clothing, including "a blue tie and a stiff hat," but was

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[19] *Id.* at 80–83.

[20] ELI ERLICK, BEFORE GENDER 42–60 (2025).

[21] SEARS, *supra* note 13, at 115–16.

given a cab ride home with no further consequences after she told the city attorney that she merely intended to cross-dress as a joke.

In contrast, people whose cross-dressing stemmed from their gender expression did not get off so lightly. Gender outlaws could be beaten by police during arrest and brutally sexually assaulted. Others were forced to publicly strip in prisons while crowds gathered to watch.[22] And their trials were often highly sensationalized, drawing crowds of voyeuristic onlookers.[23] Though cross-dressing ordinances created misdemeanor offenses, sentencing could be severe. These harsh penalties for failure to conform to a state-imposed binary also had a chilling effect on gender-diverse expression in public places, making "it virtually impossible for gender-variant people to fully participate in everyday city life."[24] Criminalizing cross-dressing ensured that gender outlaws "would be classified as criminal, aberrant, not belonging."[25] This effort to exclude gender diversity from public existence also fueled twentieth-century efforts to crack down on public spaces where gender outlaws could openly exist.

IV. Targeted and Abusive Policing

Beyond cross-dressing laws, state actors have used generally applicable laws regulating prostitution, vagrancy, public indecency, disorderly conduct, and fraud to target gender diverse people. Because vagrancy was a status crime whose "power lay in its arbitrary applications," it "wielded a tremendous amount of power over transgender populations." Those arrested for lewd vagrancy "in California and various other jurisdictions" were required to register as sex offenders, leading to "public notoriety, probably loss of employment, and perpetual police wardship." It was not until 2019 that New York police changed their patrol guide to "stop targeting people on the basis of 'gender, gender identity, clothing, and location.'"[26]

One of the earliest preserved records of an intersex person in the United States documents the Virginia colony's use of the legal system to discriminate against Thomas(ine) Hall. Known as both Thomas and Thomasine, Hall lived as a girl until age twelve, as a boy through their

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[22] *Id* at 74, 86–88.

[23] *Id.* at 92.

[24] *Id.* at 139–40.

[25] *Id.* at 19.

[26] DAVID CRUZ & JILLIAN WEISS, GENDER IDENTITY AND THE LAW 96–97 (2021).

adolescence, and then alternately as a man and a woman in adulthood. In 1629, Thomas(ine) was accused of "fornication," though court records indicate the resulting legal affair was primarily about their sex and gender. They were harassed and ridiculed by the Jamestown court and forced to undergo multiple genital examinations by townspeople who had been deputized by the court for that purpose. After the trial, the court ordered the publication of Thomas(ine)'s statement that "hee is a man and a woeman," and humiliated them by mandating an unchanging dress code: man's apparel, a woman's head covering, and an apron.[27] The court required Thomas(ine) to make subsequent court appearances to ensure they followed the clothing mandate. The focus on controlling gender through clothing is a theme that repeats throughout the history of legal discrimination against gender outlaws.

Police also used laws to target the public accommodations that served gender outlaws. In the nineteenth and early twentieth centuries, local ordinances governing the sale of alcohol could be used to target bars and similar establishments that served gender diverse patrons. In 1892, for instance, the superintendent of the New York City police department ordered an investigation of the Excise Exchange, known as a "fairy resort" where cross-dressers and other queer people congregated. State authorities, following the department's recommendation, revoked the Excise Exchange's liquor license, in part on the basis of its patrons' "bad character" and "addict[ion] to unnatural practice"—that is, because they were visibly queer.

These enforcement actions became more widespread following the repeal of Prohibition in 1933. In some states, new laws passed to regulate the sale of alcohol explicitly targeted bars serving gender outlaws and other queer people for license revocation. For example, a rule adopted by New Jersey's newly created Department of Alcoholic Beverage Control (ABC) in 1934 prohibited licensed establishments in the state from serving various "person[s] of ill repute," including

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[27] Though apparently intended to single out and demean Hall, the rationale for this unusual order has been debated by scholars. Professor Maayan Sudai suggests the governor presiding over Hall's trial may have simply been unaware of the legal rule which, at the time, "required classifying hermaphrodites according to their most 'dominant' sex.'" Maayan Sudai, *Sex Ambiguity in Early Modern Common Law (1629–1787)*, 47 LAW & SOC. INQUIRY 478, 487 (2022). On the other hand, Professor Elizabeth Reis argues that the ruling was a form of social control intended "to preclude further acts of deception, to mark the offender, [and] to warn others against similar abomination." ELIZABETH REIS, BODIES IN DOUBT: AN AMERICAN HISTORY OF INTERSEX 13 (2009).

"female impersonators." Other states left their regulations intentionally vague, instead prohibiting licensees from allowing their "premises to become disorderly," without defining what constituted "disorder."[28] These general laws granted broad authority to state investigators and enforcement authorities, who regularly interpreted them to prohibit the appearance of queer people and others with non-normative gender expression in the public spaces under their control. Even in states with more explicit regulations, agencies and prosecutors took similar advantage of more vaguely-worded provisions when faced with increasing judicial scrutiny in the 1950s and 1960s.

While agencies and courts described the targets of these actions in varying ways, often using multiple terms interchangeably, their records make clear that bars were most commonly targeted on the basis of their patrons' gender expression. Investigators' reports and testimony detailed the "feminine" characteristics they observed among "male" patrons and vice versa, from the way they walked and held their drinks to the pitch of their voices and whether they wore makeup. They often described these individuals' dress in great detail, noting the number of "male" or "female" articles of clothing they wore. For example, one ABC agent described a group of "female impersonators" he observed in 1962:

> [T]he four alleged female impersonators were made up with rouge, lipstick and eyebrow pencil; that three wore female wigs and earrings; that in addition, one was attired in female slacks, loafer-type shoes, bulky socks, a ladies' sweater and wore a madallion [sic] hanging from his neck; another wore a yellow shirt, a female sweater, low-cut female shoes, a female coat and silk stockings; the third wore a woman's sweater and slacks, ballerina shoes and bulky socks and the fourth was dressed in a two-piece woolen suit, silk stockings, high heel shoes and carried a ladies' purse.

At a different bar, another agent testified that he believed a group of patrons were "females . . . trying to impersonate men" because they were wearing:

> [E]xtremely masculine-appearing clothes, primarily using male slacks, fly front, low-cut shoes or desert boots, the ankle high suede boots, white shirts, very wooly sweaters or bulky knit sweaters, both pull-over types and button fronts . . . all wore their hair in very much the same manner or fashion, very short cut, combed straight back ending in what is called a duck tail in

[28] GEORGE CHAUNCEY, GAY NEW YORK 337 (2d ed. 2019) (quoting NY Alcoholic Beverage Control Law, § 106–6).

> the back. None of this particular group attired in this manner wore makeup, facial makeup, at all or jewelry.

While bars were sometimes accused of tolerating additional lewd or disorderly conduct among their patrons or by hired entertainers, in many cases state agencies and courts took it for granted that "[t]he presence of female impersonators" and other queer people, standing alone, "present[ed] a definite social problem" justifying sanction. The animus behind this assumption was sometimes quite explicit. A commissioner of the New Jersey Department of Alcoholic Beverage Control, considering the appropriate penalty for a bar accused of permitting "known female impersonators" on its premises, wrote in 1941: "The mere thought of such perverts is repugnant to the normal person. The deep-rooted personal contempt felt by a normal red-blooded man might well influence a decision."

For individual customers arrested during the course of these investigations, the consequences could be dire. While state agents had often received reports of queer bars and other liquor law violations and sometimes collaborated with local police in the 1930s and 1940s, many police departments left investigation and civil enforcement to the state agencies. However, by the 1950s, a growing number of cities began to establish dedicated vice squads comprising undercover police officers, who visited bars and other centers of queer social life with the express purpose of arresting those they encountered. Like the agents earlier employed by state liquor boards, many of these officers openly focused their efforts on gender outlaws. Once arrested, gender outlaws were also particularly susceptible to mistreatment; they were often harassed, beaten, and even forced to strip before groups of police officers and guards.

This targeted policing meant that there were few public accommodations accessible to gender outlaws because business owners feared reputational harm or arrest if they accepted their patronage. The few establishments that did serve them became the locus of protests and uprisings following violent police raids at sites such as Cooper Do-nuts in Los Angeles (1959), Compton's Cafeteria in San Francisco (1966), the Black Cat Tavern in Los Angeles (1967), and the Stonewall Inn in New York (1969). Some courts of this era began to recognize the legal infirmity of this targeted discrimination by state actors. In 1967, for instance, the New Jersey Supreme Court held that disciplinary charges based on the "mere congregation" of queer people, rather than "specific charges of improper conduct," were "legally unsupportable."[29] Yet even three years after this decision, the owner of

[29] *See generally* Stoumen v. Reilly, 234 P.2d 969 (Cal. 1951).

the Gold Nugget bar in New Jersey was brought before the Director of ABC on charges of having "allowed, permitted and suffered female impersonators in and upon [the] licensed premises" the previous year. In an unusually brief but disturbing statement, Agent M testified that, on his visit to the bar in June 1969:

> [H]e had observed three patrons in the premises dressed in female attire who appeared to be males . . . [E]ach of [them] wore a ladies [sic] wig, and carried a ladies' handbag. They had their eyelashes painted with mascara and wore ladies' shoes. Later he learned that their under garments were those commonly worn by females.

Reflecting on this era, transgender author and activist Leslie Feinberg wrote:

> My greatest terror was always when the police raided the bars, because they had the law on their side . . . The law dictated that I had to wear at least three articles of 'women's' clothing . . . Of course, the laws were not simply about clothing . . . Our *gender expression* made us targets. These laws were used to harass us. Frequently we were not even formally charged after our arrests. All too often, the sentences were executed in the back seat of a police cruiser or on the cold cement floor of a precinct cell.

Just as courts sanctioned private violence against gender outlaws, government institutions also mobilized diverse gender expression as a weapon against political adversaries, even when those adversaries did not profess to be transvestites. In 1966, the Federal Bureau of Investigation (FBI) created a plan to disrupt a group of Klansmen by framing them as transvestites. The FBI had received information that a particular chapter in North Carolina "decided that Klansmen, wearing female attire, would drive through Negro neighborhoods in order to provoke Negroes into taking action against 'white women.'" In response, the FBI proposed a counterintelligence operation "designed to ridicule" the Klansmen and deactivate the chapter by placing members on the mailing list of the Mattachine Society, a gay rights organization, and creating the impression that these Klansmen were "in violation of local or state laws pertaining to transvestitism" to shame their "manhood" and align them with Nazis accused of sexual perversion.

V. Institutionalization, Pathology, and Eugenics

In addition to public humiliation, violence, and imprisonment stemming from cross-dressing enforcement and targeted policing, gender outlaws were also at risk of legally mandated psychiatric institutionalization. An early example was Joseph Israel Lobdell,

committed to the Willard Asylum for the Insane in 1880. According to the assistant physician, at the time he was admitted, his voice was coarse, his features were masculine, he was dressed entirely in male attire, and he declared himself to be a man. In Joseph's own words, he was "a man in all that the name implies." He lived as a man for sixty years, renowned for his hunting and trapping skills. In each new location, he was well-liked as a hard-working and upstanding young man until it was discovered he had a "female body." In 1857, Joseph was arrested and charged with falsely impersonating a man "against the peace and dignity of the State of Minnesota," although there was no law prohibiting his behavior. During the 1860s and 70s, he was forced to wander nomadically with his wife because each time they stayed in a town, Joseph would be forced into women's clothes, jailed for vagrancy, or driven some distance out of town and told not to return. Joseph was arrested time and time again and harassed by law enforcement. After he was arrested again "out of common decency" in 1876, a local journalist wrote that Joseph was always gentle, always quiet, defrauded no one, strove to be humble yet honest, and should be left alone. By 1879, a New York court declared Joseph insane because he was "uncontrollable, indecent and immoral, and insists on wearing male attire." Joseph was diagnosed with "sexual perversion" and subjected to invasive experimentation at the Willard Asylum. He remained in state asylums for thirty-two years until he died in 1912.

By the late 1800s, medical literature solidified its pathologization of the desire to be another sex as "sexual inversion" or "sexual perversion," which often blended together the concepts of gender and sexuality. The medical establishment defined sexual inverts, or a subset of sexual perverts, as people who "wore the clothes and hairstyle, undertook the work, played the games, gestured, walked, talked, drank the drinks, acted the political role, performed the sexual acts, and felt the emotions of the 'other' sex." At the same time, it became widely accepted that "sexual perverts" were inherently criminal and that gender outlaws were a threat to the moral order, justifying their incarceration, institutionalization, and sterilization as a means to reduce crime. This "born a criminal" propaganda emerged to "identify, control, and civilize certain groups that were perceived as dangerous and threatening to social order, including gender minorities."

At the beginning of the twentieth century, the eugenics movement sought to "discover, study, discipline and regulate cross-gender behavior and identification" to rid society of pathologies such as

sexual perversion.[30] In 1907, Indiana passed the first state eugenic sterilization law. By 1939, over thirty states had passed similar laws. For example, in Alabama, the Chief Medical Officer of the Convict Department, the State Health Officer, and the Superintendent of the Insane Hospitals could decide it was "to the benefit of the physical, mental or moral condition of any sexual pervert, Sadist, homosexualist, Masochist, Sodomist, or any other grave form of sexual perversion . . . to be sterilized."[31] Many states specifically included "sexual perverts" in eugenic sterilization statutes, allowing state officials to sterilize prisoners and asylum patients.

When the United States Supreme Court's decision in *Skinner v. Oklahoma* (1942) and shifts in public opinion rendered eugenics laws no longer acceptable, the legal system shifted to using sexual psychopath laws, enacted in twenty-one states and the District of Columbia by 1955. These laws applied to a variety of crimes as well as non-criminal "sexual disorders," conflating violent sex offenses with expansive gender expression and thereby allowing for the indefinite institutionalization of gender outlaws until they were determined to be "cured." In 1946, at the height of the "sex crime panic," Chicago police responded to a gruesome crime—which a non-queer burglar later confessed to—by rounding up the "perverts." Afterward, a local queer person wrote:

> I noticed tonight that they "thought" (in their damn self righteous way) that perhaps a pervert had done it and they rounded up all the females [male homosexuals]—they blame us for everything and incidentally it is more and more in the limelight everyday—why they don't round us all up and kill us I don't know.

Children also took on particular significance for the criminalization and pathologization of gender outlaws in this era because of the widespread belief that their identities were the result of abnormal development and therefore preventable via psychiatric intervention during childhood. The sexual psychopath laws were used to incarcerate and institutionalize not only adults but also children and adolescents, many of whom were already under state custody in foster homes and other out of home placements.

Psychiatrists used state-run orphanages, asylums, prisons, and reform schools to experiment in search of a cure for expansive gender

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[30] *See generally* JULES GILL-PETERSON, HISTORIES OF THE TRANSGENDER CHILD (2018).

[31] *In re* Opinion of the Justs., 230 Ala. 543, 544 (Ala. Sup. Ct. 1935).

expression and transvestism, practicing violent forms of behavior modification therapy, lobotomies, and shock treatment on adults and children. At a state institution in Connecticut, a doctor subjected a twenty-three-year-old Black transvestite, who first appeared in excellent health and wore two carnations on her head, beautiful make-up, manicured and lacquered fingernails, and a woman's silk chemise and shirt, to two years of experimentation and "enough shock treatment to electrify a small town, with many regrettable side effects."

VI. Immigration

Another long-standing form of discrimination against gender outlaw immigrants is deportation. While immigration-based discrimination was rare before the twentieth century because the United States seldom excluded or deported *any* immigrant, there are a few early examples of immigrants targeted because of their gender expression. One such example is Henry Pohlmann, a German immigrant who lived in the United States for nine years without incident but was eventually reported to the police because Pohlmann had "shaved his moustache, powdered and pasted his cheeks, and wished to appear in girl's clothing, insisting that he was a woman." Pohlmann was declared insane in 1894 because "he . . . labor[ed] under the delusion that he [was] a woman" and confined to an asylum for two months. Although it lacked federal statutory authority to deport Pohlmann, the State of California negotiated directly with Germany for Pohlmann's deportation.

Another example is George Pepper, an Australian immigrant described in newspapers as a "woman-man of mystery."[32] Pepper arrived in the United States in 1907, after the federal government adopted a medical examination requirement for immigrants to enter the country. Although Pepper had traveled in men's clothes and quartered with men, they changed into women's clothing upon arrival in San Francisco, possibly because they "knew there was little chance of entering the country . . . if s/he continued to present as a gender (man) that diverged from his/her legal sex (female)."[33] Immigration officials "were alarmed by Pepper's gender transformation and launched an insanity investigation" because of the discrepancy between Pepper's legal documentation, physical presentation, and the ship's records.[34] Although a Board of Special Inquiry found Pepper

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[32] SEARS, *supra* note 13, at 133.

[33] *Id.* at 134.

[34] *Id.*

sane, immigration officials denied them entry as an "undesirable," categorizing them as "likely to become a public charge" (LPC) despite Pepper's occupation as a practicing doctor and the large sum of money they carried. The LPC category was frequently used to exclude gender outlaws from the United States because denials under this category were difficult to contest.[35]

During World War I, Congress passed the Immigration Act of 1917, a restrictive immigration policy predicated on an extensive list of deportable offenses. This law created a clearer path to exclude gender outlaw immigrants by labeling them Constitutional Psychopathic Inferiors (CPI). One such victim was Eve Addams, a Polish immigrant known as the Queen of the Third Sex. In 1926, the police raided Eve's Village tearoom, known for its clientele who "played with presentations of gender," and arrested Eve for disorderly conduct and obscenity. Despite pleading for her life to remain in the United States, Eve was deported to Europe, where she died under Nazi rule a decade later.

People suspected of transgressing their government-assigned sex were subjected not to ordinary inspections but to medical exams by the U.S. Public Health Service.[36] For example, in 1947, a visa officer wrote of one applicant, "[p]ersonally, I feel a man like this, if really CPI or even vaguely that way, is a lot more dangerous than a [tuberculosis] case, and I want to keep him out if we can do so without basing an opinion on vicious gossip." By the late 1940s, the Public Health Service formally classified gender outlaws as "persons with abnormal sexual instincts."[37]

In 1952, as Congress debated amendments to the Immigration and Nationality Act, the congressional record described the exclusion of "sexual perverts":

> The language of the bill lists sexual perverts or homosexual persons as among those aliens to be excluded from admission to the United States. In some instances considerable difficulty may be encountered in substantiating a diagnosis of homosexuality or sexual perversion. In other instances where the action and behavior of the person is more obvious, as might be noted in the manner of dress (so-called transvestism or fetishism), the condition may be more easily substantiated. The detection of persons with more

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[35] *Id.* at 135.

[36] Lesbian/Gay Freedom Day Comm., Inc. v. U.S. I. N. S., 541 F. Supp. 569, 571–72 (N.D. Cal. 1982), *aff'd sub nom.* Hill v. U.S.I.N.S., 714 F.2d 1470 (9th Cir. 1983).

[37] *Lesbian/Gay Freedom Day Comm.,* 541 F. Supp. at 572.

> obvious sexual perversion is relatively simple. Ordinarily, persons suffering from disturbances in sexuality are included within the classification of 'psychopathic personality with pathologic sexuality.' This classification will specify such types of pathologic behavior as homosexuality or sexual perversion which includes sexual sadism, fetishism, transvestism, pedophilia, etc.[38]

Ultimately, the 1952 Immigration and Nationality Act (INA) adopted the broader terminology of psychopathic personality as a means for excluding "transvestites."[39] For example, Micheline Johnson was excluded from the United States at the Canadian border in 1977 solely because, according to the immigration officer, INA § 212a4 bars entry to "a male dressed in feminine attire as a 'sexual deviant' in an 'excluded category.'"

In the early 1960s, the Ninth Circuit held that the psychopathic personality exclusion could not be applied to homosexuals. In response, Congress amended the Immigration and Nationality Act to explicitly bar gender outlaws, which remained in effect until 1990. The 1965 Senate that passed this amendment explained that "[e]xisting law does not specifically provide for the exclusion of homosexuals and sex perverts. To resolve any doubt the committee has specifically included the term 'sexual deviation' as a ground of exclusion in this bill."[40]

VII. Marriage Benefits and Child Custody

Laws governing marriage, family formation, and dissolution have often been hostile to gender outlaws. Marriage was particularly precarious before *Obergefell v. Hodges* (U.S. 2015), and since at least the nineteenth century, trans people seeking to marry found themselves the subject of invasive court inquiries. As Professor Jen Manion notes in *Female Husbands*, the nineteenth-century public was "hotly against those who transed genders, especially when marriage and the possibility of sexual intimacies were on the table." For example, in 1842, police arrested McGarahan, "a female husband" in

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[38] 1952 U.S.C.C.A.N. 1653, 1701.

[39] Individuals with such a disorder may manifest a disturbance of intrinsic personality patterns, exaggerated personality trends, or are persons ill primarily in terms of society and the prevailing culture. The latter or sociopathic reactions are frequently symptomatic of a severe underlying neurosis or psychosis and frequently include those groups of individuals suffering from addiction or sexual deviation. Until a more definitive expression can be devised, the term 'psychopathic personality' should be retained. 1952 U.S.C.C.A.N. 1653, 1700.

[40] 1965 U.S.C.C.A.N. 3328, 3337.

Albany, New York, and charged him with marrying a woman. Although not much more is known, he was "committed for further examination," likely incarcerated or institutionalized. Nicolai de Raylan lived as a man for at least thirteen years in Chicago, was married twice, and had a stepson with his second wife. Upon his death in 1906, the undertakers discovered he had a vulva and wore a prosthetic penis made of chamois and stuffed down. In addition to the news stories about his body, a great debate arose regarding his estate. The Cook County Probate Court decided that Nicolai's marriage was null and void, leaving his second wife without access to her late husband's money and granting the inheritance to his mother and sole heir. Even Christine Jorgensen, one of the most famous trans people of the twentieth century, was denied a license to marry Howard Knox in New York City in 1959 because her birth certificate listed her sex as male, although the designation on her passport was female and her doctor submitted a letter to the court attesting that "she must be considered female."

Even when trans people were able to obtain licenses to marry, they were still at risk of having their status revoked at any time. Even after the death of a cisgender spouse, courts could—and did—invalidate marriages on the basis of a surviving spouse's transgender status. In 1999, for instance, Christie Lee Littleton filed a medical malpractice claim in Texas state court on behalf of her deceased husband, Jonathan Littleton. The trial court granted summary judgment for Jonathan's doctor, and the Texas Court of Appeals affirmed on the grounds that Christie could not be recognized as his surviving spouse because she was legally male, and their marriage had therefore been invalid. The court determined there was no genuine issue of material fact sufficient for Christie's claim to survive summary judgment despite the fact that, as Professor Alex Sharpe notes, "Texas lack[ed] any law that settles the question of what it means to be a man or woman"[41]; that a court in the same jurisdiction had earlier considered evidence regarding Christie's legal sex and issued her an amended birth certificate listing her sex as female; and that her marriage to Jonathan had been legally recognized by the state of Kentucky.

Even when courts recognized trans people's claims, the proceedings and the resulting judicial opinions could be harrowingly invasive. Those facing questions about their legal sex were often forced to divulge private personal and medical information in far greater

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[41] ALEX SHARPE, TRANSGENDER JURISPRUDENCE: DYSPHORIC BODIES OF LAW 128 (2002).

detail than would be expected of other litigants, and judges frequently discussed those details at great length in publicly reported decisions. For example, the New Jersey Appellate Division, in *M.T. v. J.T.* (1976), upheld a family court determination that a trans woman was legally female and was entitled to spousal support from her ex-husband. However, in the course of reaching this decision, the court examined not only M.T.'s medical history but also the intimate details of her anatomy and her sexual relationship with her husband:

> The examination of plaintiff before the operation showed that she had a penis, scrotum and testicles. After the operation she did not have those organs but had a vagina and labia which were "adequate for sexual intercourse" and could function as any female vagina, that is, for "traditional penile/vaginal intercourse." The "artificial vagina" constructed by such surgery was a cavity, the walls of which are lined initially by the skin of the penis, often later taking on the characteristics of normal vaginal mucosa; the vagina, though at a somewhat different angle, was not really different from a natural vagina in size, capacity and "the feeling of the walls around it." Plaintiff had no uterus or cervix, but her vagina had a "good cosmetic appearance" and was "the same as a normal female vagina after a hysterectomy."[42]

In addition to the risk of having their marriages invalidated by the courts, gender outlaws whose marriages ended in divorce could lose custody and visitation rights or even have their relationships with their children terminated entirely, due to their gender identities. Before the 1970s, courts automatically presumed trans parents to be unfit and barred them from seeing their children without considering their individual capacity as parents. Even after courts began to shift away from this blanket presumption, the mere fact of a parent's trans status continued to be used as evidence that granting them custody rights was against the "best interests" of their children.

In 1986, the Nevada Supreme Court upheld a trial court's termination of Suzanne Daly's parental rights solely on the grounds of her transition, characterizing her as "a selfish person whose own needs, desires and wishes were paramount and were indulged without regard to their impact on the life and psyche of [her] daughter." Despite its acknowledgement of "the seriousness and finality of a

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[42] *See generally* Anonymous v. Anonymous, 325 N.Y.S. 2d 499 (Sup. Ct.1971); B. v. B., 355 N.Y.S. 2d 712 (Sup. Ct.1974); Anonymous v. Weiner, 270 N.Y.S. 2d 319 (Sup. Ct. 1966); Hartin v. Director of the Bureau of Records, etc., 347 N.Y.S. 2d 515 (Sup. Ct.1973) (engaging in similar analysis but refusing to recognize trans parties' gender).

decree terminating parental rights," the court concluded that "Suzanne, in a very real sense, has terminated her own parental rights as a father" by "cho[osing] to discard his [sic] fatherhood and assume the role of a female who could never be either mother or sister to his daughter."

In some cases, these decisions extended even to cisgender parents who maintained relationships with a trans partner who had been deemed unfit. In 1978, after an Oregon court terminated the parental rights of David Darnell, a trans man, the state's Children's Services Division advised his wife Linda Darnell "that in order to improve her chances of regaining custody of her daughter she should, among other things, have her marriage with David dissolved and completely sever relations with him." Despite her caseworker's initial recommendation to restore custody of her daughter and a "positive evaluation of [Linda's] parenting capabilities" by the Division's child psychiatrist, the state changed course when it was discovered that she had secretly continued her relationship with David. Linda was charged with perjury for her "misrepresentations of her intent to disassociate herself from David Darnell" and was stripped of her own parental rights two years later. Again, the court characterized Linda as selfish and deceptive, misleading her caseworker and psychiatrist by "portraying herself as a person whose primary concern was the welfare of the child rather than her relationship with David Darnell," and it left her daughter without either parent on the basis of that relationship.

VIII. Military Service

Though "gender-variant people have always served in the military," they have also faced a multitude of barriers standing between them and their desire to serve.

Albert Cashier served as a soldier for three years until the end of the Civil War in 1865.[43] He was beloved and respected by his community and fellow soldiers. After living as a man for forty more years, Albert was "discovered" to be a woman when he broke his leg. This disabling event necessitated a move into the Illinois Soldiers' and Sailors' Home. At this home, the psychiatrist was fascinated by him, but the superintendent had Albert declared insane by the State of Illinois, sending him to a state asylum. Against his protests, Albert was forced to wear skirts and dresses, causing him to trip and break his hip, and live in humiliation. He became a media sensation and the military Bureau of Pensions learned of Albert's body, leading them to

[43] DE ANNE BLANTON & LAUREN M. COOK, THEY FOUGHT LIKE DEMONS: WOMEN SOLDIERS IN THE CIVIL WAR 231 (2003).

open a fraud investigation. The Bureau investigated Albert for years, interviewing former employers, residents of his town, and veterans of his regiment. Albert's comrades were fiercely loyal and protective, eventually convincing the Pension Bureau that "the pensioner is the person who rendered the service." His fraud case was dropped months before he died in 1915.

By 1918, the *Standards of Physical Examination* specified that registrants, who on examination are found to suffer from "constitutional psychopathic state," including the "homosexual," shall be "unconditionally rejected for all military service." These standards allowed for rejection at induction and premature discharge without honor. During 1943 alone, the Army diagnosed roughly 1,625 service members as constitutional psychopaths of the homosexual type.[44] The Director of the Psychiatry Consultants Division in the office of the Surgeon General of the United States Army, who presided over the army psychiatrists that year, stated that when present, "feminine bodily characteristics and effeminacy in dress or manner" should lead to careful psychiatric examination and rejection from the military. Other military documents used different terminology, such as Army Regulation 615-360, dated November 26, 1942, which explained that sexual perversions were "undesirable habits or traits of character," rendering retention in the service undesirable. Or the Air Force Medical Examination Manual, which disqualified "sexual deviates," formerly classed as "psychopathic personality, with pathologic sexuality," for pathologic behavior such as transvestitism.

Beginning in 1963, Army Regulation 40-501 excluded trans servicemembers who received gender confirmation surgery (GCS). When challenged in court, the military claimed "transsexuals would require medical maintenance to ensure their correct hormonal balances and continued psychological treatment," painting trans people as psychologically unstable while vastly exaggerating the complexity of hormone replacement therapy, which is commonly administered not only to trans women but also to menopausal cisgender women.

Similarly, in the 1980s, Jane Anne Leyland was deemed not only physically, but also psychologically unfit following GCS, this time under Air Force Regulation 160-43. Though regulations required a case-by-case evaluation, the Ninth Circuit accepted, with little discussion, the Air Force's determination that GCS would categorically exclude trans patients as unfit.

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[44] WILLIAM C. MENNINGER, PSYCHIATRY IN A TROUBLED WORLD 225 (1948).

In 2007, an Ohio District Court similarly accepted the bizarre medical argument that trans people are at risk of "prostatic diseases which are more difficult to diagnose and to manage" and would be unfit even for domestic placements without ongoing access to "acute specialized tertiary medical care" from "major medical centers."

These cases rested on the unexamined assumption that trans people are sick, both mentally and physically, and unable to adapt to the rigors of military life, setting the groundwork for the present-day exclusion of capable and competent trans servicemembers. As Colonel Bree Fram pointed out, if such exclusions were founded on legitimate medical concerns, "the United States would need to kick out any woman who became pregnant because they incur greater nondeployable time than trans service members."[45]

Even service members who did not receive GCS could be excluded from military service simply for wearing clothing associated with their gender identity, even while off duty. In *United States v. Davis*,[46] the Military Court of Appeals upheld the bad conduct discharge of a servicemember who "suffered from an admitted gender identity disorder" and was seen cross-dressing while off duty.[47] The court found that cross-dressing in this context "virtually always would be prejudicial to good order and discipline" and would discredit the armed forces, in violation of Article 134 of the Uniform Code of Military Justice.[48] However, the court also mused that cross-dressing during a "King Neptune" hazing ritual or a "Kibuki [sic] theatre" performance would likely not violate Article 134.[49]

The Military Court of Appeals again affirmed the discharge of a servicemember for cross-dressing in *United States v. Guerrero*.[50] The court mused that "many popular entertainers have successfully portrayed women characters" and provided a list of popular cross-dressed performers, clarifying that "it is not the cross-dressing per se which gives rise to the offense.[51] Rather, it is (1) the time, (2) the place, (3) the circumstances, and (4) the purpose for the cross-dressing, all

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[45] WITH VALOR AND VISIBILITY: THE NEXT CHAPTER OF TRANSGENDER MILITARY SERVICE 9 (Bree Fram & Máel Sheridan, eds., 2025).

[46] 26 M.J. 445 (CMA 1988).

[47] *Id.* at 447.

[48] *Id.* at 449.

[49] *Id.*

[50] 33 M.J. 295 (CMA 1991).

[51] *Id.* at 298.

together" that violate Article 134. While the court suggested a servicemember could lawfully cross-dress in secrecy, "with his curtains or drapes closed and no reasonable belief that he was being observed by others," the defendant's publicly perceived off duty cross-dressing was held to be grounds for discharge.[52]

The court's reluctance to condemn all forms of cross-dressing can be explained by the widespread nature of cross-dressing practices in the armed forces. At times, drag shows were not merely tolerated but actually "celebrated as a boon for morale." Military officials "actively encouraged female impersonation in the soldier shows" that swept across the United States and Europe during World War I. Later, in World War II, the wartime patriotic film "This Is The Army" depicted characters played by future President Ronald Reagan and future U.S. Senator George Murphy gleefully directing active-duty World War II servicemembers, who donned dresses, wigs, and makeup to enact elaborate drag shows.

The highest military appellate court's selective condemnation of cross-dressing thus demonstrates the same disparate enforcement seen in local cross-dressing ordinances, where gender outlaws were harshly punished for the same conduct that was celebrated when enacted onstage for mainstream entertainment. Cross-dressing was tolerated when used to mock gender nonconformity and/or entertain a presumably gender conforming audience but was intolerable to government actors when performed unironically as part of a person's genuine identity.

IX. Civil Rights Exclusions

In the 1980s, two federal district courts suggested in *Doe v. USPS* (1985) and *Blackwell v. Department of the Treasury* (1987) that trans people might be protected under the Rehabilitation Act's broad definition of disability. Congress responded by explicitly excluding trans people from a variety of civil rights laws.

The issue first reached Congress during floor debates for the Civil Rights Restoration Act, which restored the Rehabilitation Act and other civil rights statutes after the Supreme Court narrowed their scope in *Grove City College v. Bell* (1984). Religious right-wing organization the Moral Majority launched an aggressive lobbying campaign claiming that the Civil Rights Restoration Act would extend protections to "drug addicts, alcoholics, active homosexuals, [and] transvestites." Republican Senators repeated these allegations in floor debates, often mentioning *Blackwell*. As Senator Jesse Helms put it,

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[52] *Id.*

"[D]o we really want private institutions . . . to be prohibited from refusing to hire a transvestite because some Federal court may find that this violates the transvestite's civil rights to wear a dress and to wear foam, that sort of thing?" Supporters only overrode President Reagan's veto by disclaiming "[t]he hysteria . . . created by the Moral Majority," assuring skeptical legislators that LGBTQ+ people would not receive protection under the Act.[53]

During floor debates for the Americans with Disabilities Act (ADA), Senators Jesse Helms and William Armstrong argued against extending coverage to a range of conditions listed in the Diagnostic and Statistical Manual of Mental Disorders. While the bill's supporters argued passionately and successfully that coverage should be extended to conditions like bipolar disorder or schizophrenia, "there was literally no support for coverage of medical conditions associated with transgender people." Armstrong introduced an amendment excluding "transvestism, transsexualism" and "gender identity disorders" from protection, lumping them together with conditions like "pedophilia, exhibitionism, [and] voyeurism." After the Senate adopted this amendment, the House narrowed its list of exclusions but left conditions impacting trans people in place. This exclusionary clause was then retroactively incorporated into the Rehabilitation Act.

A growing number of courts hold that gender dysphoria, the condition of distress arising from misalignment of body and gender identity, does not fall under the exclusionary clause, which only lists now-obsolete conditions pathologizing trans identity itself. Courts also recognize that the desire to exclude these archaic conditions was based in animus against transgender people, likely showing a constitutionally impermissible "bare desire to harm."

X. Censorship

Government entities and police forces also sought to regulate cultural life, targeting theater performances and literature that portrayed non-normative gender expression. In 1927, performer and playwright Mae West wrote a play called *The Drag* featuring characters whom she called sexual inverts that attended an extravagant cross-dressing ball. Theater writers heavily critiqued the third act because of its bizarrely attired female impersonators. The publicity led New York to rapidly enact legislation, the Wales Padlock Law, banning stage productions containing "sex degeneracy or sex perversion." The police raided another play by West, arresting her for

[53] Mark Willen, *Congress Overrides Reagan's Grove City Veto,* 1988 CONG. Q. WEEKLY REP. 774; 134 CONG. REC. 4,778 (1988); 134 CONG. REC. 4,778 (1988).

obscenity. Tammany Hall claimed that it was necessary to prevent West's new play, *The Drag*, from corrupting the youth of New York. West revised *The Drag*, renaming it *The Pleasure Man*. The police raided *The Pleasure Man* on its opening night and arrested the actors who were dressed as women, against loud protest by the theatergoers. Mae was again arrested for obscenity. At trial, the district attorney asked if gay men wore brassieres, kimonos or "adopted the mannerisms of women" offstage because they wished to target those who were not simply performing.

At the end of the 1920s, English writer Radclyffe Hall wrote a semi-autobiographical novel, *The Well of Loneliness*. Both Hall and the book's protagonist were sexual inverts, people who were a third sex, otherwise understood as men in women's bodies. Hall wrote the book "to encourage inverts to face up to a hostile world in their true colors and this with dignity and courage"; "to spur all classes of inverts to make good through hard work, faithful and loyal attachments and sober and useful living"; and "to bring normal men and women of good will to a fuller and more tolerant understanding of the inverted." Yet, the book was regarded as "more subtle, demoralizing, corrosive and corruptive than anything ever written." Intrigued by the subject, a U.S. publisher experienced in controversial literature bought the rights and printed the book in New York, armed from the start with a skilled attorney. As predicted, the publisher was criminally charged for publishing or distributing obscene material. Although initially found guilty, on appeal, the court held that the book was not obscene.

Just over thirty years later, Virginia Prince experienced similar harassment and censorship because of her famed magazine *Transvestia: The Journal of the American Society for Equality in Dress*. This magazine featured "advice on how to dress, how to talk to partners about gender, and how to find others in the community, but it also teemed with personal stories of people who gravitated toward genders other than the ones they'd been assigned at birth." Unfortunately, the U.S. Postal Service discovered a sexual letter sent between Prince and a pen pal, both trans women. The Postal Service told Prince that if she did not stop circulating *Transvestia*, the government would charge her with federal obscenity for her letter under the 1873 Comstock Act, which made it illegal to send "obscene, lewd, and/or lascivious" content through the mail. The magazine continued and Prince was prosecuted, leading to a plea deal for five years of probation and imprisonment if she publicly dressed as a woman. In 1961, the Postal Service banned the distribution of *Transvestia,* but a court overruled the decision after finding that the magazine was not obscene.

Again in 1990, trans performance and literature garnered the attention of Congress. During the appropriations act negotiations, debate raged about National Endowment for the Arts (NEA) funding "obscene" content, including *Paris is Burning*, which a Congress member called "trash" and inaccurately described as transsexuals practicing vogueing—a vulgar dance that substitutes street fighting. In the other chamber, a congress member stated that NEA funding had supported "equally sickening passages and depictions," such as a journal by Movement Research featuring "a variety of so-called 'gender confused' people including transvestites, transsexuals, cross-dressers, and a new one on me-'transgenderists.'" Congress passed restrictions on NEA grant funding. President George H.W. Bush met with the Chairman of the NEA to discuss the funding controversy. The background notes for this meeting admonished trans art, celebrating the NEA grant revocation of Movement Research because they produced "a crude and explicit publication that could only be described as transvestite pornography." The appropriations bill debates continued on for years, layering in new examples of trans artwork as justification for restricting "obscene" material.

XI. Mayhem Threats to GCS

Though Gender Confirmation Surgery had already been pioneered at the Institute for Sexual Research founded by sexologist and LGBTQ+ rights activist Dr. Magnus Hirschfeld in 1920s Germany, access to GCS was highly restricted in the United States throughout the mid-twentieth century. State attorneys general and district attorneys contributed to this denial.

In 1948, thirty staff members of the State of Wisconsin General Hospital gathered to discuss what to do about a trans woman seeking gender confirmation surgery. After much deliberation, they agreed that GCS was the appropriate treatment. The Wisconsin attorney general disagreed, claiming GCS would constitute the crime of mayhem, and the patient was denied care. San Francisco district attorney and future governor Edmund Brown similarly interpreted the crime of mayhem as prohibiting GCS. This "cast a pall, lasting for years, over efforts by US trans people to gain access to transsexual medical procedures in their own country." Hedy Jo Star, for example, was denied GCS in New York and again in Maryland because providers feared prosecution. Those who could afford it traveled to Europe or North Africa for treatment. Those who could not went without, sometimes attempting self-castration or suicide instead.

Conclusion

While the examples provided above only scratch the surface of the de jure discrimination faced by trans individuals in the United States, they serve as a valuable starting point for understanding the extent and longevity of this discrimination, which still continues today. New cross-dressing laws were enacted as recently as 2001, and several states have recently passed new laws targeting drag performances. While the sexual psychopath laws of the twentieth century were eventually struck down by courts, making it more difficult to confine people solely on the basis of their gender identities and expression, trans people continue to suffer disproportionately in institutional settings, such as out-of-home care facilities, state hospitals, and carceral institutions. Increasing numbers of trans people continue to be held in immigration detention facilities, where they are subject to physical and sexual violence, extended solitary confinement, and medical neglect, despite the Ninth Circuit's 2000 decision in *Hernandez-Montiel v. INS* (2000), which created a path for trans immigrants to seek asylum in the United States. Trans people remain excluded from the ADA and other civil rights protections, despite courts' recognition that these exclusions were based on animus. Trans parents and children continue to face bias in the family court system, and speech supportive of trans people is still censored in public schools. These examples provide ample evidence to satisfy the history of discrimination prong of the suspect classification test and illustrate why courts should view current laws targeting trans people with skepticism.

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